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]

JUSTICE SOTOMAYOR, concurring in part.

I agree with the Court that the local litigation requirement at issue in this case is a procedural precondition to arbitration (which the arbitrators are to interpret), not a condition on Argentina's consent to arbitrate (which a court would review *de novo*). *Ante,* at 8, 14. Importantly, in reaching this conclusion, the Court acknowledges that "the treaty before us does *not* state that the local litigation requirement is a 'condition of consent' to arbitration." *Ante,* at 12. The Court thus wisely "leave[s] for another day the question of interpreting treaties that refer to 'conditions of consent' explicitly." *Ibid.* I join the Court's opinion on the understanding that it does not, in fact, decide this issue.

I write separately because, in the absence of this express reservation, the opinion might be construed otherwise. The Court appears to suggest in dictum that a decision by treaty parties to describe a condition as one on their consent to arbitrate "is unlikely to be conclusive" in deciding whether the parties intended for the condition to be resolved by a court. *Ante,* at 11. Because this suggestion is unnecessary to decide the case and is in tension with the Court's explicit reservation of the issue, I join the opinion of the Court with the exception of Part IV–A–1.

The Court's dictum on this point is not only unneces-

sary; it may also be incorrect. It is far from clear that a treaty's express use of the term "consent" to describe a precondition to arbitration should not be conclusive in the analysis. We have held, for instance, that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002). And a party plainly cannot be bound by an arbitration clause to which it does not consent. See *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) ("Arbitration is strictly 'a matter of consent'" (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)).

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, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors. In this setting, a nation-state might reasonably wish to condition its consent to arbitrate with a previously unspecified investor counterparty on the investor's compliance with a requirement that might be deemed "purely procedural" in the ordinary commercial context, *ante,* at 9. Moreover, as THE CHIEF JUSTICE notes, "[i]t is no trifling matter" for a sovereign nation to "subject itself to international arbitration" proceedings, so we should "not presume that any country . . . takes that step lightly." *Post,* at 9 (dissenting opinion).

Consider, for example, the United States-Korea Free Trade Agreement, which as the Court recognizes, *ante,* at 12–13, includes a provision explicitly entitled "Conditions and Limitations on Consent of Each Party." Art. 11.18, Feb. 10, 2011. That provision declares that "[n]o claim may be submitted to arbitration" unless a claimant first waives its "right to initiate or continue before any administrative tribunal or court . . . any proceeding with respect

to any measure alleged to constitute a breach" under another provision of the treaty. *Ibid.* If this waiver condition were to appear without the "consent" label in a binding arbitration agreement between two commercial parties, one might characterize it as the kind of procedural "'condition precedent to arbitrability'" that we presume parties intend for arbitrators to decide. *Howsam*, 537 U. S., at 85. But where the waiver requirement is expressly denominated a "condition on consent" in an international investment treaty, the label could well be critical in determining whether the states party to the treaty intended the condition to be reviewed by a court. After all, a dispute as to consent is "the starkest form of the question whether the parties have agreed to arbitrate." *Post*, at 13. And we ordinarily presume that parties intend for courts to decide such questions because otherwise arbitrators might "force unwilling parties to arbitrate a matter they reasonably would have thought a judge . . . would decide." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 945 (1995).

Accordingly, if the local litigation requirement at issue here were labeled a condition on the treaty parties' "consent" to arbitrate, that would in my view change the analysis as to whether the parties intended the requirement to be interpreted by a court or an arbitrator. As it is, however, all parties agree that the local litigation requirement is not so denominated. See Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990, 1765 U. N. T. S. 38. Nor is there compelling reason to suppose the parties silently intended to make it a condition on their consent to arbitrate, given that a local court's decision is of no legal significance under the treaty, *ante,* at 8–9, and given that the entire purpose of bilateral investment agreements is to "reliev[e] investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a for-

eigner and their own government," Brief for Professors and Practitioners of Arbitration Law as *Amici Curiae* 6. Moreover, 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. See *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 546 (1991) (treaty interpretation can be informed by parties' postenactment conduct).*

In light of these many indicators that Argentina and the United Kingdom did not intend the local litigation requirement to be a condition on their consent to arbitrate, and on the understanding that the Court does not pass on

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*The dissent discounts the significance of Argentina's conduct on the ground that Argentina "object[ed] to the [arbitral] tribunal's jurisdiction to hear the dispute." *Post,* at 16, n. 2. But there is a difference between arguing that a party has failed to comply with a procedural condition in a binding arbitration agreement and arguing that noncompliance with the condition negates the existence of consent to arbitrate in the first place. Argentina points to no evidence that its objection was of the consent variety. This omission is notable because Argentina knew how to phrase its arguments before the arbitrators in terms of consent; it argued separately that it had not consented to arbitration with BG Group on the ground that BG was not a party to the license underlying the dispute. See App. to Pet. for Cert. 182a–186a. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938 (1995), is not to the contrary, as that case held that "arguing the arbitrability issue to an arbitrator" did not constitute "clea[r] and unmistakabl[e]" evidence sufficient to override an indisputably applicable presumption that a court was to decide whether the parties had agreed to arbitration. *Id.*, at 944, 946. The question here, by contrast, is whether that presumption attaches to begin with—that is, whether the local litigation requirement was a condition on Argentina's consent to arbitrate (which would trigger the presumption) or a procedural condition in an already binding arbitration agreement (which would not). That Argentina apparently took the latter position in arbitration is surely relevant evidence that the condition was, in fact, not one on its consent.

the weight courts should attach to a treaty's use of the term "consent," I concur in the Court's opinion.