**Appeal Case No. 20-13039**

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

**CORPORACIÓN AIC, SA,**

*Petitioner-Appellant*,

v.

**HIDROELECTRICA SANTA RITA S.A.,**

*Respondent-Appellee*.

On Appeal from the U.S. District Court for the Southern District of Florida
No. 1:19-cv-20294-RNS

# MOTION FOR LEAVE TO FILE EN BANC BRIEF OF AMICUS CURIAE ATLANTA INTERNATIONAL ARBITRATION SOCIETY ("AtlAS") In Support of Appellee and Affirmance

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1, *amicus curiae* Atlanta International Arbitration Society ("AtlAS") discloses that it is a Georgia nonprofit corporation, has no parent corporation, and does not issue shares of stock.

AtlAS understands that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Corporación AIC, S.A., a Guatemalan company, Plaintiff-Appellant.

2. Hidroelectrica Santa Rita, S.A., a Guatemalan company, Defendant-Appellee.

3. Amy, Jeanne L., of the law firm of Jones Walker LLP, counsel for Plaintiff-Appellant, Corporación AIC, S.A.

4. Bianchi, Jaime A., of the law firm of White & Case LLP, counsel for Defendant-Appellee, Hidroelectrica Santa Rita, S.A.

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7. Philp, Sheldon A., of the law firm of White & Case LLP, counsel for Defendant-Appellee, Hidroelectrica Santa Rita, S.A.

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## I. Statement of the Identity of the Amicus Curiae and its Interest in the Case

The Atlanta International Arbitration Society ("AtlAS") is a non-profit organization established in 2011. The AtlAS Board of Directors includes representatives of law firms, law schools, arbitral institutions, and other organizations. (*See* AtlAS website, available at www.arbitrateatlanta.org.)

AtlAS represents the international arbitration community in the southeastern United States, working with leaders in government, the State Bar and the judiciary to ensure state legislation and bar rules are supportive of international arbitration and that parties selecting Georgia as an arbitral seat will find an environment conducive to the fair, efficient and cost-effective resolution of cross-border business disputes.[1]

AtlAS also educates neutrals, lawyers in private practice, corporate counsel, and law students regarding the substantive law, practice, and culture of international arbitration, as well as civic, business, and government leaders regarding the benefits of a vibrant international arbitration center to Atlanta, the State of Georgia, the southeastern United States, and beyond.[2]

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[1] *See also* AtlAS mission statement, available at https://arbitrateatlanta.org/atlas-mission-vision-values/.)

[2] Although AtlAS is focused on Atlanta as a venue for international arbitration, the issue presented here also potentially implicates the standing of other venues in the Eleventh Circuit, most notably Miami, which has emerged as one of the world's leading international arbitration centers. *See* Elizabeth Olson, *Cities Compete to be the Arena for Global Bus. Disputes*, N.Y. TIMES (Sept. 11, 2014). It must be emphasized, however, that AtlAS does not purport to speak on behalf of

AtlAS seeks leave to submit the attached En Banc Brief to address Appellant's Statement of the Issue Presented By the Court. (Appellant's En Banc Brief at 6.) Specifically, Appellant argues that this Court should reconsider and overrule Eleventh Circuit precedent, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998), which holds that the standards for vacating an international arbitration award rendered in the United States mirror those in Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"). *Id*. at 1-6.

The resolution of this issue implicates several aspects of AtlAS's mission, including in particular, working to enhance and maintain the local legal infrastructure for international arbitration.

## II. Statement of Reason this En Banc Amicus Brief is Desirable and Relevant to the Disposition of this Case

AtlAS's proposed en banc Amicus Brief is relevant to the Court's determination because it speaks directly to the issue before this Court—whether non-domestic arbitral awards can be vacated exclusively by the standards set forth in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

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the Miami international arbitration community, which is represented by the Miami International Arbitration Society, among other organizations. (*See* website of the Miami International Arbitration Society, available at https://www.miamiinternationalarbitration.com.)

Awards (the "Convention") applicable to the recognition and enforcement of foreign arbitral awards.

The proposed en banc Amicus Brief would be helpful to the Court because it brings to bear the collective experience and expertise of AtlAS and its members regarding the interpretation of the Convention and the Federal Arbitration Act and the potential consequences of the Court's decision in this Appeal, including with respect to the attractiveness of U.S. arbitral seats to parties negotiating the venue provision in international arbitration clauses.

A copy of AtlAS's proposed en banc Amicus Brief is attached hereto as Exhibit A.

## III. Conclusion

For the reasons stated above and more fully explained in the attached proposed En Banc Amicus Brief, AtlAS respectfully requests leave to file its Amicus Brief in support of affirmance.

Dated: January 11, 2023

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 593 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: January 11, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Respectfully submitted,

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## I. Statement of the Identity of the Amicus Curiae, its Interest in the Case, and the Source of its Authority to File

The Atlanta International Arbitration Society ("AtlAS") is a non-profit organization established in 2011. The AtlAS Board of Directors includes representatives of law firms, law schools, arbitral institutions, and other organizations. (*See* AtlAS website, available at www.arbitrateatlanta.org.)

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AtlAS submits this Brief to address Appellant's Statement of the Issue Presented By the Court. (Appellant's En Banc Brief ("En Banc Brief"), at 6.) Specifically, Appellant argues that this Court should reconsider and overrule Eleventh Circuit precedent, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998), which holds that the standards for vacating an international arbitration award rendered in the United States mirror those in Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"). *Id*. at 1-6. The resolution of this issue implicates several aspects of AtlAS's mission, including in particular, working to enhance and maintain the local legal infrastructure for international arbitration.

The source of AtlAS's authority to file this Brief is a vote of its Executive Committee, whose members are identified on the AtlAS website. (*See* https://arbitrateatlanta.org/board-of-directors/)[3]

must be emphasized, however, that AtlAS does not purport to speak on behalf of the Miami international arbitration community, which is represented by the Miami International Arbitration Society, among other organizations. (*See* website of the Miami International Arbitration Society, available at https://www.miamiinternationalarbitration.com.)

[3] The views expressed in this Brief are solely those of individual members of the AtlAS Executive Committee. Neither this Brief nor the decision to file it should be interpreted to reflect the views of the respective organizations with which they are affiliated or of any of the AtlAS member organizations.

## II. Statement Affirming the Independence of Amicus Curiae

No part of this Brief was authored by counsel for the Parties to this proceeding. This Brief was prepared on a *pro bono* basis, and no person, including the Parties or their counsel, funded this Brief, directly or indirectly.

## III. Argument

The district court correctly decided that the standards to vacate an arbitration award in Chapter One of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, do not apply to non-domestic arbitration awards. Instead, as leading commentators agree and as Eleventh Circuit precedent has long established, non-domestic arbitration awards must be tested in vacatur proceedings solely by the standards set forth in the Convention, which are incorporated into U.S. law in FAA Chapter Two, 9 U.S.C. §§ 201–208.

Article I(1) of the Convention invites signatories to apply the terms of the Convention not only to "foreign" awards, but also to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, Art. I(1). The U.S. legislation implementing the Convention—FAA Chapter Two—accepted that invitation, providing that the New York Convention applies in the United States not only to

foreign awards, but also to awards made in this country that have an international character. Specifically, FAA Section 202 provides that:

> An agreement or award arising out of … a [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C. § 202. Thus, FAA Section 202 effectively creates three classes of awards in the United States: 1) **foreign** awards made on the territory of another country; 2) **purely domestic** awards; and 3) **non-domestic** awards, neither purely domestic nor foreign, that are made in the United States, but that involve one or more non-citizens, foreign property, or an underlying agreement which envisions performance outside the United States. *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983); *Lander Company, Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 477 (7th Cir.), *cert. denied*, 522 U.S. 811 (1997).

The award at issue here is a non-domestic award, issued in Miami-based arbitration proceedings between two Guatemalan companies. The question is whether the standards for vacatur of this non-domestic award: (a) include the standards for vacatur of domestic awards (*i.e.*, those in 9 U.S.C. § 10, in Chapter One of the FAA); or (b) are limited to the standards set out in Article V of the Convention for denying recognition and enforcement of foreign awards. This Circuit answered "(b)" in 1998: non-domestic awards can be vacated exclusively on the

same Convention grounds applicable to foreign awards. *See Industrial Risk,* 141 F.3d at 1446. That holding has been reaffirmed in several cases. *See Inversiones Y Procesadora Tropical Inprotsa, S.A. v. Del Monte Int'l GmbH,* 921 F.3d 1291 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 124 (2019); *Earth Science Tech, Inc. v. Impact UA, Inc.*, 809 Fed. Appx. 600 (11th Cir. 2020); *Gulfstream Aerospace Corp. v. OCELTIP Aviation 1 Pty. Ltd.*, 31 F.4th 1323 (11th Cir. 2022).

Appellant argues that "*Industrial Risk* w[as] wrongly decided." (En Banc Brief at 53.) Contrary to Appellant's argument, *Industrial Risk* was correctly decided and has not been abrogated by the Supreme Court.

**A. The Panel Decision**

The panel issued a 2-1 decision, with a concurring opinion. Both the panel majority and the concurrence properly conclude that Convention signatories are free to determine the standards their courts will apply to a request to vacate, set aside, or suspend, a non-domestic award, although they reach that conclusion through different analyses. *Corporación AIC, SA v. Hidroelectrica Santa Rita, S.A.*, 34 F.4th 1290 (11th Cir. 2022) ("Majority Op." or "Concurring Op."). As discussed below, the majority's analysis is based on the flawed premise that FAA Section 10(4)(a) is incorporated into the Convention. The Concurring Opinion is correct that the Convention does not incorporate domestic law. Concurring Op. at 38. Instead, the Convention leaves room for domestic law to serve as a "gap filler and determine[] the vacatur grounds for a

New York Convention award." Concurring Op. at 38. But both the Majority Opinion and the Concurring Opinion reach the wrong ultimate conclusion regarding what constitutes U.S. domestic law in this context.

AtlAS urges the Court to follow the Concurring Opinion's interpretation of the New York Convention but reject the conclusion in both the Majority Opinion and the Concurring Opinion that *Industrial Risk* should be overruled.

### B. Article V(1)(e) of the Convention Does Not Direct U.S. Courts to Apply Section 10 of FAA Chapter 1 to Convention Awards

Article V of the Convention enumerates the only seven grounds on which a court may refuse recognition of a qualifying arbitral award. Article V(1)(e) is one of those grounds: an award may be denied recognition where it "has been set aside [i.e., vacated] . . . by a competent authority of the country in which, or under the law of which, that award was made." The Majority Opinion stated that *Industrial Risk* "failed to consider that domestic defenses to enforcement of arbitration awards were nestled in Article V(1)(e)" (Majority Op. at 15), and that Article V(1)(e) "incorporate[s] domestic law." *Id*. at 18.

This Amicus urges this Court to reject any analysis that posits that Article V(1)(e) incorporates domestic law. By its plain terms, Article V(1)(e) simply allows a court to refuse to *recognize* or *enforce* an arbitral award that has *in fact* previously been vacated by a competent authority of the issuing (or "primary") jurisdiction. This is a factual inquiry into whether or not the award has already been set aside or suspended.

The application of Article V(1)(e) by a court in an enforcement (or "secondary") jurisdiction is straightforward. To illustrate, if a U.S. court is asked to enforce an award issued in and under the laws of Spain, the U.S. court may refuse if "the award has been set aside" by a Spanish court. Art. V(1)(e). In that case, Article V(1)(e) does not instruct the U.S. court to determine the contents of, or apply, Spanish domestic law to decide whether the award *should be* set aside. The U.S. court is only asked whether the award *has previously been* set aside in Spain.

Article V(1)(e) serves the same function when applied by a "primary" jurisdiction. If a U.S. court is asked to confirm or vacate a non-domestic award, the court may vacate if "the award has been set aside" by a competent U.S. authority. In that case, Article V(1)(e) itself does not instruct the U.S. court to determine the contents of, or apply, U.S. domestic law to decide whether the award *should be* set aside (i.e., vacated). The court determines only whether the award *has previously been* set aside or suspended in the U.S.

To be sure, each Convention signatory has domestic law that governs a request to vacate a non-domestic award. And while Article V(1)(e) reflects that premise, it does not, in and of itself, supply or point to any particular domestic laws, as Appellant contends. There is nothing of the sort "nestled" in Article V(1)(e).

The Concurring Opinion gets that right: "Article V(1)(e) does not incorporate domestic vacatur grounds into the New York Convention. Instead, the primary

jurisdiction's domestic law directly supplies the grounds for vacating a New York Convention award." Concurring Op. at 22.

Yet the Concurring Opinion, like the Majority Opinion, ultimately reaches the conclusion that "domestic law" in this context means FAA Section 10. It does not. As explained below, the United States, like the majority of other states that have ratified the New York Convention, chose to harmonize its vacatur and enforcement standards by applying the New York Convention's Article V grounds to both confirmation and vacatur of non-domestic awards.

### C. The Convention Article V Defenses Govern Confirmation and Vacatur of Non-Domestic Awards

Consistent with the Eleventh Circuit's holding in *Industrial Risk,* the Convention grounds for refusing recognition and enforcement of foreign arbitral awards have been incorporated *into* U.S. domestic law as the standards also governing vacatur of U.S.-made international arbitration (non-domestic) awards. 141 F.3d at 1441. The Convention standards, which expressly address recognition and enforcement, do not *directly* apply to the vacatur of awards. *See* Concurring Op. at 19 ("the Convention does not provide (nor seek to provide) grounds for vacatur."). Rather, the New York Convention's Article V(1)(e) standards apply to the vacatur of awards in the United States only because the U.S. Congress decided so.

This is evidenced by a number of provisions in FAA Chapter Two. FAA Section 207 converts the Convention's list of grounds for refusing recognition of an

award "falling under the Convention"—which includes non-domestic awards—into a statutory command ("the court shall confirm the award"). *See* 9 U.S.C. § 207. This precludes any other basis to challenge the award, including those set forth in FAA Section 10.

Furthermore, whereas FAA Section 9 provides that a court must confirm an award "unless the award is vacated . . . as prescribed in [§ 10]"), FAA Section 207 contains no such exception. Rather, Section 207 flatly states that "[t]he court *shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." There are no exceptions, including no "unless-the-award-is-vacated-under-§10" proviso. The absence of any such proviso, notwithstanding its presence in FAA Section 9, reinforces the conclusion that Congress intended the Convention standards to be the *sole* grounds for challenging a non-domestic award. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (internal quotation marks omitted). As stated by one commentator:

> There is an obvious and presumably intended parallelism between § 9 in Chapter 1 and § 207 in Chapter 2. They have almost precisely the same title: "Award of arbitrators; confirmation; jurisdiction; procedure ["proceeding" in § 207]." . . . Each section imposes a mandatory duty on the court to confirm the award unless it falls afoul of the applicable statutory standard. Under § 9 "the court must grant such an order [of

> confirmation] unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title." Under § 207 "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT'L ARB. 45, 67 (2011).

Furthermore, there would have been no point in Congress making non-domestic awards subject to the New York Convention in FAA Section 202 had it intended that domestic vacatur standards would apply to such awards. "Defining non-domestic awards made in the United States as Convention awards, but then treating those awards as subject to domestic vacatur standards, would take away virtually everything that is conferred by the initial categorization as a Convention award—and it certainly takes away the most important attribute of a Convention award, being the Convention's international recognition standards." Gary B. Born, INT'L COMM. ARB. (3d Ed.), at 3212 (2021). Simply stated, why would Congress have subjected non-domestic awards to the Convention if it intended those awards "to be treated in the same way that they would be if they were not subject to the Convention?" *Id*. Indeed, "[t]he easiest reading of the Convention is that where a Contracting State has chosen to categorize an award (by definition, not a foreign award) as non-domestic, it will only deny recognition in accordance with the international standards in Article V [of the Convention], and not based on domestic [vacatur] standards." *Id.* at 3213-14.

"Although Contracting States are free not to categorize any awards as 'non-domestic,' once they do so, the better view is that they must grant those awards all of the protections of the Convention." *Id.* at 3214.

### D. The *Industrial Risk* Approach Promotes Consistency, Aligns with International Practice, and Enhances this Jurisdiction's Standing as an Arbitral Venue

It should be no surprise that Congress crafted FAA Chapter Two to avoid the illogical situation in which a petition to confirm a non-domestic award is governed by Convention standards, and yet the losing party's cross-petition to vacate the same award is governed by the FAA Section 10 standards, even though the petitions are filed in the same case. "An intention that inconsistent standards are to be applied to the validity of an award falling under the Convention, by the same court in the same case between the same parties, depending on whether the issue is to confirm the award (at the suit of the winner) or to vacate it (at the suit of the loser), cannot easily (or even plausibly) be imputed to Congress." Hulbert, *The Case for a Coherent Application*, at 83.

The approach taken by Congress in FAA Chapter Two also aligns with the strong international trend toward having the bases for vacatur of a domestically rendered international arbitration award mirror the bases under the New York Convention for non-enforcement of a foreign award. For instance, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on

International Commercial Arbitration, which has been adopted in whole or in part by 85 countries (half of the 170 New York Convention signatory states), unifies the grounds for refusing recognition and enforcement of a foreign award (Article 36) and for vacatur of an award (Article 35), with both Articles essentially following the Convention standards verbatim. *See* UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), *revised by* Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex 1, U.N. Doc. A/61/17 (July 7, 2006); *see also* Concurring Op. pp. 19-20 (citing Model Law Arts. 35 and 36). Georgia's International Arbitration Code likewise applies the Article V Convention standards as the grounds both for vacatur (O.C.G.A. § 9-9-56) and refusal of enforcement (O.C.G.A. § 9-9-58).

In sum, Congress—and UNCITRAL and the Georgia legislature, among others—sensibly *harmonized* the standards available to primary and secondary jurisdiction courts. But because Appellant misses this key point, it mistakenly concludes that *Industrial Risk* improperly "blur[ed] the key distinction between primary and secondary jurisdiction." (En Banc Brief at 4).

The interpretation of the FAA followed by the Eleventh Circuit in *Industrial Risk* also makes it easier for American parties seeking to persuade a foreign counterparty to agree to arbitrate in the United States. Because vacatur in the Eleventh

Circuit is presently governed by the universally familiar New York Convention standards, parties need not fear unpleasant surprises in post-award proceedings. Non-U.S. parties contemplating arbitration in the United States generally are more comfortable having vacatur governed by the international standards to which they are accustomed, and these international standards are also familiar to most U.S. companies and multinationals involved in international business. *See* Sebastien Perry, *Coke—And Arbitration Are It*, GLOBAL ARB. REV., 2 (May 25, 2012) (noting, in connection with the advantages of arbitrating in the Eleventh Circuit, that it "is the only federal circuit to have interpreted the Federal Arbitration Act to mean that New York Convention awards rendered by tribunals seated in the US can only be set aside on the grounds set down in the Convention"); Andrew J. Tuck, Kristen Bromberek & Jamie George, *Int'l Arb.: The Role of Fed. Courts and Strong Support from the 11th Circuit*, FED. LAWYER, 61, 64 (Aug. 2017); Shelby R. Grubbs & Glenn P. Hendrix, *Int'l Comm. Arb., Southern-Style*, TENN. B. J., 20, 21 (Sept. 2012) (noting, as a selling point for "keeping . . . arbitration close to home" that "[t]he 11th Circuit is the only federal circuit to eliminate domestic arbitration law as a basis for vacating international arbitration awards rendered in the United States"); Stephen L. Wright & Shelby S. Guilbert Jr., *Recent Advances in International Arbitration in Georgia: Winning the Race to the Top*, GA. B. J., 18 (June 2013).

### E. The Supreme Court Has Not Abrogated *Industrial Risk*

Appellant argues that in *BG Group Plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014), the Supreme Court "effectively answered the legal question that is before the en banc Court—in favor of [Appellant]." (En Banc Brief p. 45.) But while the Supreme Court referenced FAA § 10(a)(4) in its decision (twice, in fact), in both instances, the Court was simply summarizing the arguments of the parties. *See BG Group*, 134 S. Ct. at 1207 ("Argentina sought to vacate the award in part on the ground that the arbitrators lacked jurisdiction. *See* §10(a)(4) (a federal court may vacate an arbitral award 'where the arbitrators exceeded their powers')."); *id.* at 1212 ("But we cannot agree with Argentina that the arbitrators 'exceeded their powers' in concluding they had jurisdiction. *Ibid.* [citing Brief for Respondent] (quoting 9 U.S.C. §10(a)(4))."

In *BG Group,* the parties and the courts below had relied only on FAA Chapter One. Neither party raised the issue considered here—whether FAA Chapter One standards were properly applied. Since that issue was not before the Court, it did not consider it, and its decision cannot be considered to have abrogated *Industrial Risk*. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (issue in prior decision not argued in briefs or discussed by the court "is not binding precedent on [the] point").

The Majority Opinion also assumes that because *BG Group* referenced the "exceeding powers ground" in FAA Section 10(a)(4), this "implicitly contradicted [this Circuit's] ruling in *Industrial Risk* that only those express grounds listed in Article V could allow a domestic court to vacate an international arbitration award." Majority Op. at 11. Yet many courts have concluded that the FAA Section 10 "exceeding powers" ground is largely (if not completely) congruent with the Convention grounds. *See, e.g., Lander Co. v. MMP Invs.*, 107 F.3d 476, 481 (7th Cir. 1997) (the defense that "the arbitrator had exceeded his terms of reference … is a defense under both the Federal Arbitration Act and the New York Convention. The wording is slightly different but there is no reason to think the meaning different."); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier (RAKATA)*, 508 F.2d 969, 976 (2d Cir. 1974) ("This provision [Convention Article V(1)(c)] tracks in more detailed form [§ 10(a)(4)] of" FAA Chapter One). Thus, in *BG Group*, not only did neither party raise the issue of whether FAA Section 10 standards or the Convention Article V standards applied, but the issue was likely immaterial to the outcome. *See also Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1025-26 (7th Cir. 2013).[4]

[4] *Johnson*, like *BG Group*, involved an "exceeding powers" challenge to a non-domestic arbitration award. *Id.* The Seventh Circuit noted that "the Convention grounds for vacatur are slightly different from those in Chapter 1 of the FAA" and added, "[i]f it made any difference to our case, we would need to decide whether the district court erred by allowing this action to proceed under Chapter 1 of the FAA."

Accordingly, the Supreme Court's references to the "exceeding powers" ground in *BG Group* should not be interpreted as abrogating *Industrial Risk*, implicitly or otherwise.

## IV. Conclusion

AtlAS, as amicus curiae, respectfully requests that this Court leave undisturbed its precedent in *Industrial Risk* that the standards for vacatur of non-domestic awards are those set out in Article V of the Convention.

Dated: January 11, 2023

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*Id.* But the court concluded that "[t]his is not a case in which one can find any of the circumstances singled out in Section 10 of the FAA (or, for that matter, Article V of the New York Convention …) as something that justifies a refusal to recognize or enforce an arbitral award." *Id.* at 1026. Thus, it did not matter whether the court applied the FAA "exceeding powers" ground or the Convention grounds, and the court did not decide the issue.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 3,873 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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