No. 12-138

In the Supreme Court of the United States

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
JEFFREY E. SANDBERG
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY MCLEOD
Acting Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

A bilateral investment treaty between Argentina and the United Kingdom provides that before a foreign investor may pursue arbitration of an investment dispute with the host State, the investor must first litigate the dispute for at least 18 months in the host State's courts. The question presented is:

Whether the court of appeals erred in undertaking de novo review of an arbitral tribunal's ruling that an investor's noncompliance with the litigation requirement did not preclude the tribunal from adjudicating the merits of the dispute.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaties and statutes:

Treaties and statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 12-138

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

INTEREST OF THE UNITED STATES

This case concerns the proper framework for reviewing the decision of an arbitral tribunal seated in the United States concerning its authority to adjudicate an investment dispute arising under a bilateral investment treaty between two foreign Nations. The United States strongly supports the resolution of investment disputes through investor-state arbitration. The United States is a party to numerous investment treaties and free trade agreements incorporating investment chapters, including the North American Free Trade Agreement (NAFTA), which typically provide for investor-state arbitration. The proper interpretation of the dispute-resolution provisions of international investment instruments is a matter of importance to the United

States. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Bilateral investment treaties (BITs) are agreements between two sovereign Nations undertaken to promote and protect investment on a reciprocal basis. A BIT typically affords various legal protections to covered investors and investments, including basic guarantees of nondiscrimination and prohibitions on expropriation in violation of international law. See Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 4-7 (2010) (Vandevelde). A BIT typically also contains provisions for resolving disputes between the host State and covered investors of the other State with respect to covered investments, commonly through international arbitration.

States may decide in their investment treaties to place conditions on a host State's consent to arbitrate with an investor. For example, the United States' 2012 Model Bilateral Investment Treaty—which reflects current Executive Branch policy and serves as a template in negotiating new BITs—requires, among other things, that a foreign investor seeking to arbitrate a dispute with the United States provide advance written notice of its intent to pursue arbitration and waive any right to pursue other dispute-settlement procedures with respect to matters at issue in the arbitration. See U.S. Dep't of State, *2012 U.S. Model Bilateral Investment Treaty*, arts. 24-26, http://www.state.gov/documents/organization/188371.pdf.

BITs usually allow claimants to choose the arbitral forum in which arbitration will proceed. For instance, BITs may provide for arbitration before the International Centre for Settlement of Investment Disputes

(ICSID), which administers an international arbitral regime created pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. With exceptions not relevant here, the ICSID arbitral regime is self-contained, in that ICSID awards are "directly enforceable in signatory states, without any method of review in national courts." 1 Gary B. Born, *International Commercial Arbitration* 106 (2009) (Born).

BITs also may contemplate dispute resolution before ad hoc arbitral tribunals convened under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (2011), or other such rules to which the parties to the arbitration may agree. See Vandevelde 434-435. The UNCITRAL Rules provide that arbitral panels have the authority to determine their own jurisdiction, although such determinations may be subject to judicial review. See generally David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 450-459 (2d ed. 2012) (Caron). For arbitrations conducted under the UNCITRAL Rules or other such rules, an aggrieved party may seek to set aside an award in a competent court of the jurisdiction in which the arbitration was seated. See, *e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"). When an investor-state arbitral award subject to the New York Convention is rendered by a tribunal seated in the United States, a

party may seek to set aside the award in accordance with the vacatur procedures set forth in the Federal Arbitration Act (FAA). 9 U.S.C. 10, 208, 307.

2. a. In 1990, respondent Republic of Argentina entered into a BIT with the United Kingdom. See Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 (Treaty). The Treaty provides that any dispute between an "investor of one Contracting Party and the other Contracting Party * * * shall be submitted" to a court "of the Contracting Party in whose territory the investment was made." Treaty art. 8(1); Pet. App. 3a. The matter then "shall be submitted to international arbitration" when one of the parties requests, "where, after a period of eighteen months has elapsed" from the submission of the dispute to the local court, "the said tribunal has not given its final decision," or where the court issues a final decision but the parties are "still in dispute." Treaty art. 8(2); Pet. App. 24a n.2. The Treaty contemplates arbitration under various arbitral rules, including the ICSID system and the UNCITRAL Rules. Treaty art. 8(3).

b. Petitioner BG Group PLC, a United Kingdom company, invested in an Argentine company that had been granted a 35-year exclusive license to distribute gas. Pet. App. 4a-5a. In 2001, Argentina experienced a severe economic crisis, and the government enacted an emergency law that implemented economic measures that had a substantial impact on petitioner's investment. *Id.* at 5a, 62a.

The emergency law authorized the creation of a "renegotiation" process intended to ameliorate the law's adverse effects, but it also barred from participating "any licensee that sought redress in an arbitral or other

forum." Pet. App. 5a, 131a. The government also enacted a decree temporarily staying the country's compliance with injunctions or final judgments in lawsuits related to the emergency law. *Id.* at 5a.

3. a. In 2003, petitioner invoked international arbitration under Article 8 of the Treaty. Pet. App. 25a. Petitioner argued that Argentina's emergency measures violated the Treaty. *Id.* at 25a-26a. Among other grounds for resisting arbitration, Argentina contended that petitioner had failed to comply with the Treaty's requirement that an investor first submit the dispute for litigation in an Argentine court. *Id.* at 162a-163a.

b. In 2007, the arbitral tribunal, seated in Washington, D.C., issued a decision rejecting Argentina's threshold objections and ruling in favor of petitioner on the merits. Pet. App. 92a-306a.

The tribunal held that petitioner had properly initiated arbitration. Pet. App. 161a-171a. Applying principles of treaty interpretation, the tribunal reasoned that it would be "absurd or unreasonable" to mandate compliance with the Treaty's litigation requirement here because Argentina had unilaterally hindered "recourse to the domestic judiciary." *Id.* at 159a n.128, 165a-166a; Vienna Convention on the Law of Treaties (Vienna Convention) art. 32, May 23, 1969, 1155 U.N.T.S. 331.

4. In 2008, Argentina filed this suit in the United States District Court for the District of Columbia, seeking to vacate the arbitral award under the FAA and the New York Convention.[1] Petitioner cross-petitioned to

[1] This case is unlike other cases in which Argentina has refused, contrary to its international legal obligations, to comply with final arbitral awards entered against it for which all applicable review mechanisms have been exhausted. See, *e.g.*, 77 Fed. Reg. 18,899 (Mar. 29, 2012) (Presidential Proclamation suspending special trade privileges

confirm the award. The district court rejected Argentina's argument that the tribunal exceeded its powers by excusing the litigation requirement, see 9 U.S.C. 10(a)(4), concluding that the arbitrators' interpretation of the Treaty was colorable. The court then confirmed the award. Pet. App. 21a-57a.

5. The court of appeals reversed the district court's judgment and vacated the award, concluding that the arbitral tribunal had exceeded its powers by allowing arbitration to proceed. Pet. App. 1a-20a.

The court of appeals first considered whether the court or the arbitral tribunal should determine the effect of petitioner's failure to comply with the litigation requirement on the tribunal's authority to adjudicate the dispute. The court observed that "[t]he Treaty does not directly answer" that question. Pet. App. 14a. The court explained that when the precondition is of the sort that "the contracting parties would likely have expected a court to have decided," *id.* at 11a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)), "'[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so,'" *id.* at 10a (quoting *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)). The court concluded that the Treaty parties would have expected a court to determine the effect of noncompliance with the litigation requirement. *Id.* at 15a. Employing de novo review, the court of appeals held that petitioner "was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," and that the arbitral tribu-

---

for Argentina based on a finding that it had not acted in good faith in failing to pay arbitral awards owed to U.S. companies).

nal had therefore lacked jurisdiction over the parties' dispute. Pet. App. 19a-20a.

SUMMARY OF ARGUMENT

In an action to set aside an investor-state arbitral award subject to the New York Convention, the standard by which a court should review the arbitral tribunal's resolution of objections to arbitration turns on whether the objection concerns the investor's alleged failure to comply with a condition on the State's consent to arbitrate, such that there is no arbitration agreement between the State and the investor. If the objection rests on such a condition, it is appropriate and consistent with the practice in certain other States that often serve as seats of arbitration for courts to review the arbitral ruling de novo. Courts should deferentially review rulings on other threshold objections that do not call into question the existence of an investor-state arbitration agreement, including those often referred to in international arbitration as "jurisdictional" objections, unless the treaty provides that the arbitral tribunal's authority to rule on such matters is limited. In determining whether a treaty requirement is a condition on the State's consent to arbitrate, a reviewing court should not employ presumptions derived from domestic contract law, but should instead apply principles of treaty interpretation in examining the treaty's text and other relevant materials for determining the treaty parties' intent.

I. In the context of private arbitration, this Court has held that the standard by which a court should review an arbitral tribunal's resolution of objections to arbitration turns on whether the parties agreed to submit that question to arbitration. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995); *Howsam* v.

Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002). The Court has further held that while "question[s] of arbitrability" are presumptively for the courts to decide independently, "'procedural' questions" concerning the requirements for submitting claims to arbitration are presumptively for arbitrators. *Howsam*, 537 U.S. at 83-84.

II. The presumptions set forth in *First Options* and *Howsam* cannot be applied wholesale to the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties. Investor-state arbitration is, like private arbitration, a matter of consent. But in the investor-state context, the relevant agreement concerning the arbitral tribunal's authority is contained in the investment treaty itself and is therefore a function of the *treaty* parties' shared intent.

An investment treaty typically sets forth a State's standing offer to arbitrate certain categories of disputes with covered investors, and it generally permits investors a choice of multiple arbitral rules, including the ICSID Arbitration Rules, which preclude judicial review. As a result, while treaty parties generally contemplate, consistent with the UNCITRAL or applicable arbitral rules, that the arbitral tribunal will adjudicate objections to arbitration in the first instance, they do not usually have a specific agreement, in the *First Options* sense, as to whether the arbitral tribunal or any reviewing court has authority to finally resolve such disputes across the board. Applying the *First Options* and *Howsam* presumptions wholesale to investment treaties would graft onto those treaties default provisions that the treaty parties did not anticipate.

In arbitrations governed by the New York Convention, the appropriate scope of judicial review of arbitral

rulings on objections to arbitration depends on whether the objection goes to the host State's consent to enter into an arbitration agreement with the investor. Because an investment treaty is structured as a standing offer to arbitrate, States may condition their consent to enter into an arbitration agreement with any individual investor on the investor's compliance with certain of the treaty's requirements. When present, such conditions serve the important sovereign function of limiting the terms under which the host State is willing to have claims adjudicated against it in an arbitral forum. In the event of noncompliance with such a condition, no arbitration agreement is formed, and the arbitrator lacks authority to rule on any dispute between the parties. To defer to an arbitral tribunal's ruling in that situation would be to assume the very arbitral authority that the State denies ever arose. It is therefore appropriate to review independently an arbitral tribunal's ruling on a party's threshold objection that no arbitration agreement exists.

By contrast, courts should review deferentially the tribunal's resolution of objections that are not based on noncompliance with a condition on consent to arbitration. When a valid arbitration agreement exists, the State and the investor contemplate that the arbitral tribunal has authority to rule on investment disputes between the parties as set forth in the treaty. It is generally understood in international practice, moreover, that the arbitral tribunal has authority to rule on objections to arbitration in the first instance, consistent with the applicable arbitral rules. When an arbitration agreement exists, the rationales that support deferring to arbitral rulings on substantive issues—the treaty's purpose of providing for resolution of investor-state

disputes through expert arbitration and the arbitrators' superior international investment law expertise—also apply to arbitral rulings on threshold objections that do not go to the issue of consent, including objections to the arbitrator's jurisdiction. Accordingly, such issues should be reviewed by United States courts under the same deferential standard that governs rulings on the merits, unless the treaty provides that the arbitral tribunal's authority is more limited.

III. The Court should remand this case to permit the court of appeals to determine, applying principles of treaty interpretation, whether the Treaty's litigation requirement is a condition to Argentina's consent to arbitrate. The court of appeals should then apply the appropriate standard of review to the arbitral panel's ruling on Argentina's objection to arbitration.

ARGUMENT

This case presents the question whether, in an action to set aside an investor-state arbitral award subject to the New York Convention, the court should review de novo the arbitral tribunal's ruling on an investor's compliance with a requirement of prior litigation in the host State's courts in a bilateral investment treaty, or instead should review the ruling under the same deferential standard that applies to the tribunal's ruling on the merits. The Convention does not establish a standard of review governing vacatur proceedings, but contemplates that the reviewing court will generally apply the set-aside law of the country in which (or under the law of which) the award was made—in this case, the FAA. New York Convention art. V(1)(e); *Yusuf Ahmed Alghanim & Sons, W.L.L.* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 19-21 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998). Argentina contends that the arbitral tribunal

exceeded its powers, 9 U.S.C. 10(a)(4), by proceeding to adjudicate the merits of the parties' investment dispute even though Argentina had agreed to arbitrate only after the investor had first submitted the dispute to Argentina's courts and allowed 18 months for its resolution.[2] Resp't C.A. Br. 11-16. The parties disagree over whether the courts should review the arbitral tribunal's resolution of that question independently or deferentially.

In the context of private commercial arbitration agreements, this Court has held that while parties are presumed to have expected arbitrators to have primary authority to decide "'procedural' questions" concerning the requirements for submitting claims to arbitration, subject to deferential review, "question[s] of arbitrability" are presumptively for the courts to review independently. *Howsam*, 537 U.S. at 83-84. In the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties, courts should not apply

---

[2] Although a majority of the courts of appeals have concluded that the Convention permits a court to invoke the set-aside grounds provided in the FAA, 9 U.S.C. 10, in reviewing a set-aside challenge to a nondomestic award, some courts have suggested that domestic grounds for set-aside may conflict with the Convention to the extent they go beyond the grounds for denying recognition of an award enumerated in Article V of the Convention. See *Industrial Risk Insurers* v. *M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998), cert. denied, 525 U.S. 1068 (1999); Restatement (Third) of the U.S. Law of International Commercial Arbitration (Restatement), § 4-11, cmt. a & reporter's note (Tentative Draft no. 2, 2012). The Court need not decide that question, as the FAA set-aside ground on which Argentina challenges the award—that the arbitral tribunal exceeded its authority by deciding a dispute that the parties did not agree to arbitrate, 9 U.S.C. 10(a)(4)—is also a ground for denying recognition under the Convention. See New York Convention art. V(1)(a); Restatement § 4-12 & cmt. a, b, and d.

that interpretive framework wholesale, but instead should review de novo arbitral rulings on consent-based objections to arbitration, and review deferentially rulings on other objections.

I. IN THE CONTEXT OF PRIVATE COMMERCIAL ARBITRATION, WHETHER THE ARBITRAL TRIBUNAL HAS PRIMARY POWER TO RESOLVE OBJECTIONS TO ARBITRATION TURNS ON THE PARTIES' AGREEMENT, INTERPRETED ACCORDING TO PRESUMPTIONS REFLECTING THEIR LIKELY EXPECTATIONS

A. Because "arbitration is a matter of consent, not coercion," *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010), the jurisdiction of an arbitral tribunal to resolve a dispute depends on whether the parties have agreed to arbitrate the matter. See *First Options*, 514 U.S. at 943; *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986). This Court has referred to questions concerning whether an arbitrator is empowered to decide a particular dispute as questions of "arbitrability."[3] *First Options*, 514 U.S. at 942.

When a party objects to the propriety of submitting a particular dispute to arbitration, the question arises

---

[3] The term "arbitrability," as employed in United States law, diverges from its meaning elsewhere. In international practice, the term is used more narrowly to refer to whether, as a matter of public policy, a particular type of dispute is capable of resolution through arbitration. Other questions that are considered issues of "arbitrability" in the United States—including the existence or validity of the parties' arbitration agreement—are typically referred to elsewhere as matters of arbitral "jurisdiction" or "competence." See generally Lawrence Shore, *The United States' Perspective on 'Arbitrability,' in Arbitrability: International & Comparative Perspectives* 69-83 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

whether a court or arbitrators should rule upon that objection. If the arbitrators have "primary power" to rule on the objection, the "court reviews their arbitrability decision deferentially." *First Options*, 514 U.S. at 942 (emphasis omitted). If the court has primary power, "the court makes up its mind about arbitrability independently," either by engaging in de novo review of the arbitrators' decision on arbitrability or, if the parties are litigating in advance whether arbitration is required, by conclusively resolving the issue for itself. *Ibid.* Whether the court or the arbitrator "has the primary power to decide arbitrability," *id.* at 943 (internal quotation marks omitted), turns on whether the parties have agreed "to arbitrate 'gateway' questions of 'arbitrability,'" *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2777 (2010).

B. In the context of private commercial arbitration, this Court has held that in "deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)," courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. To guide that determination, however, the Court employs a set of "interpretive" presumptions based on the nature of the question at issue and the Court's understanding of what the parties would likely have agreed upon had they considered the matter expressly. *Rent-A-Center*, 130 S. Ct. at 2777 n.1.

Generally, in the private commercial context, the Court presumes that the parties did not agree to arbitrate "question[s] of arbitrability," a category that includes "whether the parties are bound by a given arbitration clause" and whether a particular dispute falls within the scope of an arbitration clause. *Howsam*, 537 U.S. at 83-84; *First Options*, 514 U.S. at 945. According-

ly, unless the arbitration agreement contains "clea[r] and unmistakabl[e] evidence" that the parties agreed to arbitrate those questions, the court will decide the issue independently. *Id.* at 944 (internal quotation marks omitted). Conversely, when the objection to arbitration is one that the parties likely would have expected the arbitrator to decide, such as "'procedural' questions that grow out of the dispute and bear on its final disposition"—including "allegation[s] of waiver, delay, or a like defense to arbitrability"—the Court presumes that the parties intended to assign the arbitrator primary responsibility for deciding the issue. *Howsam*, 537 U.S. at 84 (citation omitted), 86.

II. WHEN AN INVESTOR-STATE ARBITRAL AWARD IS SUBJECT TO SET-ASIDE PROCEEDINGS, THE COURT SHOULD INDEPENDENTLY REVIEW ARBITRAL RULINGS ON OBJECTIONS BASED ON THE LACK OF A VALID ARBITRATION AGREEMENT, AND SHOULD PRESUMPTIVELY REVIEW OTHER RULINGS DEFERENTIALLY

This Court has not yet had occasion to consider whether its existing precedents, all of which concerned questions of arbitrability arising under private commercial agreements, should apply to objections to arbitration undertaken pursuant to investment treaties—here, an objection pertaining to an investor's compliance with a litigation requirement in an investment treaty. Petitioner contends that this Court should apply *First Options* and *Howsam* to the investment-treaty context, and hold that under *Howsam*, responsibility to adjudicate objections to arbitration based on non-compliance with any procedural "precondition to arbitration" under the investment treaty "presumptively lies with the arbitrators." Pet. Br. 31. In this case, petitioner asserts, com-

pliance with the litigation requirement should be deemed to be such a precondition. Applying *First Options* and *Howsam* wholesale to investment treaties, however, would be inconsistent with principles of treaty interpretation and the treaties' structure. Rather, the judicial standard of review should turn on the nature of the objection under the applicable treaty. Courts should review de novo arbitral rulings concerning objections based on the asserted lack of a valid agreement to arbitrate, even if the absence of an agreement is caused by a failure to comply with a requirement that resembles what might be viewed as a "procedural" matter or a mere "precondition" to arbitration in a private commercial dispute. Rulings on other objections should be reviewed deferentially, unless the treaty provides that the arbitral tribunal's authority to rule on such matters is more limited.

A. The Standard Of Review Of Arbitral Rulings On Threshold Objections To Arbitration Under Investment Treaties Is Not Governed By The Presumptions Set Forth In *First Options* And *Howsam*

1. As in the private context, arbitration between a State and a foreign investor under an investment treaty is fundamentally a matter of consent. Christopher F. Dugan et al., *Investor-State Arbitration* 219 (2008) (Dugan). The arbitral tribunal's authority therefore arises from, and is limited by, the consent of the parties. Christoph Schreuer, *Consent to Arbitration*, *in The Oxford Handbook of International Investment Law* 830, 831 (Peter Muchlinski et al. eds., 2008) (Schreuer); Vandevelde 433; Jeswald W. Salacuse, *The Law of Investment Treaties* 385 (2010) (Salacuse).

A crucial distinction between investor-state and private commercial arbitration, however, is that in the

investor-state context, the relevant agreement concerning the arbitral tribunal's authority is contained in the investment treaty itself and reflects the *treaty* parties' agreement. An investment treaty typically sets forth a host State's standing offer to arbitrate certain categories of disputes with a class of investors from the other contracting State, and the "offer includes the various terms and conditions contained in the * * * investment treaty." Salacuse 381. The actual "arbitration agreement" between the disputing parties comes into being only after an investor accepts the host State's offer by initiating arbitration against the State in the manner provided in the treaty. See Dugan 222; Vandevelde 437. The treaty itself therefore sets forth the prerequisites to consent and the parameters of the contemplated arbitration proceedings—the types of disputes covered, and the procedures governing arbitration. If a foreign investor properly initiates arbitration in accordance with the treaty's conditions, those terms become part of the arbitration agreement between the host State and the investor. Dugan 207. It is therefore the shared intent of the *treaty* parties, not the disputing parties, that determines the existence and substance of an agreement to arbitrate.

As a result, questions concerning the treaty parties' agreement—and therefore the existence and substance of a contracting State's agreement to arbitrate with an individual investor—are matters of treaty interpretation, and are not governed by any nation's domestic contract law. See Gary B. Born, *International Arbitration: Law and Practice*, § 18:01[B], at 420 (2012). Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins "with the text of the treaty and the context

in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). Because a treaty is negotiated between two sovereign States, the court must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 399; see *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223 (1996). Although this case involves a treaty between two foreign Nations, those basic principles of treaty interpretation are generally adhered to among Nations. See Vienna Convention art. 31.1 ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").[4]

2. In an investment treaty, the States parties typically do not address the arbitration of any particular dispute. The host State's standing offer to arbitrate under the treaty is made with respect to a class of investors as a whole. See, *e.g.*, Gus Van Harten, *Investment Treaty Arbitration and Public Law* 63 (2007). Multiple investors may accept a single state offer of arbitration, and a single treaty may therefore lead to multiple investor-state arbitrations. A treaty generally provides an investor with an option of several forums in which to pursue arbitration, and it generally leaves the seat of arbitration—and thus the national law that will govern any set-aside proceedings—for later determination by the parties to a particular dispute or by the arbitral tribunal. See David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* ¶ 17.27, at 596-597 (2d ed. 2010).

---

[4] Although the United States is not a party to the Vienna Convention, the United States generally recognizes it as an authoritative guide to treaty interpretation.

Investment treaties may permit investors to pursue arbitration under the ICSID Arbitration Rules, which do not permit judicial review of arbitral awards. Vandevelde 434-435. Alternatively, investors may choose to initiate arbitration under separate rules subject to the New York Convention, which provides for judicial review of arbitral awards in the form of set-aside proceedings governed by the law of the seat of arbitration and recognition proceedings under Article V of the Convention. While the States parties to an investment treaty generally contemplate that the arbitral tribunal will initially resolve objections to arbitration, subject to judicial review in cases subject to the Convention, they do not ordinarily agree, in the *First Options* sense, as to whether the arbitral tribunal or any reviewing court has authority definitively to resolve such disputes across the board. Nor do the treaty parties, at the time they enter into the treaty, ordinarily have specific expectations as to the availability or scope of judicial review of an arbitral tribunal's resolution of threshold objections in any particular dispute.

3. *First Options* and *Howsam* set forth default rules governing whether the court or the arbitral tribunal has authority to finally resolve particular objections to arbitration, based on the Court's understanding of what the parties to private commercial arbitration agreements would have agreed to had they considered the matter expressly. See pp. 12-14, *supra*. But, as noted above, States parties to an investment treaty do not ordinarily establish in the treaty itself the scope (or availability) of judicial review. Those matters are determined later, when the investor chooses to arbitrate under the ICSID Arbitration Rules (where available) or, in other arbitrations, when the investor and the host State select the

place of arbitration. There is no reason to read into an investment treaty—especially one, as here, to which the United States is not a party—the specific interpretive presumptions set forth in *First Options* and *Howsam* concerning private commercial arbitration under United States law. Applying those presumptions wholesale to investment treaties, without taking into account distinct sovereign interests of the contracting States, would graft onto those treaties default provisions that would not necessarily reflect the parties' expectations. See *Zicherman*, 516 U.S. at 223.

B. Under An Investment Treaty, Courts Presumptively Should Independently Review Objections Based On The Absence Of An Agreement To Arbitrate And Deferentially Review Other Objections

In investor-state arbitrations governed by the New York Convention, the appropriate scope of judicial review of arbitral rulings on objections to arbitration depends on whether the objection concerns the host State's consent to enter into an arbitration agreement with the investor. When treaty parties agree that particular treaty requirements are conditions on their consent, they necessarily agree that if an investor fails to comply with those conditions, no agreement to arbitrate with that investor is formed. Because the absence of a valid arbitration agreement prevents the arbitral tribunal from obtaining authority to rule on *any* dispute between the parties, it is appropriate for a reviewing court to independently evaluate objections based on noncompliance with conditions on consent. Once an arbitration agreement is formed, however, it is as a general matter most consistent with the basic purpose of investment treaties for courts to review deferentially the tribunal's resolution of other objections to arbitra-

tion, including non-consent-based objections to the tribunal's "jurisdiction" (see n.3, *supra*).

1. Investment treaties set forth a State's standing offer to arbitrate in multiple forums, subject to any conditions on its consent to arbitrate that limit the arbitral tribunal's final authority to adjudicate an individual dispute

Because an investment treaty is structured as a standing offer to arbitrate, States parties may condition their consent to enter into an arbitration agreement with any individual investor on that investor's compliance with particular treaty requirements. For instance, the investment chapter of the United States-Korea Free Trade Agreement articulates several "conditions and limitations on [the] consent of each [State] party," including a requirement that a claimant desiring arbitration against the State furnish a "written waiver * * * of any right to initiate or continue" a proceeding in any other forum based upon the same claim. United States-Korea Free Trade Agreement art. 11.18, Feb. 10, 2011, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. Similarly, the three States parties to NAFTA, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993)—the United States, Canada, and Mexico—agree that Article 1121 of that agreement provides conditions upon the consent of each State to arbitration under that treaty. See, *e.g.*, *Methanex Corp.* v. *United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 74-75, UNCITRAL (Nov. 13, 2000) (under NAFTA, no agreement to arbitrate is formed when conditions on consent are unfulfilled); *Mondev Int'l Ltd.* v. *United States*, ICSID Case No. ARB(AF)/99/2, Rejoinder on Compe-

tence and Liability of Respondent United States of America at 61-62 (Oct. 1, 2001); Schreuer 850.

If a condition on the State's consent to arbitrate with an investor is not satisfied, no arbitration agreement will be formed when the investor attempts to initiate arbitration. See *Waste Mgmt., Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award ¶ 16 (June 2, 2000), 40 I.L.M. 56, 63 (2001) (NAFTA). Because an arbitrator's authority to resolve any dispute between the parties must arise from the existence of an arbitration agreement between them, see p. 15, *supra*, in the absence of the host State's consent and of any resulting agreement, the arbitrator will lack any authority to consider any dispute between the parties. See *Waste Mgmt.* ¶¶ 16-17, 40 I.L.M. at 63 ("the entire effectiveness of this institution depends" on "fulfillment of the prerequisites established as conditions precedent to submission of a claim to arbitration," because those conditions pertain to "consent to arbitration"); 1 Born 893; cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964) (a party cannot be compelled to arbitrate if it never entered into an agreement to do so).

States expect an arbitral tribunal—and if necessary, a reviewing court—to enforce conditions on a State's consent to form an investor-state agreement. In entering into an investment treaty, a State acts in its sovereign capacity to establish a legal regime under which the State will consent to an adjudication of disputes against it by private parties. When present, conditions on the formation of an arbitration agreement—like limitations on a waiver of sovereign immunity to a suit in court—can serve important sovereign functions by limiting the terms under which the sovereign State may be subject to such proceedings against it. Dugan 219. And once an

arbitration agreement is formed by an investor's valid initiation of arbitration under the treaty, the consequences for a State can be significant: investor-state disputes may often implicate the State's national economic and regulatory policies and entail large financial stakes. Salacuse 355. Conditions on consent therefore can protect States' sovereign interests in a variety of ways, by establishing mandatory steps an investor must take to invoke arbitration. For instance, a treaty that makes waiving pursuit of alternative remedies a condition on consent (see p. 20, *supra*) protects the State from parallel proceedings and double recoveries.

2. When States parties make a treaty requirement a condition on consent, it is appropriate for a reviewing court to engage in de novo review of compliance with that condition

By providing in a treaty that a particular requirement is a condition on a State's consent to enter into an arbitration agreement with an individual investor, the treaty parties contemplate that the arbitral tribunal and courts engaging in judicial review under the Convention will enforce the condition as written. If the condition is unfulfilled, no agreement to arbitrate is formed, and the arbitrator never gains any authority to rule on any dispute between the parties—including on whether an arbitration agreement exists. See *China Minmetals Materials Imp. & Exp. Co.* v. *Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003). To defer to an arbitral tribunal's ruling where the host State denies that it entered into an arbitration agreement with the particular investor would thus be to assume the very arbitral authority that the State denies ever arose.

As a result, it is generally recognized that "where a party denies ever having concluded an agreement to

arbitrate, there is no basis for concluding, without independent judicial assessment, that a party has agreed to submit any issues, including jurisdictional issues, to the tribunal." 2 Born 2792; *John Wiley*, 376 U.S. at 547; *China Minmetals*, 334 F.3d at 288; *Dallah Real Estate & Tourism Holding Co.* v. *Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46 ¶ 30, [2011] 1 A.C. 763 ("The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all."). When the existence of the agreement is disputed, therefore, the "possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary."[5] 2 Born 2792;

---

[5] Petitioner argues (Br. 48-52) that an investment treaty's incorporation of the UNCITRAL Rules, which state that the arbitral tribunal has authority to resolve threshold objections, including objections to the existence of the agreement, indicates the treaty parties' intent to grant the tribunal authority to finally resolve such objections. See UNCITRAL Rules art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (1976). But if the State and the investor have not entered into any arbitration agreement, they also have not agreed that the tribunal has authority to finally resolve the existence of the agreement. 1 Born 870; see *China Minmetals*, 334 F.3d at 285-289; cf. U.S. Amicus Br. at 28-29, *Howsam*, *supra* (where existence of arbitration agreement was undisputed, agreement's incorporation of rules giving arbitrator authority to resolve timeliness issue indicated that parties had agreed to empower arbitrator to resolve that issue). In addition, although some domestic courts have construed agreements incorporating the UNCITRAL Rules to indicate that the parties intended deferential judicial review, see, *e.g.*, *Schneider* v. *Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012), other authorities construe such provisions as simply empowering arbitrators to consider jurisdictional objections in the first instance, subject to the applicable level of judicial scrutiny, Caron 451-452 & nn.13-14 (citing drafting history of the UNCITRAL Rules).

Restatement (Third) of the U.S. Law of International Commercial Arbitration § 4-12, cmt. d (Tentative Draft no. 2, 2012) ("[a] court reviews de novo an arbitral tribunal's determination of whether an arbitration agreement exists").

Accordingly, although different States' national laws concerning judicial review of arbitral rulings on objections to arbitration may vary, courts in several States that commonly serve as seats for investor-state arbitration generally review de novo whether an arbitration agreement exists. See, *e.g.*, *Republic of Ecuador/Chevron Corp.*, Rechtbank's-Gravenhage [District Court of the Hague], 2 mei 2012, 38694/HA ZA 11-402 en 408948/HA ZA 11-2813, ¶ 4.11 (Neth.) (translated by Harm Lassche, May 4, 2012) (objection that no arbitration agreement was formed pursuant to BIT was subject to de novo review, but other objections to arbitration were primarily for arbitrators to decide); *Dallah*, [2010] UKSC 46 ¶ 104 (English courts are "entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement"); George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 18-19 (2012) (describing French practice); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133, 134-136 (1997) (Swiss practice). Similarly, the New York Convention provides that a court considering a pre-arbitration challenge to arbitration where "the parties have made an agreement" to arbitrate "shall * * * refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." New York Convention art. II(3).

The clear implication is that the court may independently determine that no valid agreement exists, even though the arbitral tribunal has not considered the issue, and may then decline to refer the dispute to arbitration. See 1 Born 977.

Thus, it is appropriate for courts in the United States, on review under the Convention and the FAA, to review de novo the arbitral tribunal's resolution of objections based on an investor's non-compliance with a condition on the State's consent to enter into an arbitration agreement. Indeed, this rule is also consistent with *First Options* itself, which establishes even in the context of private commercial arbitration that the existence of an agreement to arbitrate is presumptively for the Court to decide independently. 514 U.S. at 944-945.

3. Courts presumptively should review deferentially arbitral rulings on all non-consent-related objections to arbitration

Once an arbitration agreement exists between the State and an investor under an investment treaty, any objections to arbitration will concern whether the particular dispute the investor has raised is properly subject to arbitration under the terms of the arbitration agreement—for instance, the State may object that the investor has not complied with non-consent-based jurisdictional and other threshold requirements. Courts presumptively should review such rulings using the same deferential standard that applies to arbitral rulings on the merits, unless the treaty provides that the tribunal's authority is more limited. That approach is most consistent with investment treaties' general and overarching purpose of attracting investment by providing for a neutral and effective means of resolving investment disputes.

When the investor has initiated arbitration in compliance with the relevant treaty conditions, the resulting arbitration agreement then confers on the arbitral tribunal authority to resolve disputes between the parties in accordance with the treaty. See p. 15, *supra*. It is generally understood in international practice, moreover, that when a valid arbitration agreement exists, the arbitral tribunal has authority to resolve objections to arbitration in the first instance, consistent with the rules that apply to the particular arbitration. 1 Born 856; see also New York Convention art. II(3). Accordingly, many arbitral rules, including the UNCITRAL Rules, empower arbitrators to resolve objections to their own jurisdiction, subject to judicial review determined by the place of arbitration in accordance with the New York Convention. Many investment treaties incorporate those rules. Pet. App. 4a; 1 Born 864.

Because the existence of a valid arbitration agreement gives the arbitral tribunal authority to rule on the dispute between the parties, the rationales that support deferring to arbitral rulings on substantive issues apply with equal force to rulings on non-consent-based threshold issues. An investment treaty that provides for arbitration reflects the States parties' conclusion that arbitration is preferable to litigation as a neutral means of resolving international disputes with investors. Dugan 42, 51-52. To subject arbitral awards to searching review on the merits would vitiate that purpose by rendering the arbitral proceedings a mere prelude to independent judicial review. De novo judicial review of arbitral rulings concerning threshold objections to arbitration not going to the existence of an agreement would similarly undermine the treaties' purpose by enabling parties dissatisfied with an arbitral award to attempt to

overturn the award on a broad range of threshold grounds. While de novo review of objections based on the absence of an arbitration agreement is necessary to ensure that the host State is not forced to arbitrate against its will, reviewing arbitral rulings on other threshold objections deferentially is most consistent with the overarching purpose of investment treaties.

Deferential review is also appropriate in light of arbitrators' expertise in international law in general and the resolution of investor-state disputes in particular. Vandevelde 430-431; Dugan 51-52; cf. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Arbitrators' expertise typically extends to threshold objections to arbitration. Because the limitations on which such objections would be based are set forth in the investment treaty itself, objections to the tribunal's authority ordinarily involve treaty interpretation—as do the bulk of the merits-related disputes the tribunal must resolve.[6] The international-law and investment expertise that makes arbitrators better positioned than courts to resolve the merits of the parties' dispute can also be applied to resolve threshold objections. Just as courts will set aside or decline to recognize arbitral decisions on the merits only in unusual circumstances, then, absent a contrary indication in the treaty, courts should accord the same deference to

---

[6] Objections to arbitration based on noncompliance with conditions on a State's consent are similarly matters of treaty interpretation on which the arbitral tribunal may have some expertise. But because objections based on such conditions challenge the very existence of an arbitration agreement and the sovereign's consent to an adjudicatory tribunal, to defer to arbitrators on such questions would be to assume the existence of the tribunal's authority and fail to accord the requisite respect to the sovereign State on that fundamental issue.

arbitrators' rulings on threshold objections not based on the absence of any arbitration agreement.[7]

C. When A Party Seeks To Set Aside An Arbitral Award Based On An Objection To Arbitration, The Court Should Apply Principles Of Treaty Interpretation To Determine The Appropriate Standard Of Review

1. When a State challenges an arbitral award on the ground that the arbitrator should have concluded that arbitration was not authorized, the court must ascertain the nature of the State's objection in order to determine the proper standard of review. When a State argues to a reviewing court that there is no arbitration agreement between the State and the investor, the court should engage in independent review of that objection. Sometimes the State and the investor may dispute the antecedent question whether the treaty requirement on which the State relies is in fact a condition on the State's consent. Because resolving that dispute is integral to determining whether an arbitration agreement was formed, the court should independently evaluate whether the requirement is a condition on consent, applying principles of treaty interpretation. See, *e.g.*, Dugan 224-225; pp. 16-17, *supra*.

In considering whether a treaty provision is a condition on the State's consent to enter into an arbitration agreement, the court should be cognizant of the fact that investment treaties are structured to provide a State's

---

[7] Although some States' domestic law provides for de novo judicial review of all arbitral rulings characterized as "jurisdictional," which may extend beyond objections based on lack of consent, different States may have differing conceptions of what constitutes a "jurisdictional" ruling. 1 Born 981. There is therefore no international consensus on the scope of judicial review of objections to arbitration in the context of awards not arising under the ICSID Arbitration Rules.

standing offer to arbitrate, and so the treaty itself should provide any limitations on the State's consent to form an arbitration agreement. See pp. 20-21, *supra*; *Waste Mgmt.* ¶¶ 13-14, 40 I.L.M. 62-63 (emphasizing NAFTA's use of the phrase "conditions precedent to submission" of a claim to arbitration, and the requirement that arbitration may be instituted "*[o]nly if*" the conditions are fulfilled). Absent a sufficient indication in the treaty's text and, if necessary, other appropriate evidence of the parties' intent, that a particular requirement is a condition precedent to the formation of an investor-state arbitration agreement, noncompliance with that requirement does not prevent the formation of an agreement. See *Mondev Int'l Ltd.* v. *United States*, ICSID Case No. ARB(AF)/99/2, Award on Jurisdiction, ¶ 44 (Oct. 11, 2002), 42 I.L.M. 85, 94 (2003). Courts should not assume that all threshold requirements stated in the treaty presumptively implicate a State's consent, or that the treaty parties intended any particular requirement to be a limitation on consent. Rather, courts should analyze the treaty's text and materials relevant to treaty interpretation to determine whether the States parties intended the requirement to operate as a limitation on consent. See *Saks*, 470 U.S. at 396.

At the same time, courts should be cognizant of the fact that different treaty parties, as sovereigns, may choose to make different requirements conditions on consent—including those that might resemble ones in private commercial agreements that are characterized as "procedural" and presumptively for arbitrators to decide. *Howsam*, 537 U.S. at 84; see pp. 12-14, *supra*; Schreuer 843-849. Courts should therefore conclude that a treaty requirement is a condition on consent if the text and other relevant evidence sufficiently so indicate,

rather than presuming that certain types of treaty preconditions—such as time limits, notice requirements, or waiver of any right to pursue other remedies—are *not* conditions on a State's consent based on the assertedly "procedural" nature of the requirement. Cf. *Howsam*, 537 U.S. at 83; *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 26-28 (1989) (requirement of pre-enforcement-suit notice to federal agency is a mandatory prerequisite to suit, requiring dismissal if not complied with, that serves important regulatory purposes). Such an approach would risk subjecting a sovereign State to an adjudication to which it never consented and to the liability that might ensue.

2. When a reviewing court concludes that a treaty requirement is a condition on the State's consent to arbitrate, the court, like the arbitral tribunal, must enforce that condition according to its terms to avoid forcing a nonconsenting State to submit to arbitration. If the arbitrator concluded that the investor complied with the condition on consent, the court should independently review that ruling. If the issue implicates factual questions, the court, in exercising its independent judgment, should consider affording respectful consideration to the findings made by an arbitral tribunal in resolving any factual disputes. Cf. *Solvay Pharm., Inc.* v. *Duramed Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (reviewing court's independent consideration may be "informed by the arbitrator's resolution of the arbitrability question").

3. If the court concludes that the requirement on which the State relies is not a condition to its consent, then any noncompliance with that condition did not prevent the formation of an agreement between the disputing parties. Because the arbitrator's ruling on the

objection was made pursuant to an arbitration agreement, the court presumptively should review the arbitrator's ruling on the objection deferentially.

III. THE COURT SHOULD REMAND THIS CASE FOR FURTHER PROCEEDINGS

A. In this case, the court of appeals did not employ the correct analytical framework in considering whether the United Kingdom and Argentina contemplated that an investor could be excused from complying with the Treaty's litigation requirement. The court framed the operative question as whether there was "clear and unmistakable evidence" that the "contracting parties intended the arbitrator to decide" objections based on the litigation requirement. Pet. App. 15a-16a (citing *First Options*, 514 U.S. at 944). The court's holding that de novo review was appropriate was based on its conclusion that because the treaty contemplated litigation in local courts, the treaty parties would have intended a court in the seat of arbitration to independently review compliance with the litigation requirement. *Ibid.* For the reasons stated above, however, the court should have examined as a matter of treaty interpretation whether the litigation requirement was a condition on Argentina's consent to enter into an arbitration agreement, and it should have applied de novo review only if it concluded that the requirement was indeed such a condition. Although the substance of the particular requirement—here, that the investor first seek to resolve the dispute in the host State's courts—may inform that determination, it is not the ultimate focus of the inquiry in its own right.

B. The Court should remand this case to the court of appeals so that it can construe the Treaty in accordance with the proper interpretive framework. That course is

warranted because the parties to this point appear to have assumed that the contract-law framework set forth in *First Options* and *Howsam* should control the arbitrability analysis, and they have accordingly not presented arguments concerning the proper interpretation of the Treaty under governing international-law principles.[8] See, *e.g.*, *AT&T Techs. Inc.*, 475 U.S. at 651-652.

---

[8] Petitioner contends (Br. 56-59) that Argentina forfeited the argument that de novo review is warranted. That fact-bound issue is appropriately addressed by the court of appeals on remand. See *Maracich* v. *Spears*, 133 S. Ct. 2191, 2210 (2013). Contrary to petitioner's contention (Br. 59), Argentina's "arguing the arbitrability issue to an arbitrator" does not necessarily indicate intent to have the arbitral tribunal finally resolve the issue. *First Options*, 514 U.S. at 946. Similarly, Argentina's observation that arbitrators generally have "competence to determine their own competence," Pet. Br. 57 (citation omitted), may simply have referred to the international consensus that arbitrators may determine their own jurisdiction in the first instance, subject to varying degrees of judicial review. 1 Born 856, 966-967.

While the thrust of Argentina's arguments before the court of appeals was somewhat unclear, petitioner correctly notes (Br. 58) that Argentina did not expressly argue that de novo review was appropriate, instead contending that the arbitral tribunal had exceeded its powers by failing to enforce the "terms of the arbitration agreement." Resp't C.A. Br. 15 (emphasis omitted). It is unclear, however, whether Argentina conceded the existence of an arbitration agreement, as Argentina sometimes used the phrase "arbitration agreement" to refer to the Treaty. *Id.* at 14. Argentina also argued that the litigation requirement was a "condition on * * * Argentina's consent to arbitration," *id.* at 15, and the court of appeals held that Argentina had not waived the argument that the court had "principal power" to determine the tribunal's authority, Pet. App. 12a-13a. In addition, in its response to petitioner's rehearing petition (at 5-6), Argentina argued that the court of appeals had appropriately engaged in de novo review because petitioner's noncompliance with

On remand, the court of appeals should determine, applying principles of treaty interpretation, whether the litigation requirement is a condition to Argentina's consent to arbitrate, and it should then apply the appropriate standard of review to the arbitral panel's ruling on Argentina's objection to arbitration. See pp. 28-31, *supra*. The United States takes no position on whether this litigation requirement is a condition on consent. Although litigation requirements like that at issue here appear to be uncommon in investment-treaty practice, those tribunals that have interpreted treaties containing similar litigation provisions have divided on the nature of such provisions. Compare, *e.g.*, *Abaclat* v. *Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 571-591 (Aug. 4, 2011) (Argentina-Italy BIT) (litigation requirement concerned whether claim was properly presented to tribunal, and noncompliance was excused on the facts presented), with, *e.g.*, *Daimler Fin. Servs. AG* v. *Argentina*, ICSID Case No. ARB/05/1, Award, ¶ 194 (Aug. 22, 2012) (Argentina-Germany BIT) (litigation requirement "cannot be bypassed"). Ultimately, resolution of the question will depend on the text and structure of the treaty and evidence as to the treaty parties' intent. The court of appeals should address the matter on remand after the parties have had an opportunity to brief it.

---

the requirement prevented the formation of an arbitration agreement.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
JEFFREY E. SANDBERG
Attorneys

MARY MCLEOD
Acting Legal Adviser
Department of State

SEPTEMBER 2013