No. 12-138

In the Supreme Court of the United States

BG GROUP PLC, *PETITIONER*

v.

REPUBLIC OF ARGENTINA, *RESPONDENT*

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

BRIEF OF *AMICUS CURIAE* THE REPUBLIC OF ECUADOR IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case presents the Court with its first opportunity to consider and determine the standards U.S. courts should use when deciding whether to confirm an investor-state arbitral award rendered against a sovereign State under a treaty, here a bilateral investment treaty (BIT), where the State disputes having consented to the arbitration at issue. This Court's decision, in turn, may impact the foreign relations of the United States in its dealings with other nations under existing or prospective treaties governing their investment disputes with U.S. investors as well as investment disputes between their nationals and the United States. It also may influence how foreign courts treat the United States in analogous circumstances. With the number of investor-state treaty arbitrations—and, accordingly, award confirmation proceedings—on the rise, it is important for this Court to articulate workable and sensible standards for U.S. courts to apply when determining whether a State has truly consented to arbitration.

Amicus curiae The Republic of Ecuador is a sovereign State. Ecuador is party to numerous BITs, including with the United States. See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. 103-15 (U.S.-Ecuador BIT). In fact, the U.S.-Ecuador BIT was the United States' first such treaty

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any entity other than *amicus curiae* and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed letters with the Clerk's office consenting to the filing of *amicus* briefs.

with an Andean Pact country and only the second to be signed with a South American country. Moreover, Ecuador has faced proceedings brought in U.S. court to confirm a BIT-based arbitral award rendered against it. See *Chevron Corp.* v. *Republic of Ecuador*, __ F. Supp. 2d __, 2013 WL 2449172 (D.D.C. June 6, 2013) (confirming award).[2]

Ecuador agrees with the United States that it is inappropriate to apply this Court's private arbitration precedents in the context of treaty arbitration. See Brief for the United States as *Amicus Curiae* in Support of Vacatur and Remand (filed Sept. 3, 2013) (U.S. Br.). Rather, treaty interpretation principles should govern a reviewing court's consideration of a State's objection that it did not consent to arbitrate a particular investor-state dispute (thus preventing an agreement to arbitrate from being formed), and such review should be *de novo*. Because the D.C. Circuit's analysis aligned with those principles, it reached the right result. Consequently, this Court should affirm the ruling below in favor of Respondent The Republic of Argentina.

Here, the question before the D.C. Circuit was simple, because the treaty clause at issue was explicit. That will not always be the case. Ecuador's status as a sovereign State and a U.S. BIT partner positions it to provide experienced insight into the requirements of Sovereign arbitral consent, and how federal courts might recognize and analyze them to best give

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[2] The D.C. Circuit granted Ecuador's motion to hold in abeyance its appeal of the district court's decision pending this Court's ruling here, see Order, *Chevron Corp.* v. *Republic of Ecuador*, No. 13-7103 (D.C. Cir., filed Oct. 17, 2013), underscoring further Ecuador's interest in the outcome of this case.

effect to the shared intent of States parties to treaties.

STATEMENT

The 1990 BIT between the United Kingdom and Argentina (U.K.-Argentina BIT) reflects the States parties' shared intent to consent to the arbitration of investment disputes *only* if certain conditions were first satisfied. The condition relevant to this case is that, "after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made"—i.e., the courts of Argentina—"the said tribunal has not given its final decision[.]" U.K.-Argentina BIT, Art. 8(2)(a)(i). In other words, the investor must first submit its claim to the Argentine courts, and then give them eighteen months to resolve it.

After seeing its investment in Argentina's natural gas distribution sector adversely effected by certain market-correction measures Argentina took in the wake of an economic crisis, BG Group purported to accept Argentina's standing offer (contained in the BIT) to arbitrate claims by British investors for violations of their rights under the U.K.-Argentina BIT. Pet. App. 94a. It did so, however, by initiating arbitration without first going to "the competent tribunal"—court—in Argentina. *Id.* at 95a.

Accordingly, Argentina objected that the arbitral panel did not have jurisdiction to decide the dispute. The panel rejected Argentina's objections and issued an arbitral award in BG Group's favor. It determined that the litigation precondition was excused because of alleged intervention by the Executive in Argenti-

na's courts. *Id.* at 5a. The panel further ruled for BG Group on the substance of the dispute. *Id.* at 297a.

Argentina asked the district court to vacate the arbitration award. The court concluded that the arbitral tribunal had jurisdiction to determine its own jurisdiction, to which determination the court would give deference. *Id.* at 42a-43a. Applying the deferential standard, the district court denied Argentina's motion to vacate, and granted BG Group's motion to confirm the award. *Id.* at 41a-43a.

The U.S. Court of Appeals for the D.C. Circuit reversed. *Id.* at 2a, 20a. It recognized the primary importance of giving effect to the States parties' shared intent, asking: Did the U.K. and Argentina, "as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling" the litigation precondition? Pet. App. 10a. Turning to the antecedent question whether a court or an arbitrator should provide the answer, the court of appeals explained that this Court "has held that the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator." *Id.* (citing *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995)). That intent, the D.C. Circuit concluded, dictated that a court determine arbitrability. See Pet. App. 15a ("It would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed.").

Analyzing the BIT through the lens of the States parties' intent, the court of appeals "'conclude[d] that there can be only one possible outcome on the [arbitrability question]' * * * namely, that BG Group was

required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained[.]" Pet. App. 19a-20a (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010)). And in light of an "explicit" treaty provision, the federal pro-arbitration policy could "[ ]not function to override the intent of the contracting parties" to the treaty. Pet. App. 18a.

In vacating the award, the court of appeals explained that "a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties." Pet. App. 19a.

SUMMARY OF THE ARGUMENT

The D.C. Circuit properly vacated an arbitral award rendered by a tribunal that had "ignore[d] the terms of the Treaty[.]" Pet. App. 2a. The court of appeals recognized that the fact that the dispute arose out of "an international investment treaty between two sovereigns" placed it in "an entirely different context" from this Court's private arbitration precedent, such as *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). *Id.* at 17a. And the court of appeals concluded correctly that "[b]ecause the Treaty provision at issue is explicit, the usual 'emphatic federal policy in favor of arbitral dispute resolution,' *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties." *Id.* at 18a. This Court should therefore affirm.

In the world of investment treaties (including those to which the U.S. is a party), there exists a variety of other conditions on a sovereign State's con-

sent to arbitrate that are not nearly so "explicit" as a litigation precondition. For example, a treaty may consent only to arbitration of those investment disputes arising after the treaty's effective date; determining whether that condition is met may require a more detailed inquiry into the origin of the parties' dispute.

In its merits brief, the United States argues that treaty interpretation principles should be brought to bear on the decision whether to confirm an investor-state arbitral award. Ecuador agrees. That said, the D.C. Circuit's rationale in this case sounded in treaty interpretation even as it purported to apply this Court's private arbitration precedents. For this reason Ecuador disagrees with the United States and respectfully suggests that vacatur and remand are unnecessary. Rather, the appropriate course is to affirm, and in the process provide needed guidance to the federal judiciary.

Such guidance should include the direction to apply established principles of treaty interpretation to determine whether to confirm an investor-state arbitral award. An investment treaty constitutes a standing conditional offer to arbitrate, so an investor's purported acceptance must match the Sovereign's offer, term for term, before an agreement to arbitrate has been consummated. Accordingly, this Court should hold that *de novo* review is appropriate where the State's objection goes to consent—namely, that the investor's purported "acceptance" was not valid because it failed to mirror the Sovereign's "offer."

ARGUMENT

I. The opinion below should be affirmed because the D.C. Circuit reached the result compelled by sound principles of treaty interpretation.

A brief recitation of the established principles that federal courts should apply when interpreting treaties demonstrates why this Court should affirm the D.C. Circuit's decision here. The court of appeals, while not applying those principles expressly, undertook a similar analysis and reached the conclusion compelled by sound treaty arbitration principles—that the arbitral award must be vacated.

In construing a treaty, federal courts should "begin with the text of the treaty and the context in which the written words are used." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988) (citation omitted). If necessary, courts should then look "beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534-35 (1991). Courts have a "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985). As the United States explains, these "basic principles of treaty interpretation are generally adhered to among Nations," and thus apply whether or not the United States is a party to the treaty at issue. U.S. Br. 17; see *id*. at 17 & n.4 (Although not a party to the Vienna Convention, which echoes those principles, the United States recognizes it "as an authoritative guide to treaty interpretation.").

Consistent with these principles, the D.C. Circuit construed the plain language of the U.K.-Argentina BIT to give effect to the intent of the contracting States parties. See, *e.g.*, Pet. App. 10a (recognizing "the *antecedent question of whether the contracting parties intended*" a court or an arbitrator to decide whether an investor could bypass the litigation precondition) (emphasis added); *id.* at 13a-15a (analyzing the interplay between subsections (1), (2) and (3) of Article 8 of the U.K.-Argentina BIT, and finding contextually significant that Article 9(2) provides authority to the arbitrator that is absent in Articles 8(1) and (2)). Notably, the court of appeals explained that "[t]he dispute between Argentina and BG Group ar[o]se[ ] in an entirely different context" from this Court's private arbitration precedent: "an international investment treaty between two sovereigns." *Id.* at 17a.

In the end, the court of appeals recognized that Article 8(2) of the U.K.-Argentina BIT unambiguously required BG Group to pursue its claim in Argentinian court for eighteen months before it could initiate arbitration. And because satisfaction of that condition—and hence Argentina's consent to arbitration—was in dispute, "the usual 'emphatic federal policy in favor of arbitral dispute resolution,' *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), cannot function to override the intent of the contracting parties." Pet. App. 18a. Nor could the BIT's reference to the UNCITRAL Rules (which grant the arbitrator the power initially to determine issues of arbitrability) foreclose the court's duty to ensure satisfaction of the antecedent requirement of

a valid agreement to arbitrate.[3] See *id.* at 13a ("[T]he district court clearly erred in finding that Argentina had conceded that the arbitrator had the power to determine arbitrability under the circumstances.").

The D.C. Circuit's analysis sounded in established treaty principles, even if it did not apply them expressly. And those principles lead inexorably to the same conclusion. The proper course, therefore, is to affirm. Vacating and remanding, as the United States urges, would waste both the court's and parties' time and resources, and would serve no purpose. See, *e.g.*, *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 732-33 (2013) (affirming, notwithstanding that "the courts below did not expressly invoke the [correct] standard," because "a remand would serve no purpose").

II. This Court should establish that treaty interpretation principles govern review of whether a state consented to arbitrate a dispute pursuant to an investment treaty.

In one respect, the court of appeals' task in this case was simple. As the D.C. Circuit recognized, Article 8(2) of the U.K.-Argentina BIT is "explicit," Pet.

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[3] *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), is not to the contrary. There, the Second Circuit was not presented with the question what standard of review should govern a court's consideration of a challenge to an arbitral tribunal's determination on any issue, jurisdictional or otherwise. Instead, in an action to stay a nascent arbitration, the court held that certain "threshold issues like estoppel and waiver" were left "to the arbitral panel *in the first instance*[,]" *id.* at 392 (emphasis added), without addressing the level of scrutiny it might apply to the panel's decisions in a later action to enforce or vacate any resulting award.

App. 18a, and it was therefore easy to conclude that BG Group was required to comply with it before initiating arbitration. Indeed, the court correctly "conclude[d] that there can be only one possible outcome" to the question before it. *Id.* at 19a (quoting *Stolt-Nielsen S.A.*, 130 S. Ct. at 1770). Put another way, a term of Argentina's standing offer to arbitrate was that an investor first would satisfy Article 8(2)—the litigation precondition. Any investor that failed to do so, yet purported to initiate arbitration anyway, would *not* have formed a valid agreement to arbitrate because the would-be acceptance did not match each term of the offer.[4] Consequently, the court of appeals' analysis dovetailed with sound treaty interpretation principles even as it reached the same conclusion.

Not every case will be as straightforward. For example, in entering into the U.S.-Ecuador BIT, the States parties sought to "stimulate the flow of private capital" from the United States into Ecuador by reaching "agreement upon the treatment to be accorded such investment." U.S.-Ecuador BIT, Preamble. The two States agreed to arbitrate disputes arising over such investments. *Id.* Art. VI(4). Importantly, however, and consistent with the BIT's forward-

[4] Indeed, this Court should affirm even if it decides to extend its private arbitration precedents to the investor-state context, because the existence of a valid agreement to arbitrate is a question properly resolved by courts *de novo*. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."); Brief for Respondent 29 (The court of appeals' "decision that the only possible conclusion is that the arbitral tribunal lacked jurisdiction, because there was no agreement to arbitrate with BG under the plain text of the Treaty, is correct.").

looking purpose, the BIT provided that it only "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter." *Id*. Art. XII(1).

What, then, of the question whether a particular investment "exist[ed]" at the time of the BIT's entry into force? Or, antecedent even to that inquiry, did a particular interest of an investor constitute an "investment" in the first place? Both of those requirements—(1) an investment (2) that existed at least as of the BIT's entry into force—are, like the BIT's remaining clauses, terms of Ecuador's standing offer to arbitrate with U.S. investors (and vice versa). Accordingly, any investor that cannot establish both preconditions, yet who initiates arbitration anyway, will have failed to create a valid agreement to arbitrate because its purported acceptance does not align with the State's offer.[5]

A reviewing court, moreover, should apply treaty interpretation principles to determine whether an investor has satisfied these conditions when the State objects that it has not. That is the only way to give effect to the shared intent of the States parties. See U.S. Br. 16 ("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."). Those principles, as described previous-

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[5] These are the issues that underlie Ecuador's appeal to the D.C. Circuit, *supra* note 2. In the district court, Ecuador objected to confirmation of the arbitral award against it on the grounds that, inter alia, its standing offer to arbitrate contained in the U.S.-Ecuador BIT did not represent consent to arbitrate lawsuits initiated by Chevron regarding pre-BIT investments it closed out years before the Treaty's effective date.

ly, require close analysis of the treaty's text, as well as resort "to the larger context that frames the [t]reaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minn.* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quotation omitted).

Ensuring that the federal judiciary is prepared to confront States' challenges to claims that they consented to arbitrate a particular dispute is all the more important in light of the substantial number of investment treaties to which the U.S. is party.[6] More of those agreements are on the horizon. For example, in June 2013 President Obama and European leaders "announced that the United States and the European Union (EU) will launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP) agreement." Office of the U.S. Trade Representative, *Transatlantic Trade and Investment Partnership (TTIP)*, available at http://www.ustr.gov/ttip (accessed Oct. 23, 2013).[7] The TTIP agreement almost

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[6] The United States is party to forty-two BITs currently in force. Trade Compliance Center, *Bilateral Investment Treaties Currently in Force*, available at http://tcc.export.gov/Trade_ Agreements/Bilateral_Investment_Treaties/index.asp (accessed Oct. 28, 2013). Additionally, the U.S. is party to regional treaties with investment-protection provisions, including the North American Free Trade Agreement and the Central America Free Trade Agreement.

[7] Further, the United States and eleven other nations—Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam—are at an advanced stage of negotiations for the Trans-Pacific Partnership (TPP), with plans for investment-protection provisions. See Office of the U.S. Trade Representative, *Trans-Pacific Partnership (TPP)*, available at http://www.ustr.gov/tpp (accessed Oct. 27, 2013).

certainly will include an investment arbitration chapter. See, *e.g.*, European Commission, *TTIP Questions & Answers*, available at http://ec.europa.ed /trade/policy/in-focus/ttip/questions -and-answers (accessed Oct. 28, 2013) ("Why is the EU including Investor to State Dispute Settlement in the TTIP?"). And "if it comes to fruition, [it will] be the biggest trade deal in the history of the world." Posting of Lydia DePillis to *The Washington Post*'s Wonkblog, http://www.washingtonpost.com/blogs/wonkblog (July 8, 2013, 10:26 EST).

Against this backdrop, federal courts require this Court's guidance so they properly can review not only the simple treaty arbitration cases, but also the less obvious ones. Cf. Posting of Michael D. Goldhaber to *The American Lawyer*'s AmLaw Litigation Daily, http://www.americanlawyer.com (July 21, 2013, 21:32 EST) ("The role of the Supreme Court should not be just to manage the closed system of U.S. justice, but to create a climate of legal certainty for businesses that operate globally, not to mention sovereigns that operate globally."). That is why it is important that the Court's opinion analyze the U.K.-Argentina BIT at issue in this case at a level of generality that permits lower courts to apply that analysis to other agreements in which the conditions are not as explicit as the litigation precondition at issue here.

III. Respect for sovereignty dictates *de novo* review of a state's consent-based objection to arbitration.

As part of that analysis, the Court should also hold squarely that a State's consent-based objection to arbitration is subject to *de novo* review. Over 200 years ago, "Chief Justice Marshall first emphasized

the 'exclusive and absolute' nature of a nation's territorial jurisdiction, any exception to which could arise only from the consent or waiver of that nation." *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) (quoting *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812)). And mandatory arbitration is an enormous "exception" to the right of a sovereign nation to insist upon its own "territorial jurisdiction" over disputes involving the State.

More recently, Congress enacted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 et seq., to codify exclusive criteria for establishing consent or waiver of immunity from our courts' exercise of jurisdiction to adjudicate disputes involving foreign sovereigns. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."). The FSIA, which delineates specific exceptions to immunity, is the "sole basis for obtaining jurisdiction over a foreign state in federal court[.]" *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The FSIA's exceptions are "narrowly construed." *Haven* v. *Polska*, 215 F.3d 727, 731 (7th Cir. 2000). And "[t]he existence of subject matter jurisdiction under the FSIA is a question of law subject to de novo review." *Siderman de Blake*, 965 F.2d at 706. Courts must scrutinize independently (and carefully) whether an exception is satisfied: "[S]ubject matter jurisdiction in any [FSIA] action depends on the *existence* of one of the specified exceptions to foreign sovereign immunity"—not on an exception's mere *invocation*. *Verlinden B.V.*, 461 U.S. at 493 (emphasis added). Thus,

"at the threshold of every action * * * the court must *satisfy itself that one of the exceptions applies*—and in doing so it must *apply* the detailed federal law standards set forth in the Act." *Id.* at 493-94 (emphasis added).

The FSIA's so-called "arbitration exception" permits federal courts to exercise subject-matter jurisdiction over an action "to confirm an award made pursuant to * * * an agreement to arbitrate[.]" 28 U.S.C. § 1605(a)(6). But this exception contains the predicate condition that the foreign state in fact agreed to arbitrate the particular dispute at issue. See, *e.g.*, *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993) ("Section 1605(a)(6)(B) of the FSIA provides an exception to sovereign immunity in cases *where a foreign state has agreed to arbitrate and* the arbitration agreement is or may be governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards.") (emphasis added). As the *Cargill* court explained, Senator Mathias, "the main sponsor of the bill to amend the FSIA to provide for this exception, [stated,] 'unless the arbitration agreement is enforceable, the arbitration is meaningless[.]'" *Id.* at 1017 n.4 (quoting 131 Cong. Rec. S5371 (daily ed. May 3, 1985) (statement of Sen. Mathias)).[8]

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[8] Ecuador's experience highlights the need for this Court's guidance that the primacy of consent requires *de novo* review of consent-based objections, particularly in the case of a foreign sovereign. In Ecuador's case, the district court viewed as "novel" Ecuador's argument "that it never consented to arbitrate the underlying dispute in this matter, meaning the award was not rendered 'pursuant to * * * an agreement to arbitrate,' [under the FSIA] and that the Court must satisfy itself of the arbitrability of the underlying dispute before finding subject-matter jurisdiction over this enforcement proceeding." *Chevron Corp.*,

Senator Mathias explained further that the arbitration exception would "reassure businesses that the international arbitration process will work * * * by amending the FSIA to say that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or the resultant award." *Ibid.* Any finding of waiver, whether express or implied, must be supported by an element of intentionality. See, *e.g.*, *Black's Law Dictionary* 1717 (9th ed. 2009) ("The voluntary relinquishment or abandonment—express or implied—of a legal right or advantage * * * * The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it."). In the context of a treaty's function as a standing conditional offer to arbitrate, the States parties' intent, therefore, must be afforded primary importance. Accordingly, the question whether an investor's purported acceptance of a State's offer to arbitrate contained in an investment treaty consummates a valid agreement to arbitrate invokes an exception to the FSIA requiring a court's *de novo* review.

Similarly, the New York Convention—often the vehicle for seeking recognition and enforcement of non-domestic arbitral awards (including BG Group's award here)—permits a reviewing court to refuse to recognize and enforce an award which "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it con-

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2013 WL 2449172, at *3. For reasons explained in the text, this proposition is compelled by sound principles of treaty interpretation, and therefore, at least after the Court's decision in this case, should no longer be viewed as "novel."

tains decisions on matters beyond the scope of the submission to arbitration[.]" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(1)(c), June 10, 1958, 21 U.S.T. 2517 (reprinted following 9 U.S.C. § 201). Here, too, the focus is on acceptance matching the offer—whether the State in fact agreed to arbitrate that particular dispute.

Limiting the circumstances in which federal courts can exercise jurisdiction over a foreign state reflects not only longstanding practices of respect and comity, but also the United States' interest in receiving similar treatment from foreign courts. See, *e.g.*, *Aquamar, S.A.* v. *Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1294-95 (11th Cir. 1999) (describing the Congressional purposes behind the FSIA as "codifying pre-existing international and federal common law"; "promoting harmonious international relations"; "and according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts") (alterations, quotation marks and citations omitted).

Generally, of course, "[a]rbitration is strictly a matter of consent, and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 (2010) (internal quotations and citations omitted). Accordingly, ensuring that a particular dispute falls within the scope of a State's consent—by reviewing the question *de novo* when the State maintains it has not consented—is uniquely important in the investor-state treaty arbitration context for several reasons.

Foremost among them is that an investment treaty, to the extent it represents a standing offer to arbi-

trate, constitutes a voluntary derogation of sovereignty—a consensual exception to jurisdictional immunity under the FSIA. See Andrea Marco Steingruber, *Consent in International Arbitration* 236 (2012) (Steingruber) ("[T]he consent to arbitrate has been often seen by host States as a derogation from their sovereignty."). And "[a]s treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly—for fear of waiving sovereign rights that the government or people of the State never intended to cede." *Kreimerman* v. *Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 639 (5th Cir. 1994); see Steingruber 254 ("[I]nvestment arbitration is always based on an arbitration agreement, and consent to arbitration is an indispensable requirement for an arbitral tribunal's jurisdiction.").

These considerations help explain why a State's reasons for choosing to include in a treaty recourse to international arbitration as a procedural remedy for investment-dispute resolution do not support the "emphatic federal policy in favor" of arbitration that underlies this Court's commercial-arbitration decisions. *Mitsubishi Motors Corp.*, 473 U.S. at 631. For example, States parties to a BIT will negotiate for guaranteed access by their own nationals to arbitration of *qualifying* disputes to avoid the risk—if not the reality—of judicial bias in favor of the State in whose courts the claimant seeks compensation for the State's alleged violations of specific investment-protection provisions in the treaty.

Such sovereign concerns are fundamentally different from those of commercial parties, who include arbitration clauses in their business agreements in order to "trade[ ] the procedures and opportunity for re-

view of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. Consequently, courts assessing whether arbitrators wrongly asserted jurisdiction over a dispute that is outside the scope of a State's consent manifested in a BIT should be guided by principles of treaty interpretation and respect for sovereignty—a different paradigm for addressing the questions whether and when to defer to an arbitral tribunal's decisions than that applied in the commercial context.

Additionally, as the United States points out, "[i]n 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." U.S. Br. 17 (citing Gus Van Harten, *Investment Treaty Arbitration and Public Law* 63 (2007)). Accordingly, the treaty's terms represent the scope of the State's consent to arbitrate. An investor thus can accept the offer only by accepting *all* of its terms; any purported modification would require the State to accept the new terms separately:

> The undertaking to arbitrate in the investment treaty itself contains those terms on jurisdiction; the validity of the agreement to arbitrate is contingent upon the investor claimant's acceptance of them. In other words, if the investor claimant, in its notice of arbitration, purports to modify those terms in any respect, then that would constitute a counter-offer and the respondent host state would have to accept those new terms concerning the arbitral tribunal's jurisdiction in a separate legal instrument.

Zachary Douglas, *The International Law of Investment Claims* 76 (2009).

In investor-state arbitration, this means that the investor must first satisfy every precondition to acceptance present in the treaty before the State will be found to have consented to arbitrate a dispute. See U.S. Br. 19 ("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.") (citing *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)); Steingruber 26 ("The provisions provided in investment laws or treaties by which a State generally agrees to arbitrate investment disputes have regularly been seen as unilateral standing offers to arbitrate with any party *fulfilling the requirements*." (emphasis added).

A court's review of an arbitral tribunal's determination that an investor in fact satisfied the treaty's terms—and thus that the State in fact consented to arbitrate—must be *de novo*. A fresh assessment is required in light of the fact that an investment treaty with an arbitration provision represents the States' consent to arbitration of only *qualifying* (not *all*) disputes. As the United States puts it, "[t]o defer to an arbitral tribunal's ruling where the host State denied 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." U.S. Br. 22-23 (citing domestic and international authorities). Permitting a decision by private arbitrators to override immunity when the State denies waiving it contravenes the traditional respect for, and protection of, sovereignty. The United States

would neither appreciate nor expect such treatment abroad. Nor would a foreign sovereign (such as Ecuador or Argentina) appreciate or expect it here.

CONCLUSION

The Court should affirm the judgment of the court of appeals, and should emphasize that U.S. courts should exercise *de novo* review of States' objections based upon a lack of consent to arbitration.

Respectfully submitted,

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