SUPREME COURT OF THE UNITED STATES

No. 12–138

BG GROUP PLC, PETITIONER *v.* REPUBLIC OF ARGENTINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 5, 2014]

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, dissenting.

The Court begins by deciding a different case, "initially treat[ing] the document before us as if it were an ordinary contract between private parties." *Ante*, at 6. The "document before us," of course, is nothing of the sort. It is instead a treaty between two sovereign nations: the United Kingdom and Argentina. No investor is a party to the agreement. Having elided this rather important fact for much of its analysis, the majority finally "relax[es] [its] ordinary contract assumption and ask[s] whether the fact that the document before us is a treaty makes a critical difference to [its] analysis." *Ante*, at 10. It should come as no surprise that, after starting down the wrong road, the majority ends up at the wrong place.

I would start with the document that *is* before us and take it on its own terms. That document is a bilateral investment treaty between the United Kingdom and Argentina, in which Argentina agreed to take steps to encourage U. K. investors to invest within its borders (and the United Kingdom agreed to do the same with respect to Argentine investors). Agreement for the Promotion and Protection of Investments, Dec. 11, 1990, 1765 U. N. T. S. 33 (Treaty). The Treaty does indeed contain a completed agreement for arbitration—between the signatory countries. Art. 9. The Treaty also includes, in Article 8, certain provisions for resolving any disputes that might arise between a signatory country and an investor, who is not a party to the agreement.

One such provision—completely ignored by the Court in its analysis—specifies that disputes may be resolved by arbitration when the host country and an investor "have so agreed." Art. 8(2)(b), 1765 U. N. T. S. 38. No one doubts that, as is the normal rule, whether there was such an agreement is for a court, not an arbitrator, to decide. See *First Options of Chicago*, *Inc.* v. *Kaplan*, 514 U. S. 938, 943–945 (1995).

When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises. The Treaty by itself cannot constitute an agreement to arbitrate with an investor. How could it? No investor is a party to that Treaty. Something else must happen to *create* an agreement where there was none before. Article 8(2)(a) makes clear what that something is: An investor must submit his dispute to the courts of the host country. After 18 months, or an unsatisfactory decision, the investor may then request arbitration.

Submitting the dispute to the courts is thus a condition to the formation of an agreement, not simply a matter of performing an existing agreement. Article 8(2)(a) constitutes in effect a unilateral *offer* to arbitrate, which an investor may accept by complying with its terms. To be sure, the local litigation requirement might not be absolute. In particular, an investor might argue that it was an implicit aspect of the unilateral offer that he be afforded a reasonable opportunity to submit his dispute to the local courts. Even then, however, the question would remain whether the investor has managed to form an arbitration agreement with the host country pursuant to Article 8(2)(a). That question under Article 8(2)(a) is—like the same question under Article 8(2)(b)—for a court, not an arbitrator, to decide. I respectfully dissent from the Court's contrary conclusion.

I

The majority acknowledges—but fails to heed—"the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.'" *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) (quoting *Volt Information Sciences*, *Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)); see *ante,* at 7. We have accordingly held that arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago*, *Inc.*, *supra*, at 943. The same "first principle" underlies arbitration pursuant to bilateral investment treaties. See C. Dugan, D. Wallace, N. Rubins, & B. Sabahi, Investor-State Arbitration 219 (2008) (Dugan); J. Salacuse, The Law of Investment Treaties 385 (2010); K. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 433 (2010). So only if Argentina agreed with BG Group to have an arbitrator resolve their dispute did the arbitrator in this case have any authority over the parties.

The majority opinion nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration. Instead, the majority seems to assume that, in agreeing with the United Kingdom to adopt Article 8 along with the rest of the Treaty, Argentina thereby formed an agreement with all potential U. K. investors (including BG Group) to submit all investment-related disputes to arbitration. That misunderstands Article 8 and trivializes the significance to a sovereign nation of subjecting itself to arbitration anywhere in the world, solely at the option of private parties.

A

The majority focuses throughout its opinion on what it calls the Treaty's "arbitration clause," *ante*, at 1, but that provision does not stand alone. Rather, it is only part—and a subordinate part at that—of a broader dispute resolution provision. Article 8 is thus entitled "Settlement of Disputes Between an Investor and the Host State," and it opens without so much as mentioning arbitration. 1765 U. N. T. S. 37. Instead it initially directs any disputing investor and signatory country (what the Treaty calls a "Contracting Party") to court. When "an investor of one Contracting Party and the other Contracting Party" have an investment-related dispute that has "not been amicably settled," the Treaty commands that the dispute "*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." Art. 8(1), *id.*, at 37–38. (emphasis added). This provision could not be clearer: Before taking any other steps, an aggrieved investor must submit its dispute with a Contracting Party to that Contracting Party's own courts.

There are two routes to arbitration in Article 8(2)(a), and each passes through a Contracting Party's domestic courts. That is, the Treaty's arbitration provisions in Article 8(2)(a) presuppose that the parties have complied with the local litigation provision in Article 8(1). Specifically, a party may request arbitration only (1) "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" and "the said tribunal has not given its final decision," Art. 8(2)(a)(i), *id.*, at 38, or (2) "where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute," Art. 8(2)(a)(ii), *ibid.* Either way, the obligation to arbitrate does not arise until the Contracting Party's courts have had a first crack at the dispute.

Article 8 provides a third route to arbitration in paragraph 8(2)(b)—namely, "where the Contracting Party and the investor of the other Contracting Party have so agreed." *Ibid.* In contrast to the two routes in Article 8(2)(a), this one does not refer to the local litigation provision. That omission is significant. It makes clear that an investor can bypass local litigation only by obtaining the Contracting Party's explicit agreement to proceed directly to arbitration. Short of that, an investor has no choice but to litigate in the Contracting Party's courts for at least some period.

The structure of Article 8 confirms that the routes to arbitration in paragraph (2)(a) are just as much about eliciting a Contracting Party's consent to arbitrate as the route in paragraph 8(2)(b). Under Article 8(2)(b), the requisite consent is demonstrated by a specific agreement. Under Article 8(2)(a), the requisite consent is demonstrated by compliance with the requirement to resort to a country's local courts.

Whereas Article 8(2)(a) is part of a completed *agreement* between Argentina and the United Kingdom, it constitutes only a unilateral standing *offer* by Argentina with respect to U. K. investors—an offer to submit to arbitration where certain conditions are met. That is how scholars understand arbitration provisions in bilateral investment treaties in general. See Dugan 221; Salacuse 381; Brief for Practitioners and Professors of International Arbitration Law as *Amici Curiae* 4. And it is how BG Group itself describes this investment treaty in particular. See Brief for Petitioner 43 (the Treaty is a "standing offer" by Argentina "to arbitrate"); Reply Brief 9 (same).

An offer must be accepted for a legally binding contract to be formed. And it is an "undeniable principle of the law of contracts, that an offer . . . by one person to another, imposes no obligation upon the former, until it is accepted by the latter, *according to the terms in which the offer was made*. Any qualification of, or departure from, those terms, invalidates the offer." *Eliason* v. *Henshaw*, 4 Wheat. 225, 228 (1819) (emphasis added). This principle applies to international arbitration agreements just as it does to domestic commercial contracts. See Dugan 221–222; Salacuse 381; Schreuer, Consent to Arbitration, in The Oxford Handbook of International Investment Law 830, 836–837 (P. Muchlinski, F. Ortino, & C. Schreuer eds. 2008).

By incorporating the local litigation provision in Article 8(1), paragraph 8(2)(a) establishes that provision as a term of Argentina's unilateral offer to arbitrate. To accept Argentina's offer, an investor must therefore first litigate its dispute in Argentina's courts—either to a "final decision" or for 18 months, whichever comes first. Unless the investor does so (or, perhaps, establishes a valid excuse for failing to do so, as discussed below, see *infra*, at 17), it has not accepted the terms of Argentina's offer to arbitrate, and thus has not formed an arbitration agreement with Argentina.[1]

Although the majority suggests that the local litigation requirement would not be a "condition of consent" even if the Treaty explicitly called it one, the Court's holding is limited to treaties that contain no such clear statement. See *ante*, at 11–13. But there is no reason to think that such a clear statement should be required, for we generally do not require "talismanic words" in treaties. *Medellín* v. *Texas*, 552 U. S. 491, 521 (2008). Indeed, another arbitral tribunal concluded that the local litigation require-

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[1] To be clear, the only question is whether BG Group formed an *arbitration* agreement with Argentina. To say that BG Group never formed such an agreement is not to call into question the validity of its various commercial agreements with Argentina.

ment was a condition on Argentina's consent to arbitrate despite the absence of the sort of clear statement apparently contemplated by the majority. See *ICS Inspection & Control Servs. Ltd.* v. *Argentine Republic*, PCA Case No. 2010–9, Award on Jurisdiction, ¶262 (Feb. 10, 2012). Still other tribunals have reached the same conclusion with regard to similar litigation requirements in other Argentine bilateral investment treaties. See *Daimler Financial Servs. AG* v. *Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶¶193, 194 (Aug. 22, 2012); *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶116 (Dec. 8, 2008).

In the face of this authority, the majority quotes a treatise for the proposition that "'[a] substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite.'" *Ante,* at 16 (quoting 1 G. Born, International Commercial Arbitration 842 (2009)). But that simply restates the question. The whole issue is whether the local litigation requirement is a mere "procedural mechanism" or instead a condition on Argentina's consent to arbitrate.

BG Group concedes that other terms of Article 8(1) constitute conditions on Argentina's consent to arbitrate, even though they are not expressly labeled as such. See Tr. of Oral Arg. 57 ("You have to be a U. K. investor, you have to have a treaty claim, you have to be suing another party to the treaty. And if those aren't true, *then there is no arbitration agreement*" (emphasis added)). The Court does not explain why the *only other term*—the litigation requirement—should be viewed differently.

Nor does the majority's reading accord with ordinary contract law, which treats language such as the word "after" in Article 8(2)(a)(i) as creating conditions, even though such language may not constitute a "clear statement." See 13 R. Lord, Williston on Contracts §38:16 (4th ed. 2013). The majority seems to regard the local litigation requirement as a condition precedent to *performance* of the contract, rather than a condition precedent to *formation* of the contract. *Ante,* at 8–9; see 13 Lord §§38:4, 38:7. But that cannot be. Prior to the fulfillment of the local litigation requirement, there was no contract between Argentina *and BG Group* to be performed. The Treaty is not such an agreement, since BG Group is of course not a party to the Treaty. Neither the majority nor BG Group contends that the agreement is under Article 8(2)(b), the provision that applies "where the Contracting Party and the investor of the other Contracting Party have so agreed." An arbitration agreement must be *formed*, and Article 8(2)(a) spells out how an investor may do that: by submitting the dispute to local courts for 18 months or until a decision is rendered.

Moreover, the Treaty's local litigation requirement certainly does not resemble "time limits, notice, laches, estoppel," or the other kinds of provisions that are typically treated as conditions on the performance of an arbitration agreement, rather than prerequisites to formation. Revised Uniform Arbitration Act of 2000 §6(c), Comment 2, 7 U. L. A. 26 (2009). Unlike a time limit for submitting a claim to arbitration, see *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 85 (2002), the litigation requirement does not simply regulate the timing of arbitration. As the majority recognizes, *ante*, at 15–16, the provision does not simply require the parties to wait for 18 months before proceeding to arbitration, but instead requires them to submit their claims for adjudication during that period. And unlike a mandatory pre-arbitration grievance procedure, see *John Wiley & Sons*, *Inc.* v. *Livingston*, 376 U. S. 543, 556–559 (1964), the litigation requirement sends the parties to court—and not just any court, but a court of the host country.

The law of international arbitration and domestic contract law lead to the same conclusion: Because paragraph (2)(a) of Article 8 constitutes only a unilateral standing offer by the Contracting Parties to each other's investors to submit to arbitration under certain conditions, an investor cannot form an arbitration agreement with a Contracting Party under the Treaty until the investor accepts the actual terms of the Contracting Party's offer. Absent a valid excuse, that means litigating its dispute in the Contracting Party's courts to a "final decision" or, barring that, for at least 18 months.

B

The nature of the obligations a sovereign incurs in agreeing to arbitrate with a private party confirms that the local litigation requirement is a condition on a signatory country's consent to arbitrate, and not merely a condition on performance of a pre-existing arbitration agreement. There are good reasons for any sovereign to condition its consent to arbitrate disputes on investors' first litigating their claims in the country's own courts for a specified period. It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly. Cf. *United States* v. *Bormes*, 568 U. S. ___, ___ (2012) (slip op., at 4) (Congress must "unequivocally express[ ]" its intent to waive the sovereign immunity of the United States (quoting *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33 (1992); internal quotation marks omitted)). But even where a sovereign nation has subjected itself to suit in its own courts, it is quite another thing for it to subject itself to international arbitration. Indeed, "[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation" whose "uniqueness and power should not be overlooked." Salacuse 137. That is so because of both the procedure and substance of investor-state arbitration.

Procedurally, paragraph (3) of Article 8 designates the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as the default rules governing the arbitration. Those rules authorize the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an "appointing authority" who—absent agreement by the parties—can select the sole arbitrator (or, in the case of a three-member tribunal, the presiding arbitrator, where the arbitrators nominated by each of the parties cannot agree on a presiding arbitrator). UNCITRAL Arbitration Rules, Arts. 6, 8–9 (rev. 2010 ed.). The arbitrators, in turn, select the site of the arbitration (again, absent an agreement by the parties) and enjoy broad discretion in conducting the proceedings. Arts. 18, 17(1).

Substantively, by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary. See Salacuse 355; G. Van Harten, Investment Treaty Arbitration and Public Law 65–67 (2007). Consider the dispute that gave rise to this case: Before the arbitral tribunal, BG Group challenged multiple sovereign acts of the Argentine Government taken after the Argentine economy collapsed in 2001—in particular, Emergency Law 25,561, which converted dollar-denominated tariffs into peso-denominated tariffs at a rate of one Argentine peso to one U. S. dollar; Resolution 308/02 and Decree 1090/02, which established a renegotiation process for public service contracts; and Decree 214/02, which stayed for 180 days injunctions and the execution of final judgments in lawsuits challenging the effects of the Emergency Law. Indeed, in awarding damages to BG Group, the tribunal held that the first three of these enactments violated Article 2 of the Treaty. See

App. to Pet. for Cert. 241a–242a, 305a.

Perhaps they did, but that is not the issue. Under Article 8, a Contracting Party grants to private adjudicators not necessarily of its own choosing, who can meet literally anywhere in the world, a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts. Given these stakes, one would expect the United Kingdom and Argentina to have taken particular care in specifying the limited circumstances in which foreign investors can trigger the Treaty's arbitration process. And that is precisely what they did in Article 8(2)(a), requiring investors to afford a country's own courts an initial opportunity to review the country's enactments and assess the country's compliance with its international obligations. Contrast this with Article 9, which provides for arbitration between the signatory countries of disputes under the Treaty without any preconditions. Argentina and the United Kingdom considered arbitration with particular foreign investors to be different in kind and to require special limitations on its use.

The majority regards the local litigation requirement as toothless simply because the Treaty does not require an arbitrator to "give substantive weight to the local court's determinations on the matters at issue between the parties," *ante*, at 9; see also *ante*, at 15–16, but instead provides that "[t]he arbitration decision shall be final and binding on both Parties," Art. 8(4), 1765 U. N. T. S. 38. While it is true that an arbitrator need not defer to an Argentine court's judgment in an investor dispute, that does not deprive the litigation requirement of practical import. Most significant, the Treaty provides that an "arbitral tribunal shall decide the dispute in accordance with . . . the laws of the Contracting Party involved in the dispute." Art. 8(4), *ibid.* I doubt that a tribunal would give no weight to an Argentine court's authoritative construction of Argentine law, rendered in the same dispute, just because it might not be formally bound to adopt that interpretation.

The local litigation requirement can also help to narrow the range of issues that remain in controversy by the time a dispute reaches arbitration. It might even induce the parties to settle along the way. And of course the investor might prevail, which could likewise obviate the need for arbitration. Cf. *McKart* v. *United States*, 395 U. S. 185, 195 (1969).

None of this should be interpreted as defending Argentina's history when it comes to international investment. That history may prompt doubt that requiring an investor to resort to that country's courts in the first instance will be of any use. But that is not the question. Argentina and the United Kingdom reached agreement on the term at issue. The question can therefore be rephrased as whether it makes sense for either Contracting Party to insist on resort to its courts before being compelled to arbitrate anywhere in the world before arbitrators not of its choosing. The foregoing reasons may seem more compelling when viewed apart from the particular episode before us.

II

Given that the Treaty's local litigation requirement is a condition on consent to arbitrate, it follows that whether an investor has complied with that requirement is a question a court must decide *de novo*, rather than an issue for the arbitrator to decide subject only to the most deferential judicial review. See, *e.g., Adams* v. *Suozzi*, 433 F. 3d 220, 226–228 (CA2 2005) (holding that compliance with a condition on formation of an arbitration agreement is for a court, rather than an arbitrator, to determine). The logic is simple: Because an arbitrator's authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented. Where the consent of the parties is in question, "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.

This principle is at the core of our arbitration precedents. See *Granite Rock Co.*, 561 U. S., at 299 (questions concerning "the formation of the parties' arbitration agreement" are for a court to decide *de novo*). The same principle is also embedded in the law of international commercial arbitration. 2 Born 2792 ("[W]here one party denies ever having made an arbitration agreement or challenges the validity of any such agreement, . . . the possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary"). See also Restatement (Third) of U. S. Law of International Commercial Arbitration §4–12(d)(1) (Tent. Draft No. 2, Apr. 16, 2012) ("a court determines de novo . . . the existence of the arbitration agreement").

Indeed, the question in this case—whether BG Group accepted the terms of Argentina's offer to arbitrate—presents an issue of contract formation, which is the starkest form of the question whether the parties have agreed to arbitrate. In *Howsam* v. *Dean Witter Reynolds, Inc.*, we gave two examples of questions going to consent, which are for courts to decide: "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." 537 U. S., at 84. In both examples, there is at least a putative arbitration agreement between *the parties to the dispute*. The only question is whether the agreement is truly binding or whether it covers the specific dispute. Here, by contrast, the question is whether the arbitration clause in the Treaty between the United Kingdom and Argentina gives rise to an arbitration agreement between Argentina *and BG*

Group at all. Cf. *ante*, at 2 (SOTOMAYOR, J., concurring in part) ("Consent is especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties").

The majority never even starts down this path. Instead, it preempts the whole inquiry by concluding that the local litigation requirement is the kind of "procedural precondition" that parties typically expect an arbitrator to enforce. *Ante*, at 8–9. But as explained, the local litigation requirement does not resemble the requirements we have previously deemed presumptively procedural. See *supra,* at 8. It does not merely regulate the timing of arbitration. Nor does it send the parties to non-judicial forms of dispute resolution.

More importantly, all of the cases cited by the majority as examples of procedural provisions involve commercial contracts between two private parties. See *ante*, at 9. None of them—not a single one—involves an agreement between sovereigns or an agreement to which the person seeking to compel arbitration is not even a party. The Treaty, of course, is both of those things.

The majority suggests that I am applying "a different kind of analysis" from that governing private commercial contracts, just because what is at issue is a treaty. *Ante*, at 15. That is not so: The key point, which the majority never addresses, is that there is no completed agreement whatsoever between Argentina and BG Group. An agreement must be formed, and whether that has happened is—as it is in the private commercial contract context—an issue for a court to decide. See *supra*, at 12–13.

The distinction between questions concerning consent to arbitrate and mere procedural requirements under an existing arbitration agreement can at times seem elusive. Even the most mundane procedural requirement can be recast as a condition on consent as a matter of technical logic. But it should be clear by now that the Treaty's local litigation requirement is not a mere formality—not in Buenos Aires, not in London. And while it is true that "parties often submit important matters to arbitration," *ante*, at 11, our precedents presume that parties do not submit to arbitration the most important matter of all: whether they are subject to an agreement to arbitrate in the first place.

Nor has the majority pointed to evidence that would rebut this presumption by showing that Argentina "'clearly and unmistakably'" intended to have an arbitrator enforce the litigation requirement. *Howsam*, *supra*, at 83 (quoting *AT&T Technologies*, *Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986)). As the majority notes, *ante*, at 14, the Treaty incorporates certain arbitration rules that, in turn, authorize arbitrators to determine their own jurisdiction over a dispute. See Art. 8(3). But those rules do not operate until a dispute is properly before an arbitral tribunal, and of course the whole question in this case is whether the dispute between BG Group and Argentina was before the arbitrators, given BG Group's failure to comply with the 18-month local litigation requirement. As a leading treatise has explained, "[i]f the parties have not validly agreed to any arbitration agreement at all, then they also have necessarily not agreed to institutional arbitration rules." 1 Born 870. "In these circumstances, provisions in institutional rules cannot confer any [such] authority upon an arbitral tribunal." *Ibid.*

I also see no reason to think that arbitrators enjoy comparative expertise in construing the local litigation requirement. *Ante*, at 14. It would be one thing if that provision involved the application of the arbitrators' own rules, cf. *Howsam*, *supra*, at 85, or if it were "intertwined" with the merits of the underlying dispute, *John Wiley & Sons*, 376 U. S., at 557. Neither is true of the litigation requirement. A court can assess compliance with the requirement at least as well as an arbitrator can. Given the structure of Article 8 and the important interests that the litigation requirement protects, it seems clear that the United Kingdom and Argentina thought the same.[2]

III

Although the Court of Appeals got there by a slightly different route, it correctly concluded that a court must decide questions concerning the interpretation and application of the local litigation requirement *de novo*. 665 F. 3d 1363, 1371–1373 (CADC 2012). At the same time, however, the court seems to have simply taken it for granted that, because BG Group did not submit its dispute to the local courts, the arbitral award in BG Group's favor was invalid. Indeed, the court addressed the issue in a perfunctory paragraph at the end of its opinion and saw "'only one possible outcome'": "that BG Group was required to commence a lawsuit in Argentina's courts and

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[2] JUSTICE SOTOMAYOR contends that "Argentina's conduct confirms that the local litigation requirement is not a condition on consent, for rather than objecting to arbitration on the ground that there was no binding arbitration agreement to begin with, Argentina actively participated in the constitution of the arbitral panel and in the proceedings that followed." *Ante,* at 4 (opinion concurring in part). But as the arbitral tribunal itself recognized, Argentina *did* object to the tribunal's jurisdiction to hear the dispute. App. to Pet. for Cert. 99a, 134a, 143a, 161a–163a. And we have held that "merely arguing the arbitrability issue to an arbitrator"—say, by "filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction"—"does not indicate a clear willingness to arbitrate that issue, *i.e.,* a willingness to be effectively bound by the arbitrator's decision on that point." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 946 (1995). The concurrence contends that Argentina "apparently" argued its jurisdictional objection in terms of procedure rather than consent, *ante,* at 4, n., but the one piece of evidence cited—a negative inference from the *arbitrator's* characterization of Argentina's argument on a subsidiary issue—hardly suffices to distinguish *First Options*.

wait eighteen months before filing for arbitration." *Id.*, at 1373 (quoting *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 677 (2010)).

That conclusion is not obvious. A leading treatise has indicated that "[i]t is a necessary implication from [a unilateral] offer that the offeror, in addition, makes a subsidiary offer by which he or she promises to accept a tender of performance." 1 Lord §5:14, at 1005. On this understanding, an offeree's failure to comply with an essential condition of the unilateral offer "will not bar an action, if failure to comply with the condition is due to the offeror's own fault." *Id.,* at 1005–1006.

It would be open to BG Group to argue before the Court of Appeals that this principle was incorporated into Article 8(2)(a) as an implicit aspect of Argentina's unilateral offer to arbitrate. Such an argument would find some support in the background principle of customary international law that a foreign individual injured by a host country must ordinarily exhaust local remedies—unless doing so would be "futile." See Dugan 347–357. In any event, the issue would be analyzed as one of contract formation, and therefore would be for the court to decide. I would accordingly vacate the decision of the Court of Appeals and remand the case for such an inquiry.

I respectfully dissent.