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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 12-138, BG Group v. The Republic  
5 of Argentina.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice, and may  
10 it please the Court:

11 We ask you to resolve this case narrowly by  
12 reaffirming that an arbitrator, rather than a court,  
13 presumptively resolves a dispute over a precondition to  
14 arbitration. That holding would decide the question  
15 presented and would resolve the circuit conflict and  
16 govern 99 percent of the cases in the lower courts.

17 Argentina wants you to decide a different  
18 issue. Its position in this Court is that there is no  
19 arbitration agreement with my client in the first place,  
20 so it says a precondition to that non-existent agreement  
21 is irrelevant. Now --

22 JUSTICE SOTOMAYOR: Mr. Goldstein, do you  
23 take the position that parties can't, by contract, say,  
24 this particular precondition is -- goes to my -- to the  
25 parties' consent to arbitrate?

1           MR. GOLDSTEIN:           We do not take that  
2 position. If a party were to say that, as the  
3 governments in NAFTA have done, as the Solicitor  
4 point -- Solicitor General points out is the language of  
5 the U.S./South Korea Bilateral Investment Treaty, unlike  
6 this one, we think it would be settled that a Court  
7 would resolve the dispute.

8           JUSTICE SOTOMAYOR:       All right. So if the  
9 issue is what did the parties -- as I see it -- what did  
10 the parties intend on this question, why isn't the first  
11 options Howsam divide the one that we should follow in  
12 this setting? The Solicitor General is suggesting that  
13 we shouldn't follow that. We should give some sort of  
14 heightened deference to the foreign state, but I'm not  
15 sure why because the issue is always about what did the  
16 parties intend.

17           And, if the issue is always about that,  
18 don't we look at the text, the custom and practice of  
19 the industry, the behavior between the parties? Don't  
20 we look at all of the factors we normally look at in  
21 deciding whether something goes to a substantive or  
22 procedural issue?

23           MR. GOLDSTEIN:           Yes. So let me see if I --

24           JUSTICE SOTOMAYOR:       All right. So it's not  
25 that we hold, absolutely, that in every situation a

1 precondition is subject to an arbitral decision. We  
2 look to those -- to the issue of consent, don't we?

3 MR. GOLDSTEIN: Well, a couple of things  
4 about that. You do -- you have held in *Howsam* that, if  
5 there is a precondition to arbitration, it is  
6 presumptively decided by the arbitrators, rather than  
7 the courts, so that --

8 JUSTICE SOTOMAYOR: Maybe that's why the  
9 government is saying, we shouldn't treat it as a  
10 presumption, we should just treat it as --

11 MR. GOLDSTEIN: All right. Maybe I can help  
12 by locating the parties' different arguments in this  
13 case because there are a lot of them. We have said, of  
14 course, that we think you should decide the question  
15 presented. Argentina wants you to go beyond the  
16 question presented. We can talk about whether that's  
17 appropriate.

18 If you did decide the question of consent, I  
19 think you would do it in a three-part opinion, and some  
20 of the parts are contested, and some aren't. This is  
21 how I would write the opinion: Part one would say look  
22 at our decision in *Howsam*, and it's undisputed here that  
23 if this was an ordinary contract case, just between two  
24 American companies, then BG Group would win because this  
25 looks just like a procedural precondition.

1           It's like the John Wiley staged grievance  
2 procedure, and I don't think the other side argues  
3 against that.

4           Then the other side has given you two  
5 different arguments for why you wouldn't apply Howsam  
6 and why you might have a different analytical framework.  
7 The first argument, we could call it part two of the  
8 opinion, is the argument of the United States. And what  
9 the United States says is, look, the difference between  
10 this and Howsam is it's an international case.

11           And what's different in international cases  
12 is that, when you dealt with Howsam, you dealt with a  
13 set of expectations between parties agreeing to  
14 arbitrate that may not apply in the international  
15 context, and so maybe it's different.

16           Now, this -- and the reason they say that  
17 it's different is that an international case, when it's  
18 cited in the United States, is governed by the New York  
19 Convention. And in a New York Convention case, whether  
20 it's a commercial case, whether it's an international  
21 treaty arbitration case, what the rule of judicial  
22 review is -- and that's what we're looking at here, do  
23 the arbitrators finally decide the question, or does a  
24 court, on judicial review, decide it?

25           In a New York Convention case, you look to

1 the law of the citeus, here, the United States, the  
2 Federal Arbitration Act. So I take the Solicitor  
3 General's position to be this: Look, when you have  
4 Argentina arbitrating against a company from the United  
5 Kingdom, then the Argentine company and -- excuse me --  
6 Argentina and the UK Company don't have any ex-ante  
7 understanding about whether the dispute will be finally  
8 resolved by a court or, instead, the arbitrators because  
9 who knows where the arbitration would occur. Here, it  
10 occurred in the United States.

11 Our answer is that this objection answers  
12 itself. It's true that they don't have a specific  
13 judicial system, that it will be ahead of time when they  
14 sign the treaty -- Argentina signs a treaty with the  
15 United Kingdom. They don't know whether a dispute over  
16 this precondition will be resolved de novo or, instead,  
17 it will be resolved deferentially because they don't  
18 know where the arbitration will occur, but they do know  
19 that the applicable law will be the citeus of the  
20 arbitration. And there is precedent on this.

21 The government's argument here is about  
22 international arbitration governed by the New York  
23 Convention. There are 149 signatories to the New York  
24 Convention. There have been thousands of challenges to  
25 arbitral awards under the New York Convention. And we

1 are unaware of any precedent from any country, ever,  
2 that says we are going to not apply our domestic system  
3 set of rules, here, the Howsam first options lines,  
4 because this is an international case.

5 We know that --

6 JUSTICE ALITO: I'm not sure that this  
7 argument helps you, but it's your argument. But this  
8 arbitration took place in the United States because the  
9 parties agreed that's where it would take place, right?

10 MR. GOLDSTEIN: Correct.

11 JUSTICE ALITO: So your -- your argument is  
12 that, by agreeing that the arbitration would take place  
13 in the United States, they bought into U.S. arbitration  
14 law, no international modification?

15 MR. GOLDSTEIN: That's correct. And that is  
16 what has been true in every New York Convention case  
17 ever decided in the United States and, so far as we are  
18 aware, every case decided by every New York Convention  
19 signatory because they have -- they are accepting a body  
20 of rules. When you were trying to confirm or overturn  
21 the award, they agreed to put it here. That's how it --

22 JUSTICE ALITO: See, I would have thought  
23 that there would -- there'd be an argument for saying  
24 that the first options principle shouldn't apply to  
25 international -- or to a bilateral investment treaty.



1           The whole point of these treaties, as I  
2 understand it, is to take these disputes out of the  
3 courts because of distrust, at least of the courts of  
4 the country against which the claim is asserted and --  
5 and put it in an international tribunal where some sort  
6 of standard international principles would apply, but  
7 that's -- you don't like the idea.

8           MR. GOLDSTEIN:           No, that's part three of the  
9 opinion. I just haven't gotten there. Here's the  
10 reason why, and that is, the government's argument about  
11 the New York Convention doesn't have anything to do with  
12 investment treaties. It's about the New York  
13 Convention.

14          And so it applies -- a company from Japan  
15 sues a company from Ecuador, and they arbitrate in the  
16 United States. So the government's position has very  
17 wide-ranging consequences for any international  
18 arbitration in the United States.

19          Now, Argentina does make the argument that  
20 you've described, and this is the next part of the  
21 opinion, if we got past the government's position, which  
22 I don't think has any precedent for having a special  
23 international rule, we come to Argentina's argument.  
24 And Argentina says this: Look, the reason this isn't  
25 Howsam is that this is a unilateral contract,

1 effectively, and that is, we put our treaty out there,  
2 and now, BG Group has to do something in order to create  
3 an arbitration agreement in the first place because we  
4 don't have an arbitration agreement with them, we haven't  
5 consented to arbitration, then, because of that, call it a  
6 precondition, call it whatever you want, because an  
7 arbitration agreement hasn't formed, the arbitrators  
8 have no power to decide anything, and, therefore, you  
9 can't defer to their judgment.

10 We would never expect them to have the power  
11 to decide anything Argentina says because there's no  
12 arbitration agreement at all. So that's the next part  
13 of the opinion, and it will get to the points you  
14 raised, Justice Alito.

15 JUSTICE ALITO: Could I ask you just a -- a  
16 practical question and maybe the answer to this is  
17 obvious. Is it too late, now, for you to begin  
18 litigation in Argentina? Wait 18 months and then pursue  
19 arbitration?

20 MR. GOLDSTEIN: It is not. There is a  
21 principle of laches, but there is an equivalent  
22 principle of equitable tolling, so it's true that we  
23 could go there. I do think, ultimately, it's a point in  
24 our favor because it shows how pointless this exercise  
25 is.

1           We'll recall, of course, that while we could  
2   leave -- we could file a claim in the Argentine courts,  
3   the Argentine courts, of course, would have the power to  
4   do nothing at all. They couldn't bind us. They  
5   couldn't bind Argentina. They wouldn't have to decide  
6   the case in the first place, and then we would be back  
7   here.

8           And the question is, if you have a provision  
9   like that, which is, effectively, go wait in the  
10  Argentine courts, does anybody seriously think that that  
11  determines your consent to arbitrate, when it is that  
12  that act, going and sitting, can't have any effect on  
13  the case whatsoever. Do we really --

14           CHIEF JUSTICE ROBERTS:           Well, that's not  
15  true. There are numerous statutory regimes where  
16  Congress has decided, for example, it's valuable to give  
17  people a period of time to negotiate or discuss before  
18  you can go into -- into court. I mean, the EEOC and  
19  other sorts of things saying, let's everybody -- you  
20  know, step back, you have to negotiate for six months or  
21  you can't sue for another eight months.

22           And a lot of times, nobody think that's  
23  going to change anything, but you can understand  
24  Argentina or any other country saying, look, before  
25  we're going to arbitrate -- you know, try our courts,

1     you may find -- you may be surprised, right?

2             MR. GOLDSTEIN:             We would be.

3             (Laughter.)

4             MR. GOLDSTEIN:             But, Mr. Chief Justice, my  
5     point isn't that it's not important. I'll give them  
6     that it's important; they negotiated for it. My point  
7     is that whether it's important or not doesn't tell you  
8     if it's a procedural step or a substantive step, in  
9     terms of their agreeing to arbitrate with us.

10            JUSTICE KENNEDY:           Well, then, let me just  
11    make clear where we are. Suppose we -- or at least I,  
12    were to conclude that the court of appeals was right,  
13    that it is for the Judicial Branch to decide whether  
14    there is an arbitration agreement and duty to arbitrate.  
15    Then I were to further conclude that, given Argentina's  
16    position, they have waived the judicial requirement and  
17    that this arbitration should proceed. I can't reach  
18    that second question because it wasn't raised.

19            MR. GOLDSTEIN:           Justice Kennedy, the way you  
20    would resolve that issue, I believe, is to get to  
21    Argentina's argument that it did not consent to  
22    arbitration, that there is no -- there is no  
23    arbitration agreement in the first place, you would have  
24    to go outside the question presented to begin with.

25            Remember, the question presented that you

1 granted certiorari on, to resolve a very distinct  
2 circuit conflict at the urging of the arbitration  
3 community was what do we do if we have an arbitration  
4 agreement and this is a precondition to arbitration?

5 If you were going to decide the antecedent  
6 question, the question before that, is there an  
7 arbitration agreement at all, which is my part three, it  
8 is the argument that Argentina is raising in this Court,  
9 then I think you have to carry it all the way through.

10 JUSTICE KENNEDY: Well, let me just put  
11 it -- I think there is -- this is a close case. I think  
12 there is substantial merit, the United Kingdom court is  
13 correct and that the court of appeals here is correct,  
14 as to the authority of the Court to decide the issue. I  
15 also think that they are probably wrong on the merits,  
16 but I cannot reach that second question. It wasn't  
17 presented.

18 MR. GOLDSTEIN: Well, I agree with you,  
19 Justice Kennedy, that if you were asking me did the D.C.  
20 Circuit correctly interpret the treaty and decide -- I  
21 misunderstood you. You have asked me, look, I see the  
22 D.C. Circuit's decision, which is three sentences long,  
23 on the question of whether they can invoke this waiting  
24 period, and I see the arbitrators, they're the experts.  
25 It's much more substantial.

1           If you accept the United States' argument to  
2    remand this case, which neither of the parties think you  
3    should, then it could be -- you could suggest to the  
4    D.C. Circuit it reopen it.

5           But, otherwise, I'm going to agree with you,  
6    Justice Kennedy. I am a believer that you should stick  
7    with the question presented and the arguments that are  
8    properly presented to you.

9           Let me try, then, to deal with your point  
10   about the United Kingdom court and the point about how  
11   courts decide if there is an arbitration agreement. We  
12   actually agree that you -- you are obviously a court --  
13   you need to decide if there is an arbitration agreement  
14   here. You do decide that de novo.

15          The point that I want to get to in the part  
16   three of an opinion that I am imagining is that there  
17   clearly is an arbitration agreement here, and I am going  
18   to come to that in one second. I will just bracket the  
19   point about the United Kingdom. Remember that, as I  
20   said with the New York Convention, the United Kingdom  
21   has one system for reviewing arbitral awards,  
22   Switzerland has another, we have another one.

23          What you need to look to, I think, is your  
24   own body of law because each one of those systems is  
25   because of not some great principle --

1 JUSTICE GINSBURG: Mr. Goldstein, you have  
2 given us three parts for an opinion.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE GINSBURG: Is it your position,  
5 essentially, that, under this bilateral agreement, the  
6 case is to be decided by an arbitrator, not by a court  
7 in Argentina or the United States? And so the question  
8 is when an arbitrator will decide the case. And so the  
9 question of when doesn't say whether it's an agreement  
10 or not. It just says, that you sued too early, you  
11 started it -- you started too early.

12 Is that your essential position, that this  
13 bilateral agreement says arbitration is the way this  
14 dispute gets decided, and everything on the way to that  
15 is what you call a preliminary question, but,  
16 essentially, the parties have agreed that their disputes  
17 will be solved by arbitration?

18 MR. GOLDSTEIN: Yes. And can I maybe take  
19 you to the treaty itself and explain what I think are  
20 the questions for courts and what I think are the  
21 questions for the arbitrators? Because I actually think  
22 it's pretty clear from the treaty. It's in our Blue  
23 Brief in the appendix.

24 But Justice Ginsburg, the answer to your  
25 question is yes, and I will explain how that plays out

1 under the treaty. So this is the agreement that  
2 Argentina made with the United Kingdom, and the dispute  
3 resolution provision starts at Page 8A, it's Article 8.

4 Now, there are three conditions in this  
5 agreement on Argentina's consent to arbitrate. It does  
6 have to agree, and we had to do something. We had to  
7 invest. And those three conditions are set out in the  
8 first sentence of the dispute resolution provision.

9 It says -- and I am now on Article 8, Roman  
10 I. "Disputes with regard to an investment," so this  
11 arbitration provision is only going to apply to an  
12 investment, which is a defined term under the treaty,  
13 "which arises within the terms of the agreement." So it  
14 has to be a treaty claim. "Between an investor of one  
15 contracting party and the other contracting party."

16 And so that is it has to be a U.K. investor  
17 suing an -- seeking to arbitrate against an Argentine  
18 company. And those are -- if those things aren't true,  
19 there is no arbitration agreement.

20 Now, that -- that language that I just read  
21 to you is from the local litigation provision, and then  
22 the treaty says the exact same body of disputes are  
23 eligible substantively for arbitration.

24 CHIEF JUSTICE ROBERTS: Well, that's -- it  
25 seems to me that this is a difficulty for you, the



1 structure of the treaty. I mean, if you just end it  
2 after one, nobody would say, oh, well they must be  
3 contemplating arbitration or arbitration is in the  
4 background. They say, look, you have got a  
5 dispute, if you don't resolve it, you bring it in court.

6 MR. GOLDSTEIN: Right.

7 CHIEF JUSTICE ROBERTS: Nothing about  
8 arbitration even in the background. Then they say, if  
9 you want to go to arbitration, you can. So, when you  
10 look at just the structure, it seems to suggest that  
11 Article I -- 8(I) is not part of the arbitration  
12 provision. It stands there and says, this is what you  
13 do, and then the arbitration kicks in later.

14 MR. GOLDSTEIN: I'll agree with that, but I  
15 just don't think you can ignore the rest of it. And so  
16 let me explain why that's true. So as I said, those  
17 three conditions apply to the arbitration provisions, So  
18 I'm at the top of 9A.

19 "The aforementioned disputes" -- those are  
20 the ones that meet the three conditions -- "shall be  
21 submitted to international arbitration." And then,  
22 Mr. Chief Justice, it turns immediately to the  
23 relationship between the local litigation and the  
24 arbitration. And it's common ground that, in the  
25 example that you gave, if you had just part one -- and I

1 just think it's really important by you,  
2 Mr. Chief Justice, and that is, if this provision said,  
3 go litigate in the local courts, come what may, this  
4 would be a completely different case.

5 But this provision is wildly different from  
6 that. It says, go to the local courts; whatever they  
7 do, it makes no difference. It cannot stop the case, it  
8 can't change the issues that will be arbitrated, it  
9 can't have any effect on the arbitrator's decisions. It  
10 is exactly like a waiting period, which exists in every  
11 international --

12 CHIEF JUSTICE ROBERTS: Well, that -- your  
13 argument would be better there if this was Article 8 --  
14 you know, arbitration of disputes or -- you know,  
15 parties can arbitrate, but, first, they must do this.  
16 No, it just -- you know, says settlement of disputes.  
17 The first thing is you can go to court here. The second  
18 thing is, if you want to arbitrate, you do this.

19 MR. GOLDSTEIN: Okay. Mr. Chief Justice,  
20 but then I would just take you to the next page, sub 4,  
21 and we understand what the answer to that ambiguity  
22 perhaps is, the last sentence is, "The arbitration decision  
23 shall be final and binding on both parties." That is  
24 the only body under this treaty that can issue a  
25 decision that decides the parties' dispute. It's only

1 the arbitrators. Now --

2 CHIEF JUSTICE ROBERTS: If you want to  
3 accept the invitation to arbitrate that is in 8(II). If  
4 you don't, if you go to 8(I), which doesn't say  
5 anything, then, presumably, the decision of the tribunal  
6 will be binding.

7 MR. GOLDSTEIN: Fair enough -- no, that's  
8 not quite right, Mr. Chief Justice, because, remember,  
9 imagine that we went to the Argentine courts, and for  
10 the first time ever, we won. And so that an Argentine  
11 court told the Argentine state, you know, we actually  
12 think you should pay this company \$200 million.

13 What would happen then is that Argentina can  
14 take the question to arbitration, but nothing about the  
15 local court's decision binds anyone. We -- there is  
16 never a point at which you can say that the investor  
17 will abide by or be bound by a decision of an Argentine  
18 court under this system. That's what's so unusual about  
19 it.

20 Perhaps I can explain why it's there --  
21 because it is odd, I will tell you, and I will tell you  
22 that, in deciding this question that Argentina is adding  
23 to the case, in the context of this local litigation  
24 provision, it is a very strange vehicle to do that.  
25 There are only -- only 1 percent of bilateral investment

1 treaties have this provision. It's a historic remnant.

2 It's in -- of the first 15 bilateral  
3 investment treaties that Argentina agreed to, it's in  
4 nine of them. In the subsequent 40 of them, it doesn't  
5 appear at all, again, a good example of how it isn't  
6 really a condition on their consent.

7 And it is a remnant of an era of espousal.  
8 It used to be the case that, before these treaties, that  
9 an investor in BG's position would have to go to the  
10 Argentine courts. And when Argentina first created the  
11 investment treaties, it kind of liked the idea that you  
12 had to spend some time in the courts.

13 But no one would agree to the treaty -- this  
14 is Justice Alito's question earlier -- no one would ever  
15 agree to these treaties if they didn't know that the  
16 decisionmaker would be the neutral, expert arbitrators,  
17 and so it just has this you-have-to-wait-in-court feel  
18 to it. But it is absolutely critical that we look at  
19 the substance of the provision.

20 It's very much, Mr. Chief Justice, like the  
21 John Wiley case, which is structured, one, you will have  
22 step one of our grievance process; step two, within five  
23 days you have to go to our next step of the grievance  
24 process; step three, then you can go on to arbitration.  
25 It could have stopped, theoretically, at any of those.

1 If you had given up at step one or two, you would well  
2 have been bound by it.

3 But the question you are being asked here,  
4 if we could just return to if you are trying to decide  
5 this de novo or, instead, defer to the arbitrator's  
6 interpretation of whether this litigation provision is  
7 binding, is, fundamentally, when Argentina went into  
8 this treaty, did it think that the arbitrators were  
9 going to resolve the disputes? Right?

10 Did it expect -- it's a question of consent,  
11 Justice Sotomayor -- did it expect that the answers to  
12 these questions would come from the arbitrators or,  
13 instead, the courts?

14 And when we are talking about the process  
15 for getting it going -- Justice Ginsburg talked about  
16 the timing, do you have to do this for 18 months, there  
17 is another provision here about 3 months, the natural  
18 understanding is that there is an arbitration agreement,  
19 Argentina knew that it could only get this treaty if  
20 there was a guarantee to the investors that they would  
21 be able to arbitrate, and so expects the arbitrators to  
22 decide this.

23 Imagine Argentina's world, if you will.  
24 Argentina's world is that every timing question, whether  
25 something has to be filed on blue paper -- I have no

1 idea what the line they want to draw is. Every  
2 procedural step is, instead, a condition on its consent  
3 to arbitrate, and that doesn't seem to make any sense at  
4 all. There have to be procedural prerequisites.

5 And Argentina would recharacterize this as,  
6 as I said, a unilateral agreement. So it's like  
7 Argentina says -- posts a sign on a pole and says, if  
8 you pay me -- if you find my dog, I will give you \$100.  
9 And so you have to perform an act. And it says we have  
10 to perform an act here. We have to go to the local  
11 courts, or otherwise, there is no agreement at all.

12 Well, a few things about that. Arbitration  
13 is not a dog, and Article 8, if we just go back to page  
14 8A, does not require us to submit it to the local courts  
15 at all. This can't be a step that we are required to  
16 take because we are not required to take it.

17 If I could just take you to the last two  
18 lines of it? "It shall be submitted at the request of  
19 one of the parties to the dispute." Argentina was just  
20 as entitled as us to put this into the local courts as  
21 we were. It can't have been an expectation that we had  
22 to do something before it would consent to arbitration.  
23 And so I do think that this is just on all fours with  
24 John Wiley for that -- for that reason.

25 The only other thing that has been put on

1 the table in front of you is the question of whether  
2 Argentina's sovereignty should make a difference here.  
3 And this is kind of the second theme of the brief of the  
4 United States.

5 And I would say about that that the Foreign  
6 Sovereign Immunities Act, which was discussed, of  
7 course, in the last argument, has an express waiver of  
8 sovereign immunity for arbitration awards that's  
9 controlled here.

10 And if -- when the Solicitor General's  
11 representative speaks, talked -- if that person were to  
12 talk about what the treatment of these issues in other  
13 countries is, we are unaware, again, of any country in  
14 the world where the arbitral system of review in the  
15 courts changes in the slightest because one party  
16 happens to be a signatory to a treaty, and that makes a  
17 ton of sense.

18 Again, this is fundamentally a commercial  
19 relationship. Argentina knew that it couldn't, in  
20 its -- in the crisis that gave rise to these investment  
21 treaties, Argentina couldn't get the money to come into  
22 the country if it hadn't agreed to arbitration.

23 JUSTICE SOTOMAYOR: Counsel, what do you do  
24 with Wintershall?

25 MR. GOLDSTEIN: So, Your Honor, I think that

1    there are a variety of cases out there that deal with  
2    the question in other jurisdictions of different ways of  
3    reviewing arbitration awards. And those are unique to  
4    their own arbitral system. We've cited decisions  
5    from -- a decision from France, for example, that  
6    follows your Howsam line.

7           The important point I would make is that  
8    there is -- when the other side points to decisions in  
9    which a court reviews de novo a jurisdictional ruling of  
10   an arbitral tribunal, none of those decisions are unique  
11   in any way to the fact that it was an international  
12   arbitration or an international treaty arbitration.

13           Their international rule, the U.K. rule, the  
14   rule in lots of other countries, is simply about  
15   arbitration. The reason that the other side can say  
16   that this case might well be reviewed de novo in the  
17   United Kingdom, for example, is that the jurisdictional  
18   decision in essentially every arbitration of any kind in  
19   the United Kingdom will be reviewed de novo.

20           They just have a different approach to these  
21   questions.

22           JUSTICE GINSBURG:           Isn't that the same thing  
23   in France, which is supposed to be a popular place for  
24   international arbitration, that, in the first instance,  
25   the arbitrator decides, but, ultimately, the court can



1 review everything?

2 MR. GOLDSTEIN: That is not the most current  
3 view, Justice Ginsburg. In a case called Nihon Plast,  
4 which was the most recent court of appeals decision in  
5 France in 2004, the court adopted the  
6 procedural-substantive distinction that very much  
7 parallels Justice Breyer's opinion in the Howsam case.

8 But, even if it were the case, it's because  
9 the French have their own approach to arbitration. We  
10 have a system that says, look, if you can always run off  
11 to court because of any of these procedural  
12 objections -- it has to be on blue paper, you didn't  
13 write -- wait for the -- wait 30 days, another great  
14 example would be, in lots of arbitration provisions, you  
15 have to submit a sufficiently detailed statement of  
16 claim to the arbitrators.

17 Well, that would be --

18 JUSTICE KENNEDY: Do I understand your  
19 position that, in this case, you did not have to go to  
20 the Federal -- to the Argentine court, by reason of the  
21 language in this agreement and not by reason of anything  
22 that Argentina did?

23 MR. GOLDSTEIN: The language in the  
24 agreement meant that what Argentina did disentitled it  
25 from being able to rely on this provision. I will take

1 you, quickly, if you don't mind, to the provisions of  
2 the treaty so you know what I am talking about. There  
3 are two of them.

4 One is the one that the arbitrators relied  
5 on, and that is in the arbitration provision 8-4, which  
6 is on 10A, it says, "The arbitral tribunal shall decide  
7 the dispute in accordance with the provisions of this  
8 agreement, the laws of the contracting party involved in  
9 the dispute, including conflict of laws," and, then, at  
10 the end of the sentence, "the applicable principles of  
11 international law."

12 So this exhaustion requirement -- it's not  
13 even an exhaustion requirement -- the local litigation  
14 requirement is subject to international law. And then  
15 earlier -- and so three other tribunals have reached the  
16 same conclusion as this one, that you -- for that reason  
17 of that provision, you can't rely in the particular  
18 circumstances on the local litigation. And then Article  
19 3 --

20 JUSTICE SCALIA: Say that again.

21 MR. GOLDSTEIN: Sorry.

22 JUSTICE SCALIA: By reason of --

23 MR. GOLDSTEIN: There are three other  
24 tribunals --

25 JUSTICE SCALIA: Yes.

1           MR. GOLDSTEIN:           -- that have reached the  
2     same conclusion as this one, and that is Argentina can't  
3     rely on the local litigation provision because it  
4     effectively closed the courthouse doors. It's own  
5     conduct disentitled it.

6           Then ten other tribunals have reached the  
7     same conclusion based on Article 3, the most favored  
8     nation provision, because this requirement doesn't exist  
9     in the Argentina/U.S. BIT. There are only three  
10    tribunals -- to be clear, only three tribunals out of 16  
11    or 17 have agreed to enforce it.

12           If I could reserve the remainder of my time?

13           CHIEF JUSTICE ROBERTS:           Thank you, counsel.

14           Ms. Anders.

15           ORAL ARGUMENT OF GINGER D. ANDERS,  
16           FOR UNITED STATES, AS AMICUS CURIAE,  
17           SUPPORTING VACATUR AND REMAND

18           MS. ANDERS:           Mr. Chief Justice, and may it  
19    please the Court:

20           The government's position in this case is  
21    based on the fact that this case involves a bilateral  
22    investment treaty in which the states' parties set forth  
23    a standing offer to arbitrate in the treaty itself.  
24    Because it's the treaty that determines whether there is  
25    an arbitration agreement in this case, principles of

1 treaty interpretation have to be used to assess whether  
2 there is an agreement.

3 So, therefore, applying the domestic law  
4 presumptions that are set forth in *Howsam* to this type  
5 of investor-state arbitration we think would not be  
6 appropriate. *Howsam* shouldn't apply by its terms  
7 because the question here is a question of treaty  
8 interpretation, not a question of the likely  
9 expectations of parties to a domestic commercial  
10 contract.

11 JUSTICE SCALIA: I must say I don't follow  
12 that -- that line of argument. I mean, it seems to me  
13 the treaty sets the framework for an agreement, but it  
14 is ultimately the agreement that governs.

15 MS. ANDERS: Well, there is no agreement  
16 unless the investor submits the claim to arbitration in  
17 accordance with the terms of the treaty, the conditions  
18 on the state's consent. So, for instance, in the United  
19 States investment treaties and free trade agreements  
20 such as NAFTA the United States says that an investor  
21 may submit a claim to arbitration only if it first  
22 satisfies certainly procedural conditions.

23 JUSTICE BREYER: I don't -- I can't find --  
24 it seems to me this has sprung, full blown, from  
25 someone's brain, but is not well embedded in any law

1     that I could yet find. That is the -- this is not meant  
2     to be rude. I'm trying to figure out where this idea of  
3     the consent thing comes from.

4             After all, it apparently comes from our  
5     Korean treaty and maybe one other, but I can't find it  
6     in -- I can't find -- the question in the case is, is  
7     this particular agreement, namely an agreement to go to  
8     the court first -- shall we count it as that kind of  
9     matter as to whether this is arbitrable that goes to a  
10    judge? Or rather is it that kind of procedural  
11    Howsam/Wiley type thing that goes to an arbitrator?

12            Now, we did our best, I think, to try to  
13    explain how to distinguish the one from the other in our  
14    precedent. Now, you use different words. You use these  
15    words about "consent," which doesn't appear anywhere in  
16    this treaty, but I think you are trying to get at the  
17    same thing.

18            And if you are not trying to get at the same  
19    thing, why? Why not? What are you trying to get at?

20            MS. ANDERS:           Well, I think the reason that  
21    applying Howsam and its presumption that certain  
22    procedural-type requirements, like notice requirements,  
23    would be decided by the arbitrator, the reason that  
24    would risk subjecting a state to suit without its  
25    consent is that, in investment treaties, what the states

1 do is they say we will be subject to arbitration under  
2 certain circumstances.

3 But they also place limitations on their  
4 consent to that adjudication, in order to satisfy  
5 important sovereign --

6 JUSTICE SOTOMAYOR: Are you suggesting that  
7 they --

8 JUSTICE BREYER: So if in fact there was the  
9 state that said, Look, they don't say anything in the  
10 treaty, but it turns out, for purposes of counting time  
11 limits, filing a brief, they count Saturdays, but they  
12 don't count Sundays. All right? And the government  
13 says, quite sincerely, if we had known that they were  
14 going to do that, we never would have agreed.

15 I am trying to get an example of something  
16 that is as purely procedural as I can imagine, something  
17 no one in his right mind would think a judge, rather  
18 than an arbitrator, should decide. But, under your  
19 rule, you're going to say the judges decide that and not  
20 the arbitrators, and that is what is bothering me about  
21 your rule.

22 MS. ANDERS: Well, they decided them because  
23 the state sets forth in the treaty itself that these are  
24 limitations on their consent.

25 JUSTICE BREYER: By the way, in the treaty

1     itself, you can have dozens of things, as was true of  
2     Howsam, we will follow the UNCTAD, whatever that is, the  
3     UN -- or AAA rules, and you look up AAA Rule No.  
4     1872(b), and it says just what I said. Okay? So, now,  
5     it's in the treaty itself, and why should that matter?

6             MS. ANDERS:             Because, for instance, what the  
7     United States has done in negotiating its treaties and  
8     free trade agreements for decades, in every one of these  
9     agreements, is it has said, we need to limit the  
10    circumstances in which we are subject to suit --

11            JUSTICE BREYER:         I have only found two, by  
12    the way. One was Korea, and I can't remember the  
13    second.

14            MS. ANDERS:             Well, we cited in our brief the  
15    Korea and --

16            JUSTICE BREYER:         But in any case --

17            MS. ANDERS:             -- and NAFTA.

18            JUSTICE BREYER:         -- you explicitly say,  
19    these are our conditions of consent, and you raise the  
20    question to me, you don't answer it, because suppose one  
21    of those conditions had to do with blue paper, rather  
22    than white paper, suppose that they were just what I  
23    said, nobody still would think the United States was  
24    resisting arbitration on such a matter.

25            MS. ANDERS:             Well, to give you an example of

1 a condition that we've actually used, NAFTA requires, as  
2 a condition on the United States' consent to arbitrate,  
3 that the investors, when they submit the claim to  
4 arbitration, they waive their right to pursue other  
5 remedies, and that satisfies a very important sovereign  
6 interests that we have and not being subject to parallel  
7 proceedings --

8 JUSTICE BREYER: So, here, you are putting  
9 yourselves, I gather, that the UN rules, the AAA rules,  
10 the scholars who file our briefs, the Doctrine of  
11 Competence-Competence, whatever that might be, is, in  
12 fact, far broader than what they want. It submits  
13 virtually every question of arbitrability to the  
14 arbitrator. And the United States is taking a position  
15 quite contrary, I guess, to most of the world.

16 MS. ANDERS: I don't think that's correct,  
17 Justice Breyer. What we are -- what we are saying is  
18 that, when a condition goes to consent, whether it is  
19 fulfilled or not goes to whether --

20 JUSTICE GINSBURG: How do we know that? How  
21 do we know that? The question is, is this litigation  
22 preliminary -- going to the Argentinian court, is the  
23 litigation preliminary a condition on the consent to  
24 arbitrate a dispute? What is the answer to that  
25 question, in the view of the United States?



1 MS. ANDERS: That's a question of treaty  
2 interpretation, and this Court has said that you look to  
3 first the text, but you also --

4 JUSTICE GINSBURG: Alright, so you've  
5 done all that. And what does the United States -- the  
6 United States is saying, court, you should look to all  
7 these sources, and then answer the question, is the  
8 litigation preliminary a condition on consent to  
9 arbitrate the dispute? So, after looking at the sources  
10 that the United States is telling the court it should  
11 look to, what is the answer of the United States to that  
12 question?

13 MS. ANDERS: Well, the United States doesn't  
14 feel that it is appropriate for it to express a  
15 definitive view on that question now because the parties  
16 have not argued this, really, as a question --

17 JUSTICE KAGAN: I would feel better about  
18 that argument, Ms. Anders, if you had at least suggested  
19 how we should go about deciding that question.

20 MS. ANDERS: And I could do that. Yes.

21 JUSTICE KAGAN: Because you read this  
22 through your brief, and I don't know what a  
23 consent-based objection is. In fact, you say  
24 consent-based objections can look very, very procedural,  
25 and it's still consent-based, or it might not be

1 consent-based.

2           So all the -- the techniques that we use in  
3 the Howsam-First Options line of cases seem to go out  
4 the window and not be replaced with anything else.

5           MS. ANDERS:           I don't think that's -- that's  
6 right. I think what you look to, just looking at the  
7 text, you can look to whether the text expressly calls  
8 something a condition on consent. So, for instance, in  
9 NAFTA, NAFTA says that there are certain conditions --

10          JUSTICE SCALIA:          But that's no different  
11 from the rules we apply when there isn't a treaty, of  
12 course. I mean, if the arbitration agreement said that,  
13 that the -- you know, the agreement is conditioned on,  
14 of course. So what else? What different rules would  
15 you apply, other than the common-sense rules that we use  
16 for arbitration agreements?

17          MS. ANDERS:           Well, you would also -- you  
18 would also look, possibly, for mandatory language in the  
19 treaty; so, for instance, if the treaty says that --

20          JUSTICE SCALIA:          We would look to mandatory  
21 language in the arbitration agreement.

22          MS. ANDERS:           I think that's right, but the  
23 problem with applying Howsam is that it's a presumption  
24 that is purely based on the nature of the requirement,  
25 so the fact that it is a notice requirement, the fact

1     that it is a time limit, that that means that it's  
2     procedural and, therefore, the arbitrators would decide,  
3     unless it is clearly stated --

4             JUSTICE ALITO:             What about this -- what  
5     about this principle:  If something, if some requirement  
6     seems to serve virtually no purpose, it's unlikely to be  
7     a condition of consent.  Would you accept that?

8             MS. ANDERS:             No, I think that is still --  
9     that would be grafting on a default term onto the treaty  
10    that may not reflect the treaty parties' intent.  I  
11    think, when states negotiate for these conditions on  
12    consent, what they are looking to are --

13            JUSTICE ALITO:            Well, there is nothing in  
14    the treaty that talks about consent at all, so we have  
15    to decide whether some requirement is a consent, is on  
16    something which consent is conditioned, or it's just a  
17    procedural requirement that would be decided by an  
18    arbitrator.

19            Would you not -- would you disagree with the  
20    proposition that, if something really is trivial, it  
21    doesn't seem to accomplish much of anything, it's a  
22    historical vestige, it's unlikely to be a condition of  
23    consent.

24            MS. ANDERS:            I think that one of the things  
25    the Court could look to is the nature of the

1 requirements, does it serve sovereign functions? But I  
2 think, in doing that analysis, it's important to look to  
3 what the state says are the functions that its  
4 requirements are serving.

5         So for instance, our notice requirement in  
6 our treaties, they serve the purpose of giving us  
7 advance notice of particular claims and time to correct  
8 problems that may have been caused -- you know, that we  
9 can correct and, therefore, avoid arbitration to begin  
10 with.

11         So I think you would look to the nature of  
12 the requirement, the text of the treaty, whether it's  
13 mandatory or whether it's expressly conditional. You  
14 can also look, obviously, to what this Court has called  
15 ease of interpretation, so that would be the  
16 postratification understanding.

17         If this were our treaty, we would bring  
18 in -- you know, the letter of transmittal that the State  
19 Department had provided after it had negotiated the  
20 treaty -- you know, there would be a lot of information  
21 like that that a Court could look to.

22         And I think as the Court noted, in the  
23 Sumitomo case, you can have similar language in similar  
24 treaties that have different meaning because there is  
25 different negotiating history or the aids to

1 interpretation point different ways.

2 So our point here is that it's a matter of  
3 treaty interpretation and that you simply have to look  
4 to the text of the treaty --

5 JUSTICE BREYER: What's wrong with the  
6 House -- and I'm being a little defensive here -- but I  
7 didn't think there was the presumption you are talking  
8 about. I thought it said there's a presumption about  
9 that procedural rule, and I thought important language  
10 was the language that the Court has found the phrase,  
11 i.e., for the judge, applicable in the narrow  
12 circumstance where contracting parties would likely have  
13 expected a Court to have decided the gateway matter.

14 Now, that, it seems to me, a little bit  
15 easier to work with than this notion of whether a state  
16 gave consent or didn't give consent or it doesn't  
17 mention it in the treaty.

18 CHIEF JUSTICE ROBERTS: Briefly.

19 JUSTICE BREYER: Thank you.

20 MS. ANDERS: I think, in the treaty context,  
21 the states' parties are not agreeing, and they don't  
22 have expectations with respect to the allocation of  
23 authority between the court and the arbitrator. What  
24 they do agree to are conditions on consent that limit  
25 the terms on which the state may be subject to

1 arbitration.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Blackman?

4 ORAL ARGUMENT OF JONATHAN I. BLACKMAN

5 ON BEHALF OF THE RESPONDENT

6 MR. BLACKMAN: Mr. Chief Justice, and may it  
7 please the Court:

8 This is a contract formation case, and it's  
9 a case that is decided properly by the court below  
10 whether you apply first options or whether you apply  
11 treaty principles. They get you to the same --

12 JUSTICE GINSBURG: Mr. Blackman, may I ask  
13 you, preliminarily, on your view, what happens next?  
14 That -- can this party -- and suppose you're right --  
15 can the -- can the BG Group institute an action in  
16 Argentina and, if it's not resolved within 18 months,  
17 invoke arbitration?

18 MR. BLACKMAN: Absolutely, yes. And my  
19 friend conceded that. There is no barrier.

20 JUSTICE GINSBURG: And if it is resolved,  
21 but not to BG's liking then, thereto, BG can invoke  
22 arbitration?

23 MR. BLACKMAN: That's absolutely correct,  
24 Your Honor.

25 JUSTICE GINSBURG: Well, doesn't that mean

1     that the treaty partners agreed that only an arbitration  
2     panel can conclusively resolve this dispute? Not a court.

3             MR. BLACKMAN:             What the treaty partners  
4     agreed to here, Justice Ginsburg, was a condition -- a  
5     precondition on their respectively derogating from their  
6     sovereignty. Absent the bilateral investment treaty,  
7     there is no basis on which an investor could ever compel  
8     one of these states to arbitrate its claims, and its  
9     only remedy would lie in the courts of that state.

10            JUSTICE GINSBURG:            I don't -- I don't get  
11     your answer to my question. Am I wrong in thinking  
12     that, under this treaty, the ultimate decisionmaker is  
13     the arbitrator. There is no provision for the court to  
14     be the ultimate arbiter of the controversy?

15            MR. BLACKMAN:             It depends on the issue. The  
16     arbitrator will decide the merits, assuming the offer to  
17     arbitrate has been accepted according to its terms,  
18     which was never done here.

19            After that, depending on the issue, there  
20     will or will not be judicial review of some kind, and  
21     what this court said, as a matter of U.S. law in First  
22     Options and what all the other countries say, and our  
23     brief really was not disputed on that point, is that  
24     issues of jurisdiction, whether a contract was ever  
25     formed, whether there ever was an agreement to arbitrate

1 is ultimately an issue for a court to independently de  
2 novo decide.

3 JUSTICE SCALIA: Why -- why are you  
4 complaining about the other party not initiating  
5 proceedings in the Argentine courts when, if you really  
6 wanted those proceedings to occur, you could have  
7 initiated proceedings in the Argentine courts?

8 MR. BLACKMAN: First of all, as First Option  
9 said, we didn't need to do that. First Option was very  
10 clear that it did not require someone who was resisting  
11 arbitration and objecting to the arbitrator's  
12 jurisdiction because there is no agreement to run to  
13 court, which would also be very bad policy.

14 We don't want people running to court. We  
15 want them to try an -- an arbitration, but subject to  
16 judicial review, if the arbitrators get it wrong on the  
17 fundamental jurisdictional question --

18 JUSTICE SCALIA: I must say I  
19 don't understand that. When -- when you're appealing to  
20 a condition for the thing to occur and you can bring  
21 that about as -- as readily as the other side, it's --  
22 dog in the manger comes to mind.

23 MR. BLACKMAN: No. We weren't the aggrieved  
24 party, Justice Scalia. We were not seeking relief.  
25 They're the ones who were complaining. We're -- we're



1 the putative defendant -- the Respondent. There'd be no  
2 reason for us to go to court.

3 What our offer to them was, was -- first  
4 of all, you have to go to our courts for 18 months. And  
5 then it says, in 8(2), and it refers specifically to  
6 "the aforementioned disputes," i.e., those disputes that  
7 have been brought to our courts, those aforementioned  
8 disputes can then be arbitrated "under the following  
9 circumstances."

10 And the first of those, in 8(2) -- (a)(i)  
11 is waiting the 18 months. And then, quite importantly,  
12 or in 8(2)(b) the parties can separately agree to  
13 arbitrate. Well, if they don't separately agree to  
14 arbitrate, which did not occur here, you have to go  
15 through 8(2), (a)(i), which is either wait the  
16 18 months, so the local court can try to deal with it --  
17 And I'll tell you why that's important in a moment -- or the  
18 local court does actually adjudicate it and then the  
19 party who's unhappy with that does have the right then,  
20 and then only, to go to arbitrate.

21 And that's the temporal sequence that the  
22 D.C. Court talked about. It's set forth in the  
23 structure of the treaty that the Chief Justice talked  
24 about. You go one, two, three. They're in order for a  
25 reason.

1 JUSTICE GINSBURG: That's -- the D.C.  
2 Circuit treated this as there is no agreement until you  
3 go to the local court first.

4 MR. BLACKMAN: That's correct.

5 JUSTICE GINSBURG: The argument is that  
6 there is an agreement to arbitrate. That will be the  
7 method of dispute resolution. You have to take certain  
8 steps before. So you have to go to the local court.

9 But why isn't the dispute settlement  
10 mechanism decided upon by the parties' arbitration, and  
11 then what you have to do before that is in the nature of  
12 a procedural condition?

13 MR. BLACKMAN: I don't -- I don't think  
14 that's the correct analysis, Justice Ginsburg, because  
15 the dispute resolution mechanism, which is, again, is an  
16 offer made by two states to each other to --

17 JUSTICE KAGAN: Mr. Blackman, can I just ask  
18 you to assume for a second that that's not so? If you  
19 had -- if BG and the Republic of Argentina had, itself,  
20 entered into this agreement, would you agree that this  
21 is a typical Howsam kind of provision?

22 MR. BLACKMAN: I would actually not, Your  
23 Honor. Howsam -- let's talk about the facts of Howsam.  
24 Howsam was -- there was no dispute that there was a  
25 contract between the Howsams and the broker/dealer to

1 arbitrate under the NASD rules. Those NASD rules,  
2 themselves, contained an eligibility requirement that  
3 the claim can't be more than six years old.

4 And those same rules also said the  
5 arbitrators get to decide about the interpretation and  
6 application of our rules. So it was a  
7 classic situation --

8 JUSTICE SOTOMAYOR: So how do you -- how do  
9 you distinguish John Wiley, which I think --

10 MR. BLACKMAN: John Wiley --

11 JUSTICE SOTOMAYOR: -- has two components,  
12 and the second cuts against you.

13 MR. BLACKMAN: And the first cuts in our  
14 favor, Justice Sotomayor. That's exactly right. My  
15 friend kept talking about John Wiley as involving only  
16 issues of procedural preconditions. But the first part  
17 of John Wiley, where the Court says, quite clearly, you  
18 have independent judicial review, has to do with whether  
19 there is an agreement to arbitrate at all between the  
20 parties.

21 In that case, the parties sought to be  
22 pulled into arbitration against its will, was a  
23 successor -- and the issue which the Court independently  
24 decided was, is that successor a party?

25 JUSTICE BREYER: Everybody's getting to the

1 same question, I think, but I haven't quite heard the  
2 answer. Of course, you're right in many countries. The  
3 question of arbitrability, that is to say, is there a  
4 contract is for the Court. In an investment treaty, I  
5 can find a lot of authority that says whether this  
6 counts as an investment is a matter for the Court.

7 But the question in front of us, is this  
8 that kind of decision? Is it one for the Court? Or is  
9 it one for the arbitrator? And to just summarize why it  
10 might be for the arbitrator, A, it's procedural, but  
11 that's not sufficient. B, it refers to UNC -- whatever  
12 it is -- UNCITRAL?

13 MR. BLACKMAN: UNCITRAL.

14 JUSTICE BREYER: Yes. It refers to their  
15 rules. Their rules provide all matters of competence  
16 over the arbitrator. The scholars have done exhaustive  
17 work saying most countries think that. The Doctrine of  
18 Competence-Competence goes further, and you also have  
19 the AAA rules which say the same thing. So those are  
20 all against you.

21 For you is the position of the -- the item  
22 in the document, first and foremost. All right. I'm  
23 trying to summarize what I've got as the arguments for  
24 and against. Now, what do you say to make me think  
25 there's even more for --

1           MR. BLACKMAN:           I agree with you. The text  
2   is key, and the text controls. However, I strongly  
3   disagree, with all respect, to your statements about  
4   Competence-Competence and what other countries do  
5   because we have shown, essentially, without dispute  
6   here -- and this in the third restatement, and it's in  
7   the case law of all these other countries, that  
8   Competence-Competence or Competence-Competence, or if  
9   you say it in German with a K, all that means is the  
10  arbitrators get the first crack --

11           JUSTICE BREYER:           So I agree that's not --

12           MR. BLACKMAN:           -- it's not the last word.

13           JUSTICE BREYER:           But those are not  
14  relevant -- I mean, those are relevant. I'm saying they  
15  would farther. And I think, in what I've seen so far,  
16  it gives, on certain kinds of procedural gateway  
17  questions, deference to the arbitrator, which is what is  
18  at issue here.

19           And now -- now, I'm back to the same  
20  question. What is your evidence from this contract that  
21  this is not the kind of gateway question that is for the  
22  arbitrator?

23           MR. BLACKMAN:           This is -- and, again, my  
24  friend conceded this -- this is an offer to a unilateral  
25  contract. How does a unilateral contract get formed?

1 Here, we're back at our basic contract formation  
2 principle.

3 JUSTICE SCALIA: I don't think he conceded  
4 it. He conceded that that was your argument.

5 MR. BLACKMAN: Well I think -- then I misheard.

6 (Laughter.)

7 JUSTICE SCALIA: There's a subtle difference  
8 between the two.

9 (Laughter.)

10 MR. BLACKMAN: I misheard him. I misheard  
11 him then, and I apologize, Justice Scalia. But this is,  
12 in fact, if you apply ordinary contract formation  
13 principles, as the Court says you must do in First  
14 Options and in Granite Rock, if you apply those  
15 principles, this is classic offer.

16 And the offer, we all know, has to be met by  
17 an acceptance on those terms, not on other terms.

18 JUSTICE ALITO: Well, you said a few minutes  
19 ago you were going to explain why this litigation  
20 requirement is important. And that is important to me  
21 because I don't see what it accomplishes. I can  
22 understand a waiting period, but this is more than a  
23 waiting period.

24 You have a party who doesn't want to  
25 litigate in the -- in the courts of Argentina. It

1 doesn't think it's going to get a fair shake there.  
2 What is the point of requiring this -- now, I  
3 understand, it's a requirement.

4 But if it's not very important, if it isn't  
5 going to achieve anything, that seems to me to weigh  
6 against the conclusion that it's a -- that it is a  
7 condition of consent.

8 MR. BLACKMAN: It is very important. First  
9 of all, as a factual matter, this type of requirement  
10 appears in about 8 percent of bids, and it is most  
11 prevalent in UK bids, so this is not some weird  
12 Argentine thing. The UK thinks this is important. Why?  
13 A number of reasons.

14 First of all, a lot of these investment  
15 disputes -- in fact, the vast majority -- involve  
16 challenge to some local law, some local regulation. And  
17 you want to have the local court have the first look at  
18 construing it, just as you would construe a statute  
19 before you reach the constitutional question.

20 The local court can illuminate the  
21 dispute -- the investment treaty dispute by saying, what  
22 does our law actually mean? Is our law legal under our  
23 Constitution? That's one thing. That's very important.

24 JUSTICE ALITO: Let me just interrupt  
25 before -- before the time expires -- but I don't

1 understand -- I don't know what the procedure is in  
2 Argentina. Let's assume their civil procedure is like  
3 ours.

4 So you say they have to file a complaint.

5 All right. They file a one-page complaint. They do the  
6 minimal necessary to keep the case alive in court.

7 Maybe they don't even do that because they don't care;  
8 they don't want the thing to be -- to be decided. All  
9 they're doing is running out the 18 months. What is  
10 achieved by that?

11 MR. BLACKMAN: Well, but that's their  
12 choice, which they, in fact, made here, not to avail  
13 themselves of the procedure --

14 JUSTICE ALITO: Well, let's say they avail  
15 themselves of the procedure in only the most perfunctory  
16 way, so as to satisfy the 18-month requirement. But not  
17 for the purpose --

18 MR. BLACKMAN: Why should my client be  
19 punished because they don't diligently pursue a  
20 requirement of our offer. They say, actually, in their  
21 brief, in one sentence, we accepted the offer and in the  
22 next sentence virtually --

23 JUSTICE ALITO: You're really -- you're not  
24 answering --

25 MR. BLACKMAN: -- they say we elected not to



1 follow --

2 JUSTICE SOTOMAYOR: Could you finish your  
3 answer?

4 JUSTICE ALITO: You're not answering my  
5 question.

6 MR. BLACKMAN: I'm sorry.

7 JUSTICE ALITO: What is -- if they do not  
8 litigate the matter in -- in such a way as to get a  
9 decision on any of these local law issues, they just  
10 keep it alive, perfunctorily, for 18 months. What is  
11 achieved by that?

12 MR. BLACKMAN: Well, they have -- well,  
13 they've complied with it. But, more importantly, it's  
14 what could be achieved if they wanted to achieve  
15 something, which is, as I said before, constructions of  
16 local law that would bear on the investment dispute.  
17 That's important.

18 Narrowing issues, making determinations  
19 which are not binding, but which are, nonetheless,  
20 perhaps instructive and helpful to the arbitrators.  
21 That's another issue.

22 Settlement is another issue. We talked  
23 about waiting. We have EEOC. You first have to go to  
24 the -- to the commission because this, sometimes, gets  
25 settled. If it doesn't get settled, as I say, it can be

1 narrowed. All kinds of things that would be helpful to  
2 an ultimate arbitration.

3 And they could win, by the way. They could  
4 win.

5 JUSTICE KAGAN: Mr. Blackman, could you sort  
6 of indulge an assumption for me? And the assumption is  
7 that, if this provision were in an agreement between two  
8 parties, we would treat it as a Howsam-John Wiley kind  
9 of provision; in other words, we would say that this is  
10 just a procedural rule. That's the side of the line it  
11 falls on.

12 So my question to you is: Why should this  
13 be any different? You're treating yourself as though  
14 you never made an agreement. But, in fact, you did make  
15 an important agreement. You made an agreement with the  
16 U.K., the entire point and purpose of which was to allow  
17 U.K. citizens to bring certain kinds of disputes before  
18 an arbitrator.

19 So once we have a U.K. citizen with the  
20 right kind of dispute, it seems to me you're just in the  
21 position of any other person who's agreed to this  
22 provision. And in -- in my assumption, if it's a John  
23 Wiley type provision, it should go to an arbitrator.

24 MR. BLACKMAN: I have a number of responses  
25 to that, Justice Kagan. First of all, I don't think it

1 is just a John Wiley sort of --

2 JUSTICE KAGAN: I know, but I said just  
3 assume that for me. And tell me why you are in a  
4 position where some other result should go into effect.

5 MR. BLACKMAN: Well, it's kind of assuming  
6 the conclusion, if this is just John Wiley, that's a  
7 hard case for us, but the structure of the treaty, with  
8 all respect, demonstrates it's not, and that would be  
9 true even if this was, in fact, a contract between us  
10 and BG.

11 If we had a contract with BG that says you  
12 have to sue us first, okay, and then, after 18 months,  
13 you can arbitrate with us, I don't think we would just  
14 assume that that translates into you have to arbitrate  
15 with us. They're really suggesting here, Justice Kagan,  
16 that this elaborate provision boils down to Argentina  
17 promises to arbitrate all investment disputes with BG.  
18 That's what it says.

19 CHIEF JUSTICE ROBERTS: Well, the problem  
20 is --

21 JUSTICE KAGAN: Please.

22 CHIEF JUSTICE ROBERTS: You're -- it's a  
23 point on which I'm regularly confused. You just said if  
24 we had this provision in a contract with -- a private  
25 contract that said you must sue us, but there, you have

1 already a formed separate agreement to arbitrate.

2 And it seems to me clear that those -- what  
3 do you call them, preconditions or whatever, that  
4 that -- the argument that that's for the arbitrator to  
5 decide. They may well decide that -- you know, you  
6 didn't comply, so you don't get to arbitrate.

7 But it seems to me, typically, under First  
8 Options and Howsam, that is for the arbitrator. Now,  
9 what makes it distinct in your case? What, is it just  
10 the order that they're in? Or what? Or is it something  
11 special about a sovereign's agreement?

12 MR. BLACKMAN: It's -- it's kind of all of  
13 the above. It's the text, the fact that it is, in fact,  
14 an offer by a sovereign, rather than an originally  
15 bilateral agreement with the private party, but it's  
16 also -- and this is much of what the case hinges on, is  
17 this an issue of contract formation?

18 If it's an offer, it has to be accepted on  
19 its terms. And those are formation issues that go into  
20 construing an existing agreement.

21 CHIEF JUSTICE ROBERTS: It all gets down to  
22 the question, how do we tell -- you know, the contract  
23 formation from the blue paper, right? I mean, if it  
24 says -- you know, we agree to arbitrate, and we use  
25 these rules and those rules say you have to have it on

1 blue paper, and it's not on blue paper, they say, oh, we  
2 didn't agree to have it not on blue paper.

3 How do we distinguish between those two  
4 scenarios?

5 MR. BLACKMAN: I -- I think you have to kind  
6 of look at the language. And, here, with all respect,  
7 it was clear to the circuit. I think it's -- we think  
8 it's clear -- that the consent -- which, remember,  
9 absent which there would be no arbitration, this is a  
10 sovereign, going back to sovereign immunity in our  
11 earlier case.

12 Where consent is expressly put -- the word  
13 "consent" is not used -- but the clear language of the  
14 text and the implications to be drawn from it clearly  
15 show that the sovereign is not willing to arbitrate,  
16 absent the 18-months' recourse to its courts, you should  
17 view that as a condition precedent to a unilateral  
18 contract that must be accepted by action.

19 And the action is to bring the suit in the  
20 local court and wait 18 months. An analogy, which may  
21 not be helpful, but I thought of it, so I'll give it to  
22 you. If I'm looking for someone to paint my house and I  
23 make an offer to him, I say, I'll hire you to do it if  
24 you post the bond. That's an offer to the unilateral  
25 contract.

1           He has to post the bond.           He can't say, you  
2   know, I really don't like the bond, or you want a  
3   \$20,000 bond, which isn't my offer, but I'll give you  
4   ten; now, we have a contract.

5           But let's assume we now make the contract,  
6   and I have progress payments in the contract. Now we  
7   have a signed agreement between us that says, I'll pay  
8   you -- you know, \$10,000 per floor. That's the kind of  
9   condition precedent within the contract that Howsam,  
10   perhaps, addresses.

11          But the first one is the formation issue  
12   that First Options addresses, did the Kaplans ever make  
13   the contract --

14          JUSTICE GINSBURG:           Well, what would  
15   happen -- what would happen in this case if there was a  
16   judge's strike, so none of the courts were operating in  
17   Argentina? What would happen then?

18          MR. BLACKMAN:           Well, all you have to do is  
19   actually file. So even if the courts weren't operating,  
20   which is an extreme hypothetical, all you need to do is  
21   file and wait the 18 months.

22          JUSTICE KENNEDY:           No, but the clerk's office  
23   is closed.

24          MR. BLACKMAN:           The clerk's office is closed,  
25   too?

1 (Laughter.)

2 MR. BLACKMAN: I suspect that the -- there  
3 would be a very strong case to be made to the  
4 arbitrators that, if the claimant, unlike here, did  
5 everything it could to comply -- and here, remember, the  
6 claimant deliberately "elected not to comply," the  
7 arbitrators might well find that the condition was  
8 excused and a reviewing --

9 JUSTICE KENNEDY: No, you can't -- no, you  
10 can't say that. You can't say that. There is no  
11 arbitration agreement under your -- it would still be  
12 for the court.

13 MR. BLACKMAN: Well, there could be an  
14 arbitration in the first instance --

15 JUSTICE KENNEDY: Your -- your whole  
16 argument gives me intellectual whiplash. You have to  
17 say --

18 (Laughter.)

19 JUSTICE KENNEDY: -- well, you have to --  
20 you have to go first to the court because that's what  
21 the arbitration mechanism provides, but there's no  
22 arbitration mechanism.

23 MR. BLACKMAN: No. But, in this case, what  
24 would happen would be what happened in First Options and  
25 often happens, one party invokes arbitration, and the

1 other party says, I never agreed to arbitrate with you.  
2 It would be very imprudent for the defendant in that  
3 case to do nothing and default. And you said, in First  
4 Options, specifically, you don't need to do that.

5 So you present the issue to the arbitrators  
6 and you would then argue that there's no agreement, and  
7 the arbitrators would say, well, there is an agreement,  
8 or a condition was excused. And, ultimately, on  
9 judicial review, on your facts, undoubtedly, a court  
10 would be likely to find, well, of course, they did their  
11 best, they tried to comply with a condition.

12 But that doesn't affect, to use my friend's  
13 terminology, the question presented, which is who  
14 decides in the first instance and then finally.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Goldstein, five minutes.

17 REBUTTAL ARGUMENT OF THOMAS GOLDSTEIN

18 ON BEHALF OF THE PETITIONER

19 MR. GOLDSTEIN: Mr. Chief Justice, I do have  
20 a rule that distinguishes the A4 paper, and that rule  
21 should be, and we think it does follow from the analysis  
22 of Howsam, which is just a thinking about when people  
23 make agreements and what they expect is that an  
24 arbitration agreement is formed and a party consents to  
25 arbitration when they guarantee that the ultimate



1 decision can be made by an arbitrator and not a court.  
2 It's forum selection. We're going to have the ultimate  
3 decision made by the arbitrator.

4 And that rule is applied in the investment  
5 treaty context as follows: And it is there is consent  
6 to arbitration when the investor is guaranteed that  
7 their claim can ultimately decide -- be decided by a  
8 court, and the state can't force it to be ultimately --  
9 excuse me -- by an arbitrator, and the state can't force  
10 it to ultimately be decided by a court.

11 And I'll show you where that rule, how that  
12 line is divided in this treaty. And that is, I gave you  
13 the three conditions at the beginning. Those are not A4  
14 paper. You have to be a U.K. investor, you have to have  
15 a treaty claim, you have to be suing another party to  
16 the treaty.

17 And if those aren't true, then there is no  
18 arbitration agreement and Argentina has every reason to  
19 say I have no idea why these arbitrators are here, this  
20 person's from Ecuador, not from the United Kingdom.

21 But on the other things -- at that point,  
22 once -- we are a U.K. investor and we have invested in  
23 Argentina, that's the performance that is required, once  
24 we did that, then we are protected by Article 8, the  
25 dispute resolution provision.

1           And you look at Article 8 and you say, okay,  
2       does that guarantee that you have the right to  
3       ultimately have it decided by the arbitrators? Or can  
4       Argentina actually insist that it will be ultimately  
5       decided by a court?

6           And it's the former.           We made clear, I  
7       think, and nobody disagrees, that they can't force us to  
8       go into court and wait for that ruling, take that ruling  
9       in any way, shape, or form.

10          Now, my friend says that, look, this is like  
11       a unilateral agreement, and this is like where I say  
12       I'll hire you to paint my house, if you post a bond.  
13       Well, that is a terrible argument for them because this  
14       treaty reads as if he was saying, I'll let you paint my  
15       house if you post the bond or I post the bond, because,  
16       remember, the thing they want us to perform on,  
17       supposedly, is something they can do, too.

18          Whoever heard of unilateral agreement that  
19       was conditioned on either party doing something? There's nothing they're  
20       waiting for us --

21          JUSTICE SCALIA:           They say that only the  
22       complaining party can bring a lawsuit. Evidently, they  
23       have no declaratory judgment procedure in Argentina.

24          MR. GOLDSTEIN:           That -- I don't believe that  
25       is correct, Justice Scalia.

26          JUSTICE SCALIA:           I was going to ask them

1       that.

2               MR. GOLDSTEIN:               I see. I believe the  
3       answer, when this was put to them, his answer to your  
4       question was, I just don't have to do that. His view  
5       was -- and it's a perfectly fine position to take, and  
6       that is he's not going to help me win my case. Fine.

7               But it does describe whether this is a  
8       condition on his consent, that he could do it, too, and if  
9       he could do it, too, it can't be something that he is  
10      waiting for me to perform at all.

11              I would also say that, on this question of  
12      whether it has any value, that all that you got,  
13      Justice Alito, was that, if I were to pursue the case in  
14      the Argentine courts, maybe something would happen, we  
15      might learn a little about Argentine law.

16              First thing's first.               I don't have to pursue  
17      it. Remember, his whole point is, when asked if the  
18      courts were closed, he said, I just have to put the  
19      piece of paper down.

20              So if this were a treaty provision that  
21      actually involved litigation, involved exhaustion of  
22      remedies, where we might learn something, that might be  
23      a different case. But this is a waiting period in an  
24      Argentine court.

25              And, remember, as well, these are treaty

1       claims, and it is perfectly clear and undisputed that  
2       the local court, even if it decided the treaty claims,  
3       their ruling would not bind the arbitrators. And so he  
4       says, well, hey, we might win.

5               CHIEF JUSTICE ROBERTS:               I'm not so sure you  
6       don't have to do anything, you just submit the paper.  
7       It says you have to submit it to the decision of the  
8       competent tribunal. And if the submission requires,  
9       okay, now, you have to file your brief, and you say, I'm  
10      not going to, I'm not sure that you've submitted it to a  
11      tribunal for its decision.

12             MR. GOLDSTEIN:               Well, Mr. Chief Justice, I  
13      will then say that's a possible argument. But let's  
14      figure out who we would ordinary expect to figure that  
15      out.

16             This is a treaty provision.               It's -- the  
17      experts involved in treaty interpretation are the three  
18      neutral arbitrators, who really do this every day. It's  
19      what they do. They have enormous expertise in  
20      interpreting treaties.

21             And so you might say -- and it would be a  
22      perfectly valid interpretation, well, maybe submitting  
23      it to the local court requires some activity. But do we  
24      really expect, when the U.K. and Argentina ended this  
25      treaty, that it would actually be the Supreme Court of

1 the United States that would be deciding that question,  
2 or instead, the arbitrators?

3 And if you believe it's the arbitrators,  
4 then we win, because it's the kind of procedural  
5 question that we put to them purposely.

6 CHIEF JUSTICE ROBERTS: That seems that  
7 you're not totally circular in begging the question. I  
8 don't know that a sovereign would be anxious to submit  
9 its sovereignty to three international law experts.

10 MR. GOLDSTEIN: And, surely, they wouldn't,  
11 Mr. Chief Justice, but that's the point of the treaty.  
12 Remember, my friend said, look, if it weren't for this  
13 treaty, we could never sue them. That's the reason  
14 there's the treaty because, if there wasn't the treaty  
15 and we couldn't get relief from them, we would have  
16 never invested.

17 And so the whole point of this treaty is to  
18 put these disputes into arbitration. There is no  
19 special substantive rights in this treaty. They are all  
20 customary international law. The thing that matters in  
21 this treaty -- the thing that matters in all the  
22 treaties is I don't have to have my case decided by an  
23 Argentine court.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
25 The case is submitted.

1           (Whereupon, at 12:11 p.m., the case in the  
2       above-entitled matter was submitted.)  
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