No. 12-138

In the Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court with jurisdiction over an application to vacate an arbitral award may, under *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), independently decide whether there exists a valid and binding agreement to arbitrate, predicated on the terms of a bilateral investment treaty?

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STATEMENT OF THE CASE

In *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), this Court established that the question whether a valid and binding agreement to arbitrate exists is generally one for the courts to decide, without any deference owed to the arbitrators' views. In the ruling below, for which BG Group PLC ("Petitioner" or "BG") now seeks review, the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") correctly applied that rule and properly concluded that there was no valid agreement binding Respondent, the Republic of Argentina ("Argentina"), to arbitrate.

Thus, this case concerns whether there was an agreement to arbitrate, and not, as BG and *amici* urge, compliance with conditions precedent or procedural time limits provided by an arbitration agreement whose existence and validity is conceded. Under the relevant bilateral investment treaty, Argentina offered to arbitrate disputes under prescribed terms only with investors who have already litigated in Argentine courts for a period of eighteen months or who have received a final decision from the Argentine courts but remain unsatisfied, whichever is earlier. Unless the investor, a third party beneficiary of the treaty, accepts the offer to arbitrate *according to the express terms of that offer*, no arbitration agreement can come into existence.

In this case, the Court of Appeals found that BG did not accept Argentina's offer, and therefore no agreement to arbitrate between BG and Argentina was ever formed. The Court of Appeals' decision is entirely

consistent with this Court's ruling in *First Options*, as well as with decisions from other circuits. The Court of Appeals' decision is also consistent with federal policy regarding arbitration as articulated by this Court under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), which uniformly emphasizes that arbitration is, above all, a matter of contract, and seeks to ensure that no party is forced to arbitrate when it did not agree to do so. The Court should therefore deny BG's Petition for a Writ of Certiorari ("Petition" or "Pet.").

A. The BIT

The claim in this case is alleged to arise from the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (the "BIT"). BIT, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33. While the general purpose of this and other bilateral investment treaties is to protect and promote foreign investment, that purpose is constrained "within the framework acceptable to both of the State parties." *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 161 (Aug. 22, 2012), *available at* http://italaw.com/sites/default/files/case-documents/ita1082.pdf.

The BIT's dispute resolution clause pertaining to foreign investors is contained in its Article 8. Article 8, however, is not a standard contractual arbitration clause, such as those present in the commercial agreements involved in most cases cited in the Petition, where commercial parties agree to arbitrate any and all disputes arising out of or relating to the agreement

between those parties. To the contrary, Article 8(1) of the BIT contains, first and foremost, an agreement to *litigate*:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled ***shall*** be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

BIT, art. 8(1) (emphasis added). This provision thus sets forth in unambiguous terms the investor's binding obligation to litigate its disputes in the host state, *i.e.*, the state "in whose territory the investment was made."

Article 8(2) of the BIT likewise does not contain an agreement to arbitrate all disputes arising out of or relating to the BIT, but rather a unilateral offer by each of the two state parties, Argentina and the United Kingdom, to arbitrate with an investor of the other state according to the following terms:

> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> (a) if one of the Parties so requests, in any of the following circumstances:

> (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
>
> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
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> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

BIT, art. 8(2).

Therefore, contrary to BG's contention, an investor in Argentina cannot accept Argentina's offer to arbitrate simply by "issu[ing] a demand for arbitration." Pet. 20 n.8. The BIT explicitly provides that any such dispute must be litigated in an Argentine court. An investor may arbitrate a dispute only if a separate arbitration agreement is formed in one of two ways. First, an investor can accept Argentina's unilateral offer to arbitrate according to the terms of Article 8(2)(a) of the BIT—that is, the investor must first litigate the dispute in an Argentine court, and that court must either (1) not have resolved the dispute within eighteen months, or (2) have issued a final decision but the dispute continues between the parties. Alternatively, the investor and Argentina can negotiate a mutually acceptable separate agreement to arbitrate as permitted by Article 8(2)(b). Only through one of those means can an agreement to arbitrate between

Argentina and the investor come into existence.[1] Even BG acknowledges that Article 8(2) of the BIT, alone, is *not* a binding arbitration agreement, but is instead a "standing offer from the State parties to arbitrate." Pet. 20 n.8.

B. The Arbitration

BG ignored the terms of Argentina's offer to arbitrate and never submitted its claims to an Argentine court, instead proceeding immediately to submit its claim for arbitration. Because the parties were not in agreement as to whether there was an agreement to arbitrate, let alone on procedure, the arbitration was conducted under Article 8(3) of the BIT pursuant to the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Rules"). G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). *See* Pet. App. 92a. By agreement of the parties, the seat of arbitration was Washington, D.C.

From the outset of the arbitration, Argentina objected to the jurisdiction of the arbitral tribunal (the "Tribunal") based on the fact that BG failed to first submit its dispute to an Argentine court as Article 8(1) of the BIT requires, and therefore there could be no

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[1] The BIT does not, *per se*, impose a requirement that the investor first exhaust local remedies, as BG suggests. *See* Pet. 9, 22 n.9. Article 8(2) contains an offer by Argentina to arbitrate only disputes that have been first litigated in its courts for eighteen months, *regardless of whether a decision is reached*—that is, regardless of whether local remedies have, in fact, been exhausted.

agreement to arbitrate under Article 8(2).[2] Without denying the mandatory nature of the requirement to submit the dispute to Argentine courts, the Tribunal nevertheless found it had jurisdiction and rendered an award in favor of BG (the "Award").

C. Proceedings Before Federal Courts

Argentina filed a petition to vacate or modify the Award in the United States District Court for the District of Columbia, and BG filed a cross-motion to confirm the Award. The District Court denied vacatur and granted confirmation of the Award. *Republic of Argentina v. BG Grp. Plc*, 715 F. Supp. 2d 108 (D.D.C. 2010); *Republic of Argentina v. BG Grp. Plc*, 764 F. Supp. 2d 21 (D.D.C. 2011).

On Argentina's appeal, the Court of Appeals reversed the lower court and vacated the Award, finding that "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration" (Pet. App. 19a), and that the Tribunal's decision to uphold jurisdiction had "ignore[d] the terms of the Treaty" and given no "regard to the contracting parties' agreement." Pet. App. 2a. In reaching its conclusion, the Court of Appeals found that "the 'parties would likely have

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[2] It is well recognized that a party preserves its right to judicial determination of the absence of an agreement to arbitrate so long as it has made known its objection at the start of the arbitration. *See, e.g.*, *First Options*, 514 U.S. at 941, 946-47 (holding that existence of agreement to arbitrate was subject to independent review by the courts despite the fact that First Options had presented its objections to the arbitration panel).

expected a court' to decide arbitrability" because "there is no clear and unmistakable evidence . . . that the contracting parties intended an arbitrator to decide the gateway question." Pet. App. 15a (citing *First Options*, 514 U.S. at 944).

The Court of Appeals denied BG's petition for rehearing and rehearing en banc. After two extensions of time, BG filed the Petition with this Court.

REASONS FOR DENYING THE PETITION

The Petition does not satisfy the Court's criteria for *certiorari* review. The decision below correctly applied this Court's precedent, which provides that courts are entitled to decide without deferring to arbitrators whether a valid arbitration agreement exists. In addition, *certiorari* should be denied because this precedent is well settled and uniformly applied by the courts of appeals. Petitioner can suggest a split between the circuits only by mischaracterizing the issue presented by this case as one of conditions precedent contained in a valid arbitration agreement, notwithstanding the Court of Appeals' finding that no agreement to arbitrate exists in this case.[3] Finally, the

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[3] The four *amicus* briefs that have been filed with the Court supporting the Petition suffer the same defect, among others. The first, filed by AWG Group Limited ("AWG *Amicus* Brief"), is nothing more than private pleading. AWG Group is currently engaged in an arbitration against Argentina that suffers a comparable jurisdictional deficiency, and its brief focuses on its own facts. Another brief comes from various professors and practitioners of arbitration law ("Professors and Practitioners *Amicus* Brief"), at least some of whom are counsel or associated

Court of Appeals' decision does not conflict with but rather supports the federal policy in favor of arbitration, as embodied in the FAA, which dictates that arbitration, first and foremost, is a matter of contract between the parties, and no party can be compelled to arbitrate if no valid arbitration agreement exists. Accordingly, there being no conflict with any of this Court's decisions, with any other court of appeals'

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with law firms that are counsel in arbitration or litigation against Argentina. Although *amici* United States Council for International Business ("USCIB *Amicus* Brief") and American Arbitration Association ("AAA *Amicus* Brief") are not as directly involved in this case, they both petition the Court in an effort to protect their own business interests.

More fundamentally, the arguments presented by all the *amici* arise from the false premise embedded in the question presented by BG—that this case is one of conditions precedent under a valid agreement to arbitrate—which renders their analysis largely irrelevant. Indeed, just one month before serving as co-author of the Professors and Practitioners *Amicus* Brief, Professor Bermann filed a petition in the Second Circuit which avers (contrary to the position intimated in the *Amicus* Brief) that until a recent Second Circuit decision, a consistent line of precedent across the circuits has "h[e]ld that the presumption laid down in *First Options* in favor of independent post-award review o[f] arbitral jurisdiction is not overcome merely because the arbitration agreement pursuant to which the arbitrator made his jurisdictional determinations" adopted the UNCITRAL, AAA, or ICC arbitration rules that refer the issue to the arbitrators in the first instance. Petition for Rehearing En Banc at 6 & n.1, *Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, No. 11-3536 (2d Cir. July 27, 2012). Obviously, this is not the occasion to determine whether later decisions of the Second Circuit, unrelated to the current case, have created a split from what otherwise has been consistent application of *First Options*.

decisions, or with federal policy regarding arbitration, the Petition lacks merit and should be denied.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Court of Appeals' decision that courts must independently determine whether an arbitration agreement exists between Argentina and BG is entirely in line with this Court's unambiguous precedent.

The BIT at issue in this case reflects an agreement between Argentina and the United Kingdom to "consent" to submit future investment disputes to arbitration, not in general, but in accordance with the terms of the BIT. The BIT provides "merely an *offer* to agree to arbitration . . . [that] is consummated as a binding obligation to arbitrate only with th[e] investor's acceptance of the offer." Christopher F. Dugan et al., *Investor-State Arbitration* 221 (2008). *See also Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (to form an agreement to arbitrate, one party must be a BIT signatory and the other must "consent to arbitration of an investment dispute *in accordance with the Treaty's terms.*") (emphasis added); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 116 (Dec. 8, 2008), *available at* http://italaw.com/sites/default/files/case-documents/ita0907.pdf ("an investor . . . can accept the 'offer' only as so conditioned").

Accordingly, to create a binding agreement to arbitrate, an investor must first accept the offer the sovereign state actually made, according to its terms,

not a counter-offer the investor might wish to propose.[4] In this case, BG never accepted Argentina's offer to arbitrate as specified in Article 8(2), which was an offer only for disputes that have been litigated in an Argentine court for eighteen months, or for disputes that remain unresolved after a final judicial decision has been rendered, whichever is earlier. Accordingly, no agreement to arbitrate was ever created.[5]

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[4] Under *First Options*, whether a separate arbitration agreement was formed is a matter for contract law. *See First Options*, 514 U.S. at 940, 944 ("[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

[5] Several arbitral tribunals, interpreting treaties to which Argentina is party, have declined jurisdiction on this same basis. *See, e.g.*, *Daimler Fin. Servs. AG*, ICSID Case No. ARB/05/1, Award, ¶ 194 (the eighteen-month domestic courts provision "cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter"); *ICS Inspection & Control Servs. Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 262 (Feb. 10, 2012) *available at* http://italaw.com/sites/default/files/case-documents/ita0416.pdf (the most recent instance of application by an arbitral tribunal of the BIT at issue here) ("the failure to respect the pre-condition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute."); *Wintershall Aktiengesellschaft*, ICSID Case No. ARB/04/14, Award, ¶ 156 (because the claimant failed to comply with the local court litigation requirement, "the Tribunal has no competence to entertain the claim and to proceed with it on merits").

A. The Court Of Appeals' Decision Correctly Applied This Court's Holding In *First Options Of Chicago v. Kaplan*.

In *First Options* this Court addressed the question of "how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute" and held that the answer turned on whether "the parties agree[d] to submit the arbitrability question itself to arbitration." 514 U.S. at 940, 943. Moreover, this Court cautioned lower courts "not [to] assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citations omitted). Absent such evidence, a court should decide the arbitrability question "independently." *Id.* at 943.

In this case, and as the Court of Appeals found, there is no "clear and unmistakable evidence" that Argentina intended to have an arbitral tribunal decide the question whether it agreed to arbitrate. To the contrary, the plain terms of Article 8(1) of the BIT make clear that disputes thereunder must be submitted first to litigation in an Argentine court, which will have the first opportunity to decide any issue in dispute between the parties. Absent a separate arbitration agreement between BG and Argentina, the possibility of arbitration does not even arise until eighteen months of court litigation have passed or the Argentine court has rendered a final decision unsatisfactory to the parties. BIT, art. 8(2)(a). Accordingly, the Court of Appeals' decision that, absent such "clear and unmistakable" evidence, the question of arbitrability is an independent question of law for

the court to decide (Pet. App. 15a) is a straightforward application of this Court's holding in *First Options*.

B. This Court's Decisions Regarding Procedural Prerequisites To Arbitration Are Inapplicable In The Absence Of A Valid Arbitration Agreement.

BG attempts to craft a conflict with this Court's precedent in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)—both discussed in detail and distinguished by the Court of Appeals—by characterizing the issue presented in this case as one of compliance with a condition precedent to arbitration under a valid arbitration agreement, which it argues is a question for the arbitrators to decide. But BG has it wrong. This case is not about conditions precedent to arbitration, but, as discussed above, about whether there is a valid agreement to arbitrate between BG and Argentina, an issue to which neither *John Wiley* nor *Howsam* speaks at all. Moreover, on that issue, BG acknowledges, as it must, the well-settled principle that "absent contrary agreement, the 'question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination.'" Pet. 21 (quoting *Howsam*, 537 U.S. at 83, 85). *See also, e.g.*, Professors and Practitioners *Amicus* Brief 27-28 (when the "existence or validity of an arbitration agreement" is challenged, that "objection strikes at the very heart of the legitimacy of arbitration, namely the consent of the parties, and is, presumptively, for the courts to decide").

In *John Wiley*, the question presented was whether procedural requirements under a collective bargaining agreement had been met. 376 U.S. at 544. This Court concluded that "procedural questions . . . should be left to the arbitrator" but only "[o]nce it is determined . . . that the parties are obligated to submit . . . a dispute to arbitration." *Id.* at 557. The Court of Appeals correctly determined that the analysis in *John Wiley* is not applicable to this case because where the contracting parties are two sovereigns that "agree to require dispute resolution in a court prior to arbitration, and the aggrieved party initiating the dispute disregards the requirement, a fundamentally different question of arbitrability arises than that of the ignored informal resolution steps in *John Wiley*." Pet. App. 19a. That "fundamentally different question" is whether an arbitration agreement between the sovereign and the investor exists—recognizing that the investor is not a party to the underlying agreement (the BIT)—and not whether a procedural prerequisite of an existing agreement has been met.

Howsam is similarly inapplicable. *Howsam* involved the application of a six-year limitation period under the NASD arbitration rules. This Court found that "[t]he time limit rule closely resembles the gateway questions that this Court has found *not to be 'questions of arbitrability*.'" 537 U.S. at 85 (emphasis added) (citations omitted).[6] As this Court stated and the Court

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[6] The Court of Appeals did not, as BG suggests (Pet. 25), read *Howsam* as being limited to rule-based conditions precedent. Rather, it distinguished *Howsam* based on the fact that Article 8 of the BIT suggests that the parties would have expected a court

of Appeals quoted, a court will decide the question of arbitrability where the

> contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam, 537 U.S. at 83-84; Pet. App. 11a. In this case, the "'parties would likely have expected a court' to decide arbitrability" since "the gateway provision *itself* is resort to a court." Pet. App. 15a.

Accordingly, *John Wiley* and *Howsam* delegated to arbitrators questions of procedural arbitrability but not the fundamental question whether a party consented to arbitrate. Therefore, the Court of Appeals' decision in no way conflicts with this Court's precedent and the Petition does not warrant *certiorari* review.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

BG attempts to manufacture not just one but two circuit conflicts. Neither exists. First, because this case does not involve compliance with procedural

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and not an arbitrator to decide whether an agreement to arbitrate exists. Pet. App. 15a.

preconditions to an existing arbitration agreement, it does not conflict with decisions of other circuits holding that compliance with such procedural preconditions are for arbitrators to decide. Second, the Court of Appeals' decision does not conflict with decisions from the Second Circuit regarding the application of the UNCITRAL Rules because in this case the UNCITRAL Rules were never triggered and in any case do not foreclose judicial inquiry.

A. There Is No Conflict With The First, Sixth, Seventh, And Eighth Circuits.

BG relies on cases from the First, Sixth, Seventh, and Eighth Circuits that have all held that compliance with preconditions to arbitration are for arbitrators to decide. *See* Pet. 28-34. These decisions are all irrelevant, however, because as discussed above this case is not about preconditions to arbitrate, but about whether an agreement to arbitrate exists, an issue which these cases either do not address, or appropriately hold is for the courts, and not the arbitrators, to decide.

In *Lumbermens Mutual Casualty Co. v. Broadspire Management Services, Inc.*, 623 F.3d 476 (7th Cir. 2010), for example, the Seventh Circuit explicitly noted that the dispute in question (the adequacy of a party's disagreement notice) was for the arbitrators to decide because "there is no dispute as to the existence of an agreement to arbitrate . . . Instead, this is a procedural dispute over preconditions *to* that arbitration." 623 F.3d at 483. Similarly, in *JPD Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 390-91 (6th Cir. 2008), and in *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 373, 375 n.8 (1st Cir. 2011), the parties did not

dispute whether a valid arbitration agreement existed (which they understood a court would decide), but whether the particular issue was within the scope of the agreed arbitration clause. The courts' holdings regarding the separate question of who should decide compliance with preconditions to a concededly valid arbitration agreement are irrelevant to the present case.

Finally, in *International Brotherhood of Electrical Workers, Local Union No. 545 v. Hope Electrical Corp.*, 380 F.3d 1084 (8th Cir. 2004), where the defendant actually contended that no arbitration agreement existed, the Eighth Circuit, consistent with *First Options* and with the decision of the Court of Appeals, held that "whether the parties had a valid arbitration agreement . . . [is] appropriate for judicial resolution." 380 F.3d at 1100 (citation omitted). Accordingly, the Court of Appeals' decision is not in conflict with the decisions from the First, Sixth, Seventh, and Eighth Circuits.[7] For this additional reason, the Petition should be denied.

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[7] In *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (11th Cir. 2002), which BG claims—together with the Court of Appeals' decision—contributes to a circuit split, the parties did not dispute the existence of a valid arbitration agreement. 290 F.3d at 1291. Thus, the Eleventh Circuit's decision as to the separate question of who should decide compliance with conditions precedent to arbitration is irrelevant to this case, and this case is not an appropriate vehicle to address the propriety of *Kemiron*'s resolution of that issue.

B. The Court Of Appeals' Decision Is Not Contrary To Second Circuit Decisions Involving The UNCITRAL Rules.

The Second Circuit, consistent with *First Options*, has held that a party is entitled to have "independent court review of a question of arbitrability unless there is clear and unmistakable evidence that the parties agreed to arbitrate that question." *Schneider v. Kingdom of Thailand*, No. 11-1458, 2012 U.S. App. LEXIS 16508, at *5 (2d Cir. Aug. 8, 2012); *see also Chevron*, 638 F.3d at 394-95. In addition, it has held that when the parties' arbitration agreement incorporates rules that empower the arbitrators to consider their own jurisdiction, as the UNCITRAL Rules do, such incorporation provides "clear and unmistakable" evidence of the parties' intent to delegate questions of arbitrability to the arbitrators precluding subsequent independent judicial review. *Schneider*, 2012 U.S. App. LEXIS 16508, at *9-13.

In *Chevron*, however, there was no question that the investor had accepted Ecuador's standing offer to arbitrate the dispute at issue and that a valid arbitration agreement between Chevron and Ecuador therefore existed. 638 F.3d at 392-93. Similarly, in *Schneider* the UNCITRAL Rules were adopted in the post-dispute Terms of Reference for the arbitration, in which the parties specifically empowered the tribunal to "consider . . . objections to jurisdiction." *Schneider*, 2012 U.S. App. LEXIS 16508, at *11. In contrast, in this case, as the Court of Appeals correctly found, because BG never accepted the offer to arbitrate actually made by Argentina, Article 8(3) of the BIT and its reference to the UNCITRAL Rules was never triggered. Pet. App. 14a. Accordingly, the Court of Appeals' finding that the BIT's

reference to the UNCITRAL Rules does not provide "clear and unmistakable" evidence of the parties' intent to delegate issues of arbitrability to arbitrators is not in conflict, direct or otherwise, with Second Circuit precedent, because the UNCITRAL Rules had not been incorporated into any valid agreement to arbitrate.

Moreover, Second Circuit precedent recognizes that an agreement to which an entity is not a party "does not evidence a 'clear and unmistakable' . . . intent . . . to arbitrate or to permit the arbitrator to decide the issue of arbitrability." *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005); *see also Republic of Iraq v. BNP Paribas USA*, 472 F. App'x. 11, 13 (2d Cir. 2012) (where "the arbitration clause does not clearly vest any right to invoke arbitration in a non-party," incorporation of the UNCITRAL Rules in the arbitration clause "does not afford [that party] the right to have arbitrators rather than a court determine the arbitrability of its dispute.").[8]

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[8] The Third Circuit has similarly held that when one party alleged that the agreement to arbitrate was forged, incorporation of similar rules (in that case the China International Economic and Trade Arbitration Commission Arbitration Rules) "is relevant only if the parties actually agreed to its incorporation. After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction[, i]f the parties never entered into it." *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003).

Moreover, as Professor Bermann explained, until its recent decision, the Second Circuit never relied on the incorporation of the UNCITRAL Rules as a basis to preclude post-award judicial review of the existence of an agreement to arbitrate, but only as a basis to refer the matter to arbitration and decision by the

Accordingly, because the Court of Appeals' decision does not conflict with decisions of other circuits, the Petition does not warrant *certiorari* review and should be denied.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH FEDERAL POLICY UNDER THE FEDERAL ARBITRATION ACT.

Finally, the decision below is fully concordant with federal policy towards arbitration. While BG relies on an "'emphatic federal policy in favor of arbitral dispute resolution,'" Pet. 16 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), this Court has been equally "emphatic" that, at its core, "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943 (emphasis added). "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *Id.* at 947 (citations omitted). Any federal policy "in favor of" arbitration as a form of dispute resolution has no role in the absence of an agreement between the parties. *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2859

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arbitrators in the first instance, subject to eventual judicial review. Petition for Rehearing En Banc, *Thai-Lao Lignite (Thailand) Co.*, No. 11-3536, *supra* note 3, at 6-7.

(2010) ("we have never held that [the federal policy favoring arbitration] overrides the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit' . . . Nor have we held that courts may use policy considerations as a substitute for party agreement.") (citation omitted). Thus, those who have not agreed to arbitrate cannot be compelled to do so, even in light of the "healthy regard [due to] the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (because "arbitration is a matter of contract," no arbitration may be compelled in the absence of an agreement to arbitrate); *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010) (the FAA's goal is to "give effect to the contractual rights and expectations of the parties") (citation omitted).

The Court of Appeals' decision is therefore consistent with the FAA's primary purpose of ensuring that arbitration agreements are enforced *according to their terms*. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). BG attempts to avoid this obstacle by characterizing Argentina's unilateral offer to arbitrate, as embodied in the BIT, as an offer that can be accepted by an investor simply by submitting a demand for arbitration (Pet. 20 n.8), at which point the parties are bound by an arbitration agreement that, like many commercial arbitration agreements, "'provide[s] for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration.'" Pet. 18 (quoting Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* ¶ 86 (2010)). But BG's characterization misses

the point. Here, the parties to the BIT are two sovereign states whose offers to arbitrate disputes with third-party investors were confined to their terms and were not open-ended. The Court of Appeals' decision that no arbitration agreement exists because BG did not accept the terms of Argentina's offer, and that the question of arbitrability is for the court to decide, is fully consistent with the FAA's purpose, and has nothing to do with multi-stage dispute resolution provisions contained in valid arbitration agreements.[9]

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[9] Although BG points to secondary sources to demonstrate that oftentimes arbitration is secondary to another form of alternative dispute resolution, it does not cite a single source saying that *litigation* (as opposed to mediation, negotiation, "or some other form of alternate dispute resolution") is a standard preliminary step in an already-concluded arbitration agreement. *See generally* Pet. 17-20. Further, its reliance on the *IBA Guidelines for Drafting International Arbitration Clauses*—which are intended to assist "in-house counsel and business lawyers ordinarily involved in contract drafting but unfamiliar with the complexities of arbitration"—for the interpretation of an international investment treaty such as the BIT is misplaced. Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* at 2 (2010).

BG's contention that the Court of Appeals disregarded the Vienna Convention (Pet. 15) fares no better. The Court of Appeals followed the Convention's instructions under Article 31(1) that a treaty be interpreted in accordance with the ordinary meaning of its terms. *See* Pet. App. 7a n.1. Here, the BIT expressly states that disputes which have not been amicably settled "shall" be submitted to Argentine courts before there is an operative offer to arbitrate which the investor can accept. Accordingly, the Court of Appeals correctly relied on this mandatory and unambiguous language to conclude that there was no agreement to arbitrate this dispute.

The floodgates warnings of BG and its *amici* (Pet. 35; AAA *Amicus* Brief 8-9) are not borne out by the facts. BG freely chose to arbitrate in the United States nearly a decade after *First Options*, and indeed tried to impose arbitration on Argentina while not accepting the terms of Argentina's offer, notwithstanding that as a matter of United States arbitration law courts, and not arbitrators, would ultimately decide whether the parties were bound to arbitrate. Evidently, BG was not persuaded that this legal doctrine makes the United States inhospitable to arbitration. Indeed, it could scarcely have imagined otherwise, since the case would have been decided in exactly the same way had the issue arisen in the United Kingdom, BG's home state and the other signatory to the BIT at issue in this case. In *Dallah Real Estate & Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (appeal taken from Eng.), *available at* http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0165_Judgment.pdf, the UK Supreme Court refused to enforce an arbitral award after finding that the "issue regarding the existence of any relevant arbitration agreements falls to be determined by the Supreme Court as a United Kingdom court" which is "neither bound nor restricted" by the findings of the arbitral tribunal. *Id.* ¶¶ 12, 31.

Moreover, this issue does not arise frequently. According to one of the *amici*, there have been a total of only 236 reported arbitral awards under the more than 2700 investment treaties that have been adopted over the last 40 years. *See* Professors and Practitioners *Amicus* Brief 10-12 & n.4. Thus, "investment treaty arbitration still accounts for only a small proportion of the total arbitration market." PricewaterhouseCoopers,

International Arbitration: Corporate attitudes and practices 2008, PricewaterhouseCoopers, 3 (2008), *available at* http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf. Further, it remains the case that vacatur or enforcement proceedings are exceptional—according to a recent survey, such proceedings occurred with respect to only 11% of all arbitrations. *Id.* at 10. As a result, even if there were doubt as to the application of *First Options*—and there is not—this is not an issue prone to frequent litigation, nor is it one of any great urgency.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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