No. 21-1244

IN THE

Supreme Court of the United States

BEIJING SHOUGANG MINING INVESTMENT COMPANY, LTD., CHINA HEILONGJIANG INTERNATIONAL ECONOMIC AND TECHNICAL COOPERATIVE CORP., QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.,

Petitioner,

v.

MONGOLIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF FOR PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONERS

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INTRODUCTION

Prior to seeking Mongolia's consent to submitting the Amicus Brief in the case, Professor Bermann made public statements criticizing the Second Circuit's decision, which demonstrated a fundamental misunderstanding of the case. For that reason, Respondent Mongolia withheld consent and submits this Objection to Motion for Leave to file Amicus Curiae Brief (the "Motion") and *Amicus Curiae* Brief of Professor George A. Bermann (the "Amicus Brief") in support of Petitioners' petition for writ of certiorari (the "Petition") under United States Supreme Court Rules, § 37.5.

The proposed Amicus Brief, which repeats the public statements made by Professor Bermann following the issuance of the Second Circuit's decision, does not bring to the attention of the Court any matter not brought to its attention by the Petitioners, as required under the Rules of this Court. Rather, the Amicus Brief is structured as a subsidiary piece of advocacy aimed at complementing the Petition—indeed even purporting to engage, albeit incorrectly, with the record of the arbitration. In doing so, however, the Amicus Brief betrays a fundamental misunderstanding of the case as evaluated by the Second Circuit, which may lead the Court in error. This is perhaps not surprising when considering that Professor Bermann is a law professor with no connection to the arbitration underlying the case.

There is no circuit split for this Court to resolve, nor law that remains for this Court to develop. Professor Bermann's attempt to elevate before this Court a case presenting nothing more than a question of application by the Second Circuit of settled law to the facts of the case falls short of the applicable criteria for granting certiorari. This, too, is unsurprising considering Professor Bermann's long-standing interest in having a hand in the development of the law regarding the question of arbitrability (for which he notably submitted an amicus brief in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 2019 WL 122164). But there is no law to develop here.

The case at hand was decided on the facts of the procedural conduct of the parties during the arbitration of a dispute between Chinese state-owned enterprises and the sovereign state of Mongolia, pursuant to a bilateral treaty concluded in 1991 by the People's Republic of China and the then- Mongolian People's Republic (the "Treaty"). Professor Bermann's views advocated in the Amicus Brief do violence to that Treaty.

At issue in this case is the question of whether the substantive law created by two foreign sovereigns in their Treaty created a protection for investments of the nationals of one of them in the territory of the other (the arbitral tribunal answered that question in the negative). Further, by agreement of the State-parties, to the extent that the Treaty created a substantive protection, a claim that the substantive protection had been violated could be

heard and decided by only an *ad hoc* international arbitral tribunal constituted pursuant to the Treaty (not any U.S. or other foreign national court).

By definition, absent consent, Mongolia is not a subject of Federal or New York law, such that there can be no ***displacement*** of jurisdictional questions ***from*** the New York courts ***to*** an arbitral tribunal. This is why the Petitioners themselves brought the question of arbitrability to the arbitrators and, of course, never challenged the arbitrators' authority to make that determination during arbitral proceedings that spanned over seven years. As the Second Circuit confirmed, such conduct by the Petitioners manifested "clear and unmistakable" evidence of their belief that it was exclusively for the Tribunal to determine whether the Treaty conferred it jurisdiction. If the arbitrators were not competent to make that determination, as Professor Bermann argues, then any dispute with Mongolia regarding its consent to arbitrate would have been brought before its own courts in Mongolia, not those of New York, which was a juridical seat selected later by the Tribunal itself.

As the above foreshadows, and as further explained in this Objection, the proposed Amicus Brief mischaracterizes the case in several respects. As such, the Amicus Brief would burden rather than assist the Court. For that reason, the Motion should be denied.

LEGAL STANDARD FOR GRANTING LEAVE TO FILE AN AMICUS BRIEF

"An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored." United States Supreme Court Rules, § 37.1.

Leave to file an amicus brief will be denied where "[i]t does not appear that applicant is interested in any other case which will be affected by the decision of the case". *Northern Securities Co. v. United States*, 191 U.S. 555 (1903).

ARGUMENT

The Motion transparently does not satisfy the Court's criteria for granting leave. On its face, the Amicus Brief is ostensibly based on the allegation that the Court of Appeals for the Second Circuit misapplied settled law as laid out in *First Options*. In substance, the Amicus Brief is, at its core, an argument that the Second Circuit was incorrect in its assessment of whether the parties' conduct in the arbitration satisfied the "clear and unmistakable" standard this Court articulated in *First Options*. The Amicus Brief supports the Petitioners' plea for this Court's intervention, arguing that such alleged misapplication is significant given that jurisdictional objections and bifurcation are commonplace in arbitration. None of this is sufficient to satisfy the requirements for granting certiorari.

Professor Bermann does not contend that the Second Circuit erred because of a conflict in interpretation between courts of appeals regarding the issue of delegation of the question of arbitrability that this Court ought to clarify. Nor does Professor Bermann argue that this is an important area of the law that remains to be developed, such that this Court's intervention is warranted. Professor Bermann merely takes issue with the way the Second Circuit decided the case, having applied the applicable legal standards under *First Options* and its progeny to the facts of the case.

More fundamentally, however, Professor Bermann's argument that the Second Circuit misapplied the law is based upon an incorrect and only partial recitation of the facts on the basis of which the Second Circuit ruled, which this Objection will establish below by juxtaposing Professor Bermann's characterizations of the facts with passages from the Second Circuit's decision.

A. Professor Bermann's Interest in the Case, as Stated in the Amicus Brief, Is Premised on Misstatements About the Record of the Arbitration

In the Amicus Brief, Professor Bermann contends he is interested in the case because the Second Circuit's decision allegedly "severely undermines one of the most fundamental decisions of this Court in the area of arbitration. That decision is *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995)." Am. Br. at 2. All the reasons Professor Bermann gives for his allegation that the Second Circuit's decision is a "severe undermining" of the law are

purely factual in nature. It is clear, however, that Professor Bermann has a limited command of the record of the case, as he made numerous, and consequential, misstatements of fact in the proposed Amicus Brief.

For example, one of the main contentions Professor Bermann makes in the Amicus Brief is that the case "has the effect of stripping this Court's 'clear and unmistakable' test of any meaning, by essentially depriving a claimant of *de novo* court review merely because it replies to a respondent's challenge to arbitrability." Am. Br. at 2. In support of this contention, Professor Bermann relies on the fact that Mongolia purportedly "challenged arbitral jurisdiction on the ground that the claim against it fell outside the scope of the parties' agreement to arbitrate." Am. Br. at 5. As such, the Petitioners were purportedly "compelled to answer" with a "response to a challenge" which, in Professor Bermann's submission, is the reason the Second Circuit denied Petitioners a d*e novo* review. *See* Am. Br. at 12-13. This is factually incorrect, and even contradicted by the Amicus Brief itself.

Indeed, as Professor Bermann recites, the Second Circuit noted that the Petitioners "initiated the arbitration and argued for the arbitrators' jurisdiction from their very first submission." Am. Br. at 14. As claimants in the arbitration, it is the Petitioners themselves who brought the question of arbitrability to the arbitrators.[1] The Petitioners and Mongolia

[1] As will be seen further below, there is nothing surprising about this, given that this dispute arose out of the Treaty. Contrary to arbitration clauses in private contracts, treaties providing protections for foreign investors give blanket consent in advance to arbitrate certain disputes, or arbitration without privity, under

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reached an agreement that the Tribunal would resolve this question, together with the Petitioners' case on the merits, in the first phase of the bifurcated case. This agreement was memorialized by the arbitral tribunal in the "Procedural Order No. 1." The reason the case was bifurcated in that way, as opposed to a jurisdictional phase followed by a merits phase if jurisdiction is found, was because the question put to the tribunal was whether the Treaty created any actionable protection at all for the Chinese state-owned enterprises in the case. The question was thus mixed in nature, straddling jurisdictional and substantive issues.

In the course of the written and oral submissions, Mongolia responded to the Petitioners' extensive arguments that the Treaty contained an agreement by the State-parties to the Treaty that claims of expropriation could be decided by an arbitral tribunal, and eventually prevailed on this issue. Before a decision was reached by the Tribunal, however, Petitioners expressly requested a formal commitment that the Parties would abide by the Tribunal's ruling on all issues put to its determination. That correspondence was specifically emphasized by the Second Circuit—which emphasis Professor Bermann does not address—as belying any argument that the Petitioners did not believe that the tribunal had authority to determine arbitrability. The Second Circuit stated as follows:

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certain conditions. Contrary to a typical arbitration, therefore, it is quite expected that a claimant will try to persuade the tribunal at the outset that it was given jurisdiction by the signatory states to hear the investor's grievance on its merits.

> "the Petitioners-Appellants also submitted a letter to the tribunal on August 31, 2012, towards the close of briefing, requesting that the tribunal issue an order specifically for the purpose of "remind[ing] the parties that any award rendered by the Tribunal is *final* and binding and that the parties should not, directly or indirectly, take any steps that may undermine or affect the enforceability of the award' which strongly belies their argument on appeal that they did not believe that the tribunal had authority to conclusively determine jurisdictional issues." App. 28 (emphasis in original).

The Petitioners issued this "reminder" presumably because they were confident of their arbitration position. But when the arbitral award was issued in favor of Mongolia, Petitioners reversed course and turned to the New York courts for a second bite at the apple, asking the District Court for the Southern District of New York to act as an appellate forum to revisit the arbitrators' decision of whether the State-parties had created in the Treaty a substantive protection against expropriation that, if it existed, would be exclusively with in the competence of *ad hoc* arbitral tribunals constituted pursuant to the Treaty, despite the fact that the arbitration was "final and binding".

Furthermore, in support of his inapposite contention that the Second Circuit's decision strips of any meaning the "clear and unmistakable" test, Professor Bermann compares the facts of the case with those at play in *First Options*, in an attempt to argue that the outcome should have been the same because the impugned conduct of the parties was the same. This is again incorrect.

Consider Professor Bermann's explanation that, in *First Options*, "[t]he Kaplans unsuccessfully objected to the tribunal's jurisdiction, preserved their objection, and proceeded

to the merits. When they lost on the merits as well, this Court held that they were entitled to a *de novo* jurisdictional determination of arbitrability, and on that basis affirmed the vacatur of the award rendered against them." Am. Br. at 10. On that basis, Professor Bermann says there is no justification for treating claimants and respondents differently here. But here, contrary to the Kaplans, the Chinese state-owned enterprises never "objected to the tribunal's jurisdiction," let alone "preserved" any such objection. In other words, the Petitioners never raised the issue of whether the tribunal was competent to determine its own competence over the dispute under the Treaty. Rather, the Petitioners positively argued that the Tribunal was competent to hear the matter and attempted to persuade the Tribunal as much. When confronted with Mongolia's jurisdictional objection, the Petitioners did not then argue that the Tribunal was not competent to determine the matter and that a New York court should instead.

The Second Circuit's review of the record directly contradicts Professor Bermann's assumptions. The Second Circuit held as follows:

- "at no point in the arbitration did Petitioners-Appellants object to the arbitrators resolving arbitrability issues." App. 28.

- "The Parties agreed at the outset of the arbitration that the tribunal would hear jurisdictional issues in the first phase of the arbitration, after it had become clear that the key jurisdictional issue to be argued was the scope of the Treaty's arbitration clause, a question clearly implicating 'arbitrability'. This agreement 'clear and unmistakably' evidences the Parties' intent. Petitioners-Appellants' conduct during the remainder of the arbitration,

> moreover, confirms their intent as expressed in that agreement, and in no way casts doubt on it." App. 16.

Professor Bermann's misconception in the Amicus Brief is a repetition of public statements he has made to criticize the Second Circuit's decision. In a recent virtual meeting of the Committee of International Institute for Conflict Prevention & Resolution ("CPR"), Professor Bermann made a presentation about the very case at hand. Professor Bermann was asked by Richard F. Ziegler, a prominent arbitration practitioner, the following: "Did the Claimant accompany its submissions to the Tribunal on the jurisdictional issue with a preservation of its right to an independent judicial determination of the issue? Wouldn't that be a simple solution to this conundrum?"[2] Professor Bermann's response was that, although he had not made any review of the arbitration record, he "assumed"—incorrectly, the record establishes—that the Claimants had affirmatively acted to reserve a right to an independent judicial review. The basis for this assumption, Professor Bermann stated, was that claimants were represented by competent counsel. It is true indeed that claimants/Petitioners were then represented by highly seasoned arbitration counsel from the law firm Freshfield in Paris and Hong Kong. Claimants' counsel did not make the "reservation" that Professor Bermann "assumed" was made in this case.

[2] For purposes of this Objection, Respondents deemed it unnecessary to submit evidence of that exchange between Mr. Ziegler and Professor Bermann. This exchange provides color as to Professor Bermann's understanding of the case, which is relevant to the weight to be accorded to the proposed Amicus Brief. Evidence of this exchange can be provided if the Court wishes to see it.

B. The Amicus Brief Fails to Demonstrate That the Question Presented Is an Important One That Warrants This Court's Review

Professor Bermann contends that the question presented is exceptionally important "since jurisdictional objections and bifurcation are commonplace." Am. Br. at 7. Professor Bermann adds that, especially in the context of investor-state arbitration, "delegations will be found regularly and routinely" if the Second Circuit decision stands, which Professor Bermann opines "cannot be what the Supreme Court intended when it propounded the 'clear and unmistakable' test." Am. Br. at 8. Professor Bermann argues that the "sole concern" of a U.S. court should be "whether the parties actually conferred authority on an arbitral tribunal, ***rather than a court***, to adjudicate their dispute." Am. Br. at 5. (bold emphasis added). Professor Bermann's contention makes a critical omission: the arbitration in this case arose out of a bilateral treaty between sovereign states, neither of which is subject to the jurisdiction of the New York courts.

Indeed, this is not a case in which there is or was ever any possibility of any U.S. court deciding the parties' dispute, which Professor Bermann describes as the "sole concern" of what he calls the *First Options* "arbitrability inquiry". This is because if the 1991 Treaty between the People's Republic of China and the Mongolian People's Republic (as it then was) contained protection for investors against expropriation (the question the arbitrators decided in Mongolia's favor), it would be exclusively for an international arbitral tribunal or the courts of the allegedly expropriating State-party to the Treaty to determine the claim.

In other words, this Treaty-based arbitration never presented a "gateway problem" in the sense that Professor Bermann has focused on in his scholarship. The reason there is a "gateway" at all in American jurisprudence is because of the concern that if a delegation of primary responsibility for the determination of jurisdiction to an arbitrator is found absent "clear and unmistakable" evidence of such delegation, then an individual consumer or other private party may be forced to arbitrate a claim that otherwise would be determined by a U.S. court. No such concern is present in this case.

It should come as no surprise, therefore, that it was the agreed preference of Mongolia and the Chinese companies who were parties to the arbitration for an international tribunal to interpret the Treaty, not a court in the United States. It is toward that end that the Petitioners and Mongolia reached an agreement in the "Procedural Order No. 1" that the tribunal would resolve this question, together with the Petitioners' case on the merits, in the first phase of the bifurcated case.

Importantly, at the time of this agreement, there was no agreed election by the parties of New York being the seat of the proceedings, and thus no possibility whatsoever of any New York court having anything to do with their dispute or the interpretation of the Treaty. New York had no connection to either party, or to the dispute about the alleged expropriation of Chinese assets in Mongolia. It was only because the parties were in disagreement about the selection of a seat for the arbitration that the arbitral tribunal itself

eventually selected New York. To be sure, the Parties never even set foot in New York in connection with the arbitration, the hearing having been conducted at the Peace Palace in The Hague, Netherlands.

After over seven years of extensive written and oral proceedings, an arbitral tribunal chaired by the then-President of the International Court of Justice, a Slovak national,[3] issued an award interpreting the Treaty in accordance with public international law—that is, through an analysis under the canons of interpretation in the 1969 Vienna Convention on the Law of Treaties. A prominent component of that analysis was consideration of the treaty with regard to the historical practices of Communist-era countries. The Tribunal's analysis considered in particular the manner in which expropriations had been conducted by such countries prior to the time when the Treaty was entered in 1991 to determine the scope of consent to arbitrate intended by China and post-Soviet Mongolia.

To conclude, as Professor Bermann rightly put, "[t]his Court has repeatedly and forcefully acknowledged that the foundation of arbitration is party consent and that neither arbitration agreements nor arbitral awards deserve recognition or enforcement unless they are the product of such consent." Am. Br. at 3. Party consent in this case was to permit the

[3] The other two members of the Tribunal were a former head of international claims and investment disputes for the U.S. State Department (by designation of Mongolia) and a French National who headed the public international law practice at a major U.S. law firm and a visiting lecturer at Yale Law School (by designation of the Petitioners).

creation of an *ad hoc* arbitral tribunal for the purpose of adjudicating disputes falling within the scope of the Treaty and to retain sovereignty over any other matter that does not. When they accepted Mongolia's standing offer to arbitrate in the Treaty, the Petitioners and their arbitration counsel understood as much, and acted accordingly by submitting to the tribunal the question of arbitrability directly. The Petitioners' conduct throughout seven years of proceedings manifests clear and unmistakable evidence of their delegation of the determination of the question of arbitrability to the Tribunal. Under *First Options*, the arbitral tribunal's determination of the scope of the Treaty's substantive protections afforded to covered investors ought to be reviewed with deference, as the District Court correctly determined, and the Second Circuit affirmed.

CONCLUSION

The motion for leave to file an amicus brief in support of the petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted.

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