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.,

Petitioners,

v.

MONGOLIA,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The arbitral award that the petitioners have sought, unsuccessfully, to undo before the U.S. federal courts is a decision delineating the scope of protections afforded to Chinese investors under a bilateral treaty concluded by Mongolia in 1991 with China. Specifically, the question put to the arbitral tribunal by the petitioners themselves was whether and to what extent this treaty gave Chinese investors a claim for an unproclaimed expropriation that they could take to international arbitrators in lieu of the Mongolian courts. The tribunal decided that this particular treaty did not provide any such claim to Chinese investors, and instead created only a claim for quantification of the amount due to the investors in the event of a state nationalization—or "proclaimed" expropriation. This was a question about the substance of a bilateral treaty that the parties agreed an arbitral tribunal would decide, and the finality of that decision was something *petitioners themselves* chose to emphasize in the proceedings.

Did the Second Circuit err in applying the "clear and unmistakable" test from *First Options* and finding that the parties had delegated to the arbitral tribunal the authority to decide the above-described question?

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INTRODUCTION

As the petitioners' eventual request for summary reversal demonstrates, this case is not a candidate for certiorari review, *see* Pet. 24. There is no dispute about the standard to be applied in deciding whether arbitrability was for the arbitrators to decide (*i.e.*, "clear and unmistakable evidence" of delegation), or whether the Second Circuit correctly stated it. Nor is there any argument that there is a disagreement among the circuits that requires resolution because this is a recurring set of facts that other circuits have addressed differently. Instead, the petition argues on its face that the Second Circuit applied a correctly stated rule of law that this Court has already articulated to one particular set of facts and reached, in petitioners' submission, an incorrect result. In other words, under the guise of an alleged "de facto reversal," the petition seeks factbound error correction without even alleging a circuit split. In so doing, the petitioners fail to meet their burden under Rule 10 to show a compelling reason for the Court to grant certiorari. The petition should be denied on that basis alone.

Indeed, it is undisputed here that the Second Circuit (i) identified the proper legal test under *First Options* and its progeny, (ii) applied this test to the specific facts of the case, and (iii) determined that those facts showed that the parties had clearly and unmistakably delegated to the arbitral tribunal the power to decide the "arbitrability" question that the tribunal resolved. Having thus applied this Court's settled law, the Second Circuit found that there existed no grounds to vacate the award under the Federal Arbitration Act ("FAA") and the New York

Convention.[1] Accordingly, there is no colorable certiorari here.

With that said, the case for certiorari (or summary reversal) only gets worse from there, because—although the petition tries to obscure this reality—this case presents a radically atypical set of facts that the Second Circuit addressed correctly. In fact, the typical arbitration case that raises a question of consent to arbitrability under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), looks diametrically opposed to this one in at least three related respects, and those differences explain away all of the alleged deficiencies petitioners identify in the Second Circuit's decision.

First, in the usual case, it is the party that objects to arbitration who, logically, also objects to the arbitrators deciding the scope of their own powers. *See, e.g.*, *First Options*, 514 U.S. at 946 (emphasizing that the Kaplans "were forcefully objecting to the arbitrators deciding their dispute"). Here, it is the party that initiated the arbitration and thus submitted both the merits question *and* the question of arbitrability to the arbitrators—without expressing any reservation for over seven years—who is all-of-a-sudden claiming (conveniently, after losing) that they never wanted the arbitrators to decide the scope of the arbitration agreement at all.

In a highly misleading use of the precedent, petitioners and their amici rely ad nauseam on *First Options*' holding that "*filing* with the arbitrators a written memorandum [addressing] the arbitrators' jurisdiction … did

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (1958).

not suffice" to create consent in that case. Pet. 10 (emphases and alteration in the petition; our ellipsis). Except that the word "[addressing]" was used by the petitioners and amici here in replacement of the word "*objecting*" in *First Options*, *see* 514 U.S. at 946. This substitution is anything but anodyne: In *First Options*, it was the Kaplans' persistent *objection* to arbitration on which this Court relied to find an absence of clear consent when they litigated arbitrability before the arbitrators. *See id.* The exact opposite is true here.

Second, in the typical arbitration case, the question of arbitrability and who decides it can be reasonably disentangled from the merits question to be arbitrated. *See, e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). That is because, ordinarily, the question of arbitrability revolves around whether the parties consented to displace from a court to an arbitral tribunal the authority to adjudicate their dispute. This question is purely procedural and thus distinct from the merits. Here, in contrast, the "arbitrability" question is also the core merits question: Did petitioners have any kind of legal claim at all—apart from the claims they already brought and lost in the Mongolian courts—under the bilateral treaty concluded in 1991 by the People's Republic of China and the then-Mongolian People's Republic (the "Treaty")[2]?

[2] Agreement Between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, Aug. 26, 1991, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/760/download

More specifically, it is only if the Treaty created a cause of action in the event of an unproclaimed expropriation that these Chinese state-owned investors could seek redress before an arbitral tribunal *or anyone else*—that cause of action comes from the Treaty or else does not exist. Put another way, there could be no substantive award in favor of the petitioners unless the arbitrators first interpreted the Treaty to create a substantive protection to Chinese investors for any unproclaimed expropriation they alleged. And here, the tribunal determined that the Treaty did not create such a protection, and therefore that the petitioners had no actionable claim under the Treaty to bring in *any* venue. Accordingly, what the petitioners are seeking here is a U.S. court order compelling the arbitrators to read the *substance* of the Treaty their way after the arbitrators already interpreted the substance of the Treaty to say the opposite. In other words, the petitioners attempt inappropriately to use the U.S. court system as an appellate forum. This is impermissible under the FAA, and certainly far from anything required by *First Options*.

Third, and relatedly, in the typical arbitration case contemplated under *First Options*, the alternative to arbitration is that the parties maintain the ability to bring their claims in the U.S. courts instead. *See, e.g.*, *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (seeking right to litigate antitrust claims in court); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (seeking to litigate false advertising claims in court). Here, in contrast, the Chinese state-owned enterprises that sued Mongolia have (1) already litigated and lost in the Mongolian courts, and (2) have no claims left to litigate against Mongolia in *any* court—and *certainly* no claims that would be litigable in the courts of this country (this

being a dispute with a foreign sovereign, brought by a different foreign sovereign, about conduct that occurred in the first sovereign's foreign and sovereign territory). Again, petitioners' argument is but a backdoor attempt to have a U.S. court *create* a claim specifically for them and then compel the arbitrators to decide it (something the US courts would have no competence to do, which is a further deficiency of their request petitioners never address).

In this context, it is no wonder that the Second Circuit found that the parties had clearly and unmistakably agreed that the arbitrators would decide the meaning of the parties' agreement, and the U.S. courts would review that arbitral determination deferentially, as the FAA requires. Indeed, the record is replete with clues that petitioners are being obtuse when they deny that they clearly and unmistakably agreed to have the arbitrators decide arbitrability. Among them is that, before they learned that the arbitrators disagreed with their position as to whether they were entitled to bring a claim under the treaty, they requested an extraordinary order from the arbitrators clarifying that their decision in the case would be final and binding. Petitioners do not just want two bites at the apple; they want a second bite after erecting a giant sign in front of the apple that says: "only one bite allowed."

As explained in this Opposition, there are many other problems with the petitioners' arguments—in particular, the suggestion that this decision will affect any case besides this one. There can be no precedential effect attached to this decision, as it only confirms that a party always retains the ability to deny an arbitral tribunal's competence to determine the arbitrability question by

simply signaling so in some fashion—something the petitioners did not do here. The critical point is that, in addition to seeking factbound error correction, this petition presents an esoteric vehicle that the Second Circuit correctly analyzed. The petition thus fails to present an even-colorable claim for certiorari review, or summary reversal, and should be denied.

STATEMENT OF THE CASE

A. Inception of the dispute.

This dispute arises out of the revocation of a license to one of the largest iron ore deposits in Mongolia. This deposit—the Tumurtei deposit—had been exploited since the early 1990s, upon the fall of the Soviet Union, primarily to feed Mongolia's nascent steel industry. Given the economic and strategic implications of this mining operation, licensing was strictly regulated.

In 2005, Mongolia learned that the petitioners had not only misappropriated the license but also abused the rights conferred by the license. *See* Award in PCA Case No. 2010-20, June 30, 2017 ("Award"), pp. 42-60. Indeed, this license had been obtained by the Chinese state-owned enterprises through covert maneuvers aimed at bypassing strict requirements for access to strategic national resources. *Id.* The license had also been misused, as the production of iron ore had been diverted from the Mongolian steel manufacturing plant to Chinese state-owned companies in China. *Id.* In the process, the petitioners had also committed a number of violations of Mongolian environmental and explosives-safety regulations. *Id.*

After a thorough investigation of the matter, the license was revoked in 2006, whereupon the petitioners and

their subsidiaries launched a series of lawsuits before the Mongolian courts, aimed primarily at forcing the reinstatement of the license. *See* Award, pp. 60-64. The petitioners were notably successful in judicially securing the return of assets and equipment left *in situ*. They were not successful, however, in securing the reinstatement of the license to mine at Tumurtei.

When the petitioners' attempts—which escalated to Mongolia's Supreme Court—failed, the petitioners commenced arbitration proceedings under the Treaty, assisted by seasoned arbitration counsel.

B. Commencement of the arbitration.

As early as their request to arbitrate, the petitioners affirmatively argued that the tribunal had the authority under the Treaty to grant them relief. The issue, as advanced by the petitioners, was whether the Treaty, a self-contained set of rules agreed between China and Mongolia to promote investment, created a substantive claim for alleged expropriation in a manner that was actionable through arbitration. The petitioners argued that the language of the Treaty permits, without any limitation, a claim for expropriation by any means—whether proclaimed by the State or not—which claim would be decided through international arbitration. Accordingly, in their Request for Arbitration, filed on February 12, 2010, the petitioners set out the following argument:

> "Article 8 on its true interpretation is not limited to an assessment of the compensation due for an expropriation but gives the Arbitral tribunal jurisdiction to determine the existence of an expro-

> priation under Article 4 of the Treaty and its lawfulness as well as any compensation due. Any other interpretation would render the standard of protection under the Treaty purely formal and would thus defeat the purpose of the Treaty, namely to promote investment." Request for Arbitration, ¶¶ 68–69; *see also* Pet. App. 21.

That petitioners argued the arbitrators should interpret the Treaty to give them "jurisdiction" (a well-known concept under public international law) was because if they didn't, then petitioners would be left with no claim about the "lawfulness" of an unproclaimed expropriation.

When the petitioners made that argument in their first submission as claimants, Mongolia had naturally not yet voiced any position on the matter. More importantly, when the petitioners made that argument, there existed no other judicial forum where the petitioners could make it—and certainly not the U.S. courts. Either the Treaty covered such claim, in which case the arbitral tribunal could hear its merits, or the Treaty did not cover such claim, in which case no court or tribunal anywhere could.

Accordingly, upon commencement of the arbitration by the petitioners, Mongolia did not refuse to arbitrate the matter, or object to the arbitrators' "jurisdiction" in the sense that U.S. law would typically use that term. Instead, Mongolia willingly participated in the arbitration and counter-argued that the Treaty did not give the petitioners any substantive claim actionable before an arbitral tribunal (or anyone else). Indeed, the language of the Treaty is clear on its face that only disputes as to the appropriate amount of compensation due in the event of a proclaimed expropriation—typically, a case of nationalization—could give rise

to a claim under the Treaty. *See* Treaty, Article 8.3 ("If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations… it may be submitted at the request of either party to an ad hoc arbitral tribunal."); Article 4.2 ("The compensation… shall be equivalent to the value of the expropriated investments at the time the expropriation is proclaimed"). But the more important point is that the parties *agreed* that the arbitrators should decide the meaning of this language in order to determine whether petitioners had any substantive claim at all.

C. Parties' agreement regarding the arbitral procedure.

The Parties accordingly agreed, when they negotiated with the tribunal to establish the procedural ground rules of the arbitration (referred to as the "Procedural Order No. 1"), that the matter of jurisdiction and merits would be bifurcated from the matter of determination of remedy. Pet. App. 68. That made sense because there was no reason to engage in a complex analysis of compensation for expropriation *if the tribunal determined* that the petitioners had no actionable claim for an unproclaimed expropriation under the Treaty to begin with.

During these early negotiations, petitioners pressed for the applicability of the UNCITRAL (i.e., United Nations Commission on International Trade Law) Arbitration Rules, to circumscribe the arbitral process. Pet. App. 67. The tribunal rejected the petitioners' request for the applicability of the UNCITRAL Rules, having no need for a formal incorporation of a set of rules in an ad hoc arbitration in which the arbitral tribunal was given full latitude to control the procedure. *Id.*, referring to Treaty,

Article 8.5 ("The tribunal shall determine its own procedure."). Notably, however, the UNCITRAL rules that petitioners wanted have been consistently read to clearly and unmistakably delegate to the arbitral panel the authority to determine its own jurisdiction. *See, e.g., Republic of Ecuador v. Chevron,* 638 F.3d at 394 (2d Cir. 2011); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012). Moreover, the part of the UNCITRAL rules that has been construed to delegate such authority to the arbitrators is the language stating that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate." UNCITRAL Rules (2010), Article 17. Here, not only did Article 8.5 of the Treaty already cover that aspect by using the word "shall" rather than "may" but the tribunal undeniably made use of this power by ordering that the question of arbitrability would be decided in a first phase, along with liability.

At that juncture of the arbitral procedure, the tribunal—not the Parties—also elected a formal seat for the proceedings, determining then that New York would be most convenient. Pet. App. 65. The tribunal made that decision over the parties' respective choices, the petitioners preferring Stockholm while Mongolia preferred Singapore. *Id.* In other words, the tribunal's determination of "its own procedure" included its own choice of New York as a seat.

Both Parties understood that the determination by the tribunal regarding the scope of the Treaty protections would be final and binding, from the unambiguous text of the Treaty. *See* Treaty, Article 8.6 (stating that "[t]he tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both Contracting States [*i.e.,* Mongolia and

China] shall commit themselves to the enforcement of the decision in accordance with their respective domestic law."). Yet, believing they were going to prevail on the merits, petitioners still made the truly extraordinary request that the tribunal issue an order for the sole 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." *See* Pet. App. 28.

D. Tribunal's engagement with Parties' submissions regarding "arbitrability" question.

In the course of thorough written and oral submissions, the Parties' respective arbitration counsel engaged extensively on the question of whether the Treaty contained the sort of actionable claim the petitioners argued they had under the Treaty. This included a week-long hearing at the United Nations' Peace Palace at The Hague, Netherlands in September 2015. The arbitral proceedings included submission of 528 pages of written pleadings, fact and expert witness statements totaling 126 pages, 320 fact exhibits, and 336 legal authorities, a large number of which concerned the parties' respective positions as to the scope of the Treaty protections. Despite the fact that, in one of these authorities, petitioners' arbitration counsel himself had agreed with Mongolia's position,[3] the petitioners maintained their argument that the

[3] *See* Peter Turner, Q.C., "China's Investment Treaties: substantive and procedural rights," *Asian-Counsel*, May 2007, at 22 (with M. Mangan); Peter Turner, Q.C., "Investment treaty arbitration," in *Managing Business Disputes in Today's China: Duelling with Dragons* 103 (Kluwer, 2007).

Treaty entitled them to lodge a claim for alleged expropriation throughout the seven years that the arbitration lasted. At no point during these seven years did the petitioners raise any concern with the tribunal's competence to determine that question, or otherwise object to the panel's competence to determine questions of "jurisdiction" or "arbitrability."

After over seven years of proceedings, Mongolia prevailed. The arbitral tribunal, chaired by the then-Presiding Judge of the International Court of Justice,[4] unanimously issued an award interpreting the Treaty in accordance with international law—that is, through a detailed analysis under the canons of interpretation of the Vienna Convention.[5] Having conducted that analysis, the tribunal agreed with Mongolia that the Treaty did not create a claim for an unproclaimed expropriation on which the tribunal could grant relief. The tribunal thus concluded that "it lacks jurisdiction *ratione materiae* with respect to the Claimants' claim that the Respondent is in breach of Article 4 of the Treaty in that in unlawfully expropriated the Claimants' investments." Award, p. 148.

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[4] Alongside President Peter Tomka, a former Slovak ambassador to the United Nations who is currently on his third 9-year term as ICJ Judge, were Mark Clodfelter, a former head of international claims and investment disputes for the U.S. State Department (by designation of Mongolia) and Yas Banifatemi, a French National who headed the public international law practice at a major U.S. law firm and is a visiting lecturer at Yale Law School (by designation of the petitioners). No arbitrator disagreed with this determination.

[5] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

E. Petitioners' change of heart following issuance of final and binding award.

Having lost in the arbitration, the petitioners went to the District Court for the Southern District of New York for another chance to have the Treaty interpreted in their favor. The relief requested by the petitioners was to both vacate the award and compel arbitration at the same time, which remedies are, on their face, mutually exclusive. In other words, the petitioners, who had vehemently reminded Mongolia that the tribunal's decision would be final and binding, and forewarned Mongolia not to take "any steps that may undermine or affect the enforceability of the award", reversed their commitment in the face of defeat and sought to appeal the decision before the S.D.N.Y.

District Judge Edgardo Ramos rejected the petitioners' plea, finding unequivocal evidence of delegation by the parties to the tribunal of the power to determine arbitrability. Judge Ramos notably found that

- the "Chinese companies, by initiating this arbitration, affirmatively arguing for the tribunal's jurisdiction, and vigorously participating in the seven-year long arbitration proceedings, have waived their opportunity to object now to the arbitrator's ability to decide arbitrability." Pet. App. 41.

- "[t]he facts of *First Options* are very different from the instant case. The *First Options* Court had in front of it respondents who opposed the formation of any arbitration agreement at all. There is no dispute that the [Treaty] exists

here. The *First Options* arbitration respondents participated only through a single memo objecting to arbitrability. the Chinese companies vigorously participated for seven years in the underlying arbitration." Pet. App. 49.

- the "Chinese companies affirmatively presented their desire for the arbitrators to decide arbitrability in its initial petition and developed those arguments over at least three formal submissions. And it agreed at the very first procedural meeting to decide jurisdiction simultaneously with the dispute. It cannot be said that, after starting the whole proceeding, framing the jurisdictional issue, participating for seven years, and never objecting, the companies can now come to a U.S. court and claim that this question was not one for the arbitrators to decide. Accordingly, the Court finds that the question of arbitrability was clearly and unmistakably put before the arbitrable tribunal." Pet. App. 51.

The Court of Appeals for the Second Circuit affirmed. Quoting *First Options*, the Second Circuit held "that petitioners-Appellants and Respondent-Appellee Mongolia … 'clear[ly] and unmistakabl[y]' agreed to submit questions of arbitrability to the arbitral tribunal in the course of the dispute between them." Pet. App. 2. The Second Circuit reached that conclusion because, on the facts of the case, "[f]irst, the Parties reached an agreement at the outset of the arbitration, as confirmed by the arbitral tribunal in its first procedural order" and '[s]econd, petitioners-Appellants' conduct throughout the remainder of the arbitration further confirms, and in no way casts doubt on,

their intent as expressed in that agreement to submit arbitrability issues to the arbitral tribunal." Pet. App. 2-3. The Second Circuit notably held as follows:

- "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." Pet. App. 16.

- "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." Pet. App. 27-28 (emphasis in original).

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

REASONS FOR DENYING THE WRIT

The case at hand does not turn on any misinterpretation of *First Options*, let alone its "overruling" as the petitioners would have this Court believe. The decision by the Second Circuit turned only on the specific facts of the case—that is, the procedural conduct of the parties during the arbitration of a dispute between Chinese state-owned enterprises and the sovereign state of Mongolia regarding the scope of the Treaty's protections.

I. The Second Circuit Correctly Determined that the "Arbitrability" Question the tribunal Decided Was "Clearly and Unmistakably" Entrusted to the tribunal

A. The Parties' procedural conduct has always evidenced their agreement to delegate the arbitrability question to the tribunal.

By default, an investor claiming to have been wronged in the country hosting the investment can only bring a claim before the courts where that wrong occurred and the investment was made. There is no jurisdictional avenue for an investor to complain about such wrong to the courts of a third country.

Here, the petitioners first litigated in the Mongolian courts through seven separate proceedings, some of which reached Mongolia's supreme court. The petitioners'

efforts to reinstate the license, which had been misappropriated and egregiously misused (notably by diverting all of the iron ore to China instead of supplying the Mongolian steel industry, and violating many Mongolian statutes along the way), went nowhere.

Accordingly, having exhausted the available local remedies without success, the petitioners would have had no further legal recourse at all but for the existence of the Treaty. In other words, it was only because China and Mongolia had entered the Treaty allowing for *some* disputes under *specific* circumstances to be arbitrated—*i.e.*, disputes regarding the quantum due where the state proclaims an expropriation—that the petitioners could even *attempt* to assert a claim outside the Mongolian courts. To do that, the petitioners needed to convince the tribunal to expand the scope of the Treaty to include a substantive claim that the state committed an unlawful expropriation (in this case, by revoking the ill-gotten license), as opposed to claims for "the amount of compensation due" in the event of a nationalization. The petitioners understood very clearly the hurdle they were facing, which is why they brought up the issue in the very first submission and maintained that position throughout the arbitral proceedings. As the Second Circuit noted, the petitioners "initiated the arbitration and argued for the arbitrators' jurisdiction from their very first submission." Pet. App. 50.

Accordingly, when the petitioners commenced the arbitration, there was no "arbitrability" question—or even a dispute about jurisdiction—in the sense that a U.S. lawyer would usually use that term. There was only a question of whether or not the Treaty provided a cause of action against any form of expropriation to these Chinese state-owned investors. It was thus only natural that the

petitioners never challenged (and in fact argued *for*) the arbitrators' competence to determine their own competence. Had they not done so, they would have had no case at all to try—not in the U.S., nor anywhere else. That's because there was no other place to take this substantive claim: either the Treaty creates this claim and gives it to the arbitrators to decide, or it does not create any claim at all.

Accordingly, several aspects of the Parties' agreement regarding the procedural ground rules of the arbitration (referred to as the "Procedural Order No. 1" or "PO1") demonstrate petitioners' clear understanding that their only recourse was to convince the tribunal that they had an actionable claim under the Treaty.

In PO1, the Parties agreed that the matter of jurisdiction and merits would be bifurcated from the matter of determination of remedy, as there was no reason to engage in a complex analysis of compensation for expropriation if the tribunal determined that the petitioners had no actionable claim for an unproclaimed expropriation under the Treaty to begin with. The Second Circuit correctly noted that this procedural order was "confirmation" of the Parties' already-existing agreement that arbitrability was for the tribunal to decide. Pet. App. 2.

Moreover, in the course of negotiating PO1, the petitioners pressed for the application of the UNCITRAL Rules. The U.S. courts have uniformly held that, under those rules, any questions of arbitrability would undeniably be bestowed upon the arbitral tribunal. *See* Pet. 9; *see also* Pet. App. 19. In other words, petitioners must concede that they *wanted* the arbitral tribunal to be the sole gatekeeper of the arbitrability question—at least if the

views of U.S. courts on that question were to be of any moment.

But of course, niceties about the treatment of the arbitrability question under U.S. law was not a relevant concern then, because the Treaty had obviously delegated to the tribunal the authority to determine *everything* about the arbitration and the substantive claims that it would reach. So much so, in fact, that the election of New York as the seat of arbitration—without which this petition could never have been filed—was made by the tribunal itself. *See* Pet. 4, 20. Indeed, it was the tribunal's prerogative under the Treaty to make that election, being vested with the power to "determine its own procedure" under the Treaty. Treaty, Article 8.5.

This fact further illustrates why the petitioners expectedly conducted themselves in keeping with the view that it was for the tribunal to determine the scope of the Treaty's protections. How could it be otherwise when the choice of a seat of arbitration—and thus the courts and law that would be used to supervise any and all of the tribunal's decisions—was to be made for the first time, in the middle of the proceedings, by the tribunal itself?

B. There is no "de facto reversal" of *First Options*.

The petitioners argue that the Second Circuit somehow reversed "de facto" *First Options*. It is obvious on the face of its decision that the Second Circuit did no such thing. As seen *supra*, the Second Circuit expressly referred to the applicable standards under *First Options* and found, *as a factual matter*, that the petitioners' conduct demonstrated petitioners' clear and unmistakable

consent to having the tribunal decide the question that it decided about the meaning of the Treaty.

Focusing on the facts of the case at hand, it is easy to see why the petitioners have to contort their argument to say that the Second Circuit rejected "de facto" this Court's law, and thus make the extraordinary request for summary reversal. When contrasted with the facts of *First Options*, the facts here are easily distinguishable.

Most importantly, in *First Options*, the Kaplans had not signed any arbitration agreement, such that no arbitration should have taken place. Instead, the dispute between the Kaplans and First Options of Chicago, Inc., both U.S. parties, should have been litigated before the competent U.S. courts. When the arbitral tribunal found jurisdiction notwithstanding the lack of arbitration agreement, the Kaplans thus maintained their objection throughout the arbitral proceedings that there was no arbitral jurisdiction at all. Stated differently, the Kaplans' consistent position was that they had the right to have their day in *court*, and could not be forced to arbitrate instead absent their express consent to do so.

This Court agreed with the Kaplans. In doing so, this Court held that the tribunal's decision on arbitrability (or the scope of the tribunal's own "jurisdiction") was reviewable directly, because there was no "clear and unmistakable evidence" of delegation of that determination to the tribunal by the parties. And it reached that result by emphasizing the Kaplans' consistent *objection* to arbitral jurisdiction, and in that context found that merely litigating that question before the panel was not evidence of consent. The opposite is true here, where petitioners have

wanted the arbitral panel to rule that they have a claim on the merits all along.

Another way in which the facts of *First Options* are distinguishable is in the very sort of arbitrability question posed. As mentioned above, in *First Options*, the question posed was whether there was any valid consent at all to arbitrate anything. There was none, as the Kaplans had never signed the agreement embodying the arbitration clause. Here, there was never any question that a valid consent to arbitrate existed. That consent is memorialized in Article 8 of the Treaty, and the Treaty was properly executed by representatives of the governments of China and Mongolia in 1991. What was disputed was the scope of protections afforded under the underlying agreement—here, the Treaty.

In that respect, it is worth pausing on the tribunal's choice of words in the Award. The tribunal held that "it lacks jurisdiction *ratione materiae* with respect to the Claimants' claim that the Respondent is in breach of Article 4 of the Treaty in that in unlawfully expropriated the Claimants' investments." Award, p. 148. This language makes clear that the decision was not a determination *rationae voluntatis*—i.e., whether there existed a valid consent to arbitrate, as in *First Options.*

Relevantly, the Second Circuit explained in *Bevona* that *First Options* simply provides "a clarification of the type of evidence needed to submit to arbitration a dispute regarding whether parties ever entered into a valid arbitration agreement at all." *Abram Landau Real Estate v. Bevona*, 123 F.3d 69, 73 (1997). Conversely, in the case at hand, the question was whether or not the subject-matter raised by the petitioners was the type of claim that the

treaty had created—a determination *ratione materiae*. To borrow this Court's words, "the application of the [Treaty] is not a 'question of arbitrability' but an 'aspec[t] of the [controversy] which called the grievance procedures into play." *Howsam*, 537 U.S. at 80 (internal citations omitted).

In sum, the Second Circuit reviewed the facts surrounding the arbitration proceedings and determined, under the proper standards of review, that the facts demonstrated clear and unmistakable evidence of delegation of the question of arbitrability to the tribunal. There is no "overturning" of *First Options* here.

Nor is there, as one amicus stated, a "direct conflict with controlling precedent" through rejection "as a matter of law" of *First Options*' distinction between primary and secondary power to decide arbitrability. NYCBA Am. Br., p. 2. The Second Circuit indicated time and time again that it would look to who has the power to decide arbitrability "in the first instance". *See* Pet. App. 24-25. Here, the Second Circuit analyzed the facts and determined that the Parties agreed that the tribunal would "in the first instance" decide arbitrability, which agreement was clear and unmistakable from the conduct they had over seven years of proceedings. Pet. App. 26-27. And there is no question that the intent to delegate the question of arbitrability to the arbitrators can be evinced through conduct. *See e.g., Republic of Ecuador*, 638 F.3d at 395.

There is no flouted "reversal of presumption" either. Pet. 8. To the contrary: as this Court recognized in *First Options*, "when the parties have a contract that provides for arbitration of some issues… the parties likely gave at

least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter." 514 U.S., at 945 (internal citations omitted).

The Second Circuit's decision comports with this Court's precedent. The petition is meritless.

II. The Petition Fails to Demonstrate That the Case Presents an Important Question Worthy of This Court's Intervention

The Second Circuit applied—correctly—settled law to the specific facts of the case and in no way created new or diverging law. This should be the end of the inquiry. It is nonetheless enlightening to analyze the justification given by the petitioners as to why it would be in this Court's interest to grant certiorari in this case. Indeed, contrary to the contention of the petitioners and their amici, there is no precedential value to this case or impact on another case.

The argument that the case is "exceedingly" important fails in three respects, as explained below.

A. This case has no important effect on any other case.

The petitioners' amici comprised of foreign practitioners and academics contend that the Second Circuit has created a "framework" that would make New York an outlier. Scholars Am. Br., 3. Specifically, the amici argue that *First Options* is "aligned… with a growing international

norm" but that the "Second Circuit's decision here risks upending that alignment." *Id.*, 17. They base this conclusion on the argument that the Second Circuit "for the first time [found] that participation in jurisdictional proceedings before a tribunal and agreeing to a schedule for submission of jurisdictional objections waives a party's right to subsequent de novo review." *Id.*, 18. This is a mischaracterization of the Second Circuit's decision.

The Second Circuit's decision was premised on a review of the conduct of the petitioners who, for over seven years, acted as though the tribunal was the sole decisionmaker with respect to the "arbitrability" question. Not once have the petitioners voiced any reservations, however minute, to the tribunal's authority to make that determination. In fact, as the Second Circuit pointed out, the petitioners went out of their way to insist that there should be no attempt to evade the binding nature of the tribunal's determination. This is a far cry from *First Options*, where the Kaplans objected at every turn. This Court notably found that "filing with the arbitrators a written memorandum **objecting** the arbitrators' jurisdiction … did not suffice" to create consent in that case. Petitioners and the amici's attempt to downplay the import of the Kaplans' repeated objections by substituting the word "objecting" with the word "addressing" is as deceitful as it is useless a misquote. Pet. 10

All the case at hand does is clarify for future litigants how U.S. courts will interpret utter silence on the question of who should decide arbitrability from the party that initiated the arbitration in the first place (to the extent that was even uncertain). Under this clarification, parties in future cases will remain in complete control of the outcome: All they need to do is signal in *some* way that they

want this question reserved for a court regardless of whether their conduct may otherwise seem insistent on having the arbitrators decide the entirety of the dispute.

Put another way, this case only deals with how the parties have conducted themselves *during* the arbitration; it says nothing about how parties should structure their *ex ante* agreements. As such, parties remain free to formulate an objection when they arbitrate their cases in New York or any other U.S. jurisdiction as to who should decide the arbitrability question. This court's intervention is thus entirely unnecessary to affect the result in any case save the one at bar.

For this reason, among others, the amici are wrong that this case creates a tension as to the applicable standards of review of arbitral awards between the U.S. and other foreign jurisdictions. They remain, to borrow the amici's words, fully aligned.

B. This case does not put the Second Circuit at odds with foreign jurisdictions.

Leaving the lack of any precedential effect aside, there is another reason why the petitioners and their amici are wrong that this case creates any meaningful non-uniformity among international jurisdictions. Although petitioners try to hide this reality, the fact is there are virtually no cases like the case at hand, which is an ad hoc arbitration that arises out of a post-Soviet era treaty (i.e., between states that were known to distrust foreign institutions and adamantly preserve their sovereignty).

Unlike this earlier Treaty, modern investment treaties provide for arbitration by the World Bank's International

Centre for Settlement of Investment Disputes ("ICSID"), in most cases. Notably, as explained further below, ICSID is a self-contained system that itself creates uniformity, as no court is empowered to review any decision rendered by an ICSID tribunal. In the minority of other cases, arbitration is instead conducted under the UNCITRAL Rules—that is to say, rules that make arbitrability an issue for the arbitrators to decide. For example, the treaties entered by China after 1998 (that is, the year China switched its foreign policy from "open doors" to "go global") all provide a choice including ICSID and UNCITRAL. So do the treaties entered by Mongolia in the 21st century.

Ad hoc treaty-based arbitrations are exceedingly rare nowadays, and the scenario where one of these would be subject to U.S. procedural law after a U.S. seat is selected by the arbitral tribunal itself is essentially academic. It is thus exceedingly unlikely that a dispute even remotely resembling this one will arise again.

C. This case presents no threat to U.S. litigants and the United States.

As the foregoing highlights, it is silly to suggest that the decision of the Second Circuit threatens the right of "U.S. investors and the United States itself (when it is a respondent) … to a *de novo* review of jurisdictional decisions as a matter of course". In at least three respects, this suggestion betrays a fundamental confusion of how international arbitration actually works and the extent to which the decision in this case about particular parties' *conduct* during the course of an *ad hoc* determination could even theoretically affect arbitrations involving U.S. investors or the United States.

First, the case at hand is quite unique in the sense that the Treaty *only* allowed for ad hoc arbitration, which is a rare occurrence in investor-state arbitration as mentioned above. Because the arbitration was ad hoc, the need arose to have a juridical seat designated by the tribunal to 'anchor' the proceedings someplace, and the tribunal picked New York. Pet. App. 65. It is more typical, however, for tribunals constituted under a treaty not to have to choose a seat. That is because investment treaties almost universally involve ICSID, including the international agreements entered by the United States to which the petitioners have alluded. U.S. investment treaties *all* provide for arbitration under the auspices of ICSID. These arbitrations are fully administered by ICSID and are devoid of any juridical seat by definition. That is because, under the Washington Convention,[6] to which the United States is a party, all ICSID awards are enforceable directly, without any sort of review, in any and all of its 156 member-states. The only possible recourse following the issuance of an ICSID award is to seek annulment within the ICSID system itself. In such cases, ICSID nominates a so-called *ad hoc* annulment committee in charge of reviewing the award for error. In other words, it is not even theoretically possible for arbitrations arising under the U.S. treaties at issue to raise the sort of question petitioners bring to this Court. And even if arbitration was not brought under the ICSID rules, it would be brought under the UNCITRAL rules, which, as seen above, is sufficient under U.S. law to confer upon the tribunal the ability to determine arbitrability.

[6] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, [1991] ATS 23, 4 ILM 532 (1965), UKTS 25(1967).

Second, even if the United States somehow found itself involved in a legal dispute over the application of certain standards of judicial review (which it would not, for the reason above), that dispute would almost certainly be in the courts of another country, not the Second Circuit. Indeed, it is virtually impossible for any arbitration involving the United States to be seated in the United States, as no arbitration party or institution would select a seat in the United States when the United States, or a U.S. investor, is a party to the proceedings. Neutrality, real or perceived, is paramount to the integrity of arbitral proceedings. And so, even leaving aside the fact that all such disputes are likely to be diverted to the ICSID system, there is no way that the question of how to apply *First Options* to the conduct of the United States or a U.S. investor is ever going to arise—let alone arise in a court that falls under the power of this one.

Third, even assuming that (for some reason) (i) this issue would bypass ICSID and come up in a case involving a U.S. treaty, (ii) the foreign courts would somehow apply *First Options* rather than their own law, and (iii) the United States would somehow not just *say* whether it wanted arbitrability to be decided by the arbitral tribunal, there is no question that the U.S. party would *want* the arbitral panel to have the authority to decide the arbitrability question when the alternative is *de novo* review in a foreign court. To see this, just imagine that the United States, and not Mongolia, was a party to the arbitration against the Chinese state-owned enterprises here, and that the tribunal decided in the course of the proceedings to make Moscow the seat of the arbitration. In that scenario, it is hard to imagine that the United States would agree that *the Russian courts* should have the power to determine *de novo* the scope of the protections intended

in a treaty the United States negotiated with China—particularly when the entire purpose of that treaty was to protect investors by giving them access to a neutral forum *before an arbitral tribunal* if they ended up in a dispute with a sovereign state.

And this leads, in turn, to the ultimate vehicle problem with this case. Ultimately, the factbound question presented here is a question of *intent*: Did petitioners intend to give the arbitral panel the power to decide whether they had a claim for an unproclaimed expropriation under the Treaty or not. There is no question that they did:

- petitioners agreed that the arbitral tribunal had the power to decide the seat of the arbitration;

- they agreed that the tribunal had the power to pick its own rules; they advocated for rules that would have left this issue to the tribunal;

- they invoked the authority of the tribunal themselves and asked the tribunal to decide this question;

- they sought an extraordinary order emphasizing the finality of the tribunal's decision;

- there is no other panel that would have authority over this substantive question apart from the tribunal;

- petitioners argued that the tribunal *did* have jurisdiction (unlike the Kaplans in *First Option*), and

- petitioners never in seven years suggested that this question should be left to a court.

It is frankly hard to imagine having more obvious evidence that a party intended the relevant question to be decided by the arbitrators, and that is no doubt because *that is what petitioners actually wanted.* The sole reason their tune has changed is because they lost—the arbitrators gave them what they wanted as a matter of procedure, but did not give them what they wanted on the merits. That about face cannot possibly be a sound foundation upon which to build a case for certiorari or summary reversal.

CONCLUSION

The petition presents no "compelling reason" warranting this Court's intervention. On its face, the petition merely invokes a misapplication by the Court of Appeals for the Second Circuit of a properly stated rule of law, which is insufficient under Rule 10 for the Court to grant certiorari.

The petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted.

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