



# Exhaustion of Local Remedies in International Investment Law

IISD Best Practices Series - January 2017



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## **Exhaustion of Local Remedies in International Investment Law**

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## 1.0 Introduction

The customary international law rule of exhaustion of local remedies (ELR) aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international proceedings against that state. In international investment law, this rule has in large part been dispensed with, as states conclude investment treaties and chapters under which they give advance consent to international arbitration with foreign investors—a practice that was understood to mean that the investor could initiate a claim without prior recourse to the host state’s administrative or judicial courts. Even under treaties lacking an explicit or implicit waiver of the exhaustion rule, arbitral tribunals—ruling on their own jurisdiction—have generally allowed foreign investors to bypass local remedies.

In recent years, states including Argentina, India, Romania, Turkey, the United Arab Emirates and Uruguay, as well as countries in the Southern African Development Community (SADC) and East African Community (EAC) regions, have reintroduced a mandatory requirement to pursue or exhaust local remedies for the settlement of investment disputes in their investment treaties. This practice is meant to empower domestic legal systems and avoid their bypassing. Other states are considering a similar path.

In this advisory bulletin, part of IISD’s Best Practices Series, we review state-of-the-art options and approaches to the ELR requirement in international investment law. Beginning with a background section, we define the scope of the paper (Section 2.1), review the customary international law origins of the ELR rule (Section 2.2) and review how it was adapted to and developed in the context of international human rights law (Section 2.3). Turning then to international investment law, we examine treaty practice (Section 3.1) and case law (Section 3.2) on requiring ELR before initiating international arbitration. Based on the lessons learned from treaty practice and jurisprudence, we conclude (Section 4.0) by outlining policy options for ELR in international investment law.



## 2.0 Background

### 2.1 Definition and Purpose of Exhaustion of Local Remedies

The ELR rule requires that a foreign national allegedly harmed by a state must first seek to redress the alleged harm before the administrative and judicial system of that state, until a final decision has been rendered, before seeking diplomatic protection or initiating international proceedings directly against the state. It serves the purpose of giving the state where the violation occurred “an opportunity to redress it by its own means, within the framework of its own domestic system,”<sup>1</sup> “before its international responsibility can be called into question” (Cançado Trindade, 1983, p. 1).

Certain investment treaties<sup>2</sup> require the pursuit or exhaustion of local remedies (whether administrative, judicial or both) for a specified period—ranging from three months to five years—before a foreign investor may initiate international proceedings against the host state. Not requiring a final decision by the domestic courts, these provisions do not reflect the ELR rule as typically understood in international law.<sup>3</sup> However, they are similar to ELR, as both require recourse to domestic remedies before bringing an international claim and serve the same purpose of “honouring the host state’s sovereignty” by affording its domestic legal system the opportunity to settle the dispute before the initiation of international arbitration.<sup>4</sup> For simplicity, in this paper we refer generally to ELR as including time-limited pursuit of local remedies.<sup>5</sup>

The ELR rule should not be confused with somewhat similar provisions in investment agreements:

- *Cooling-off period*: Many treaties require disputing parties to resort to amicable means of dispute settlement for a specified period before initiating international arbitration. These amicable means may include negotiation, conciliation and mediation, but do not include local administrative or judicial remedies.
- *Exclusive forum choice clauses*: Some investment treaties and contracts indicate domestic courts as the exclusive forum for settling disputes. In this context, domestic courts are an exclusive choice; unlike the ELR rule, exclusive forum choice clauses do not create pre-conditions to initiate international arbitration.
- *Fork-in-the-road clauses*: These clauses indicate alternative forums to which the investor, at her choice, may submit an investment dispute; they also determine that the choice made is final. Like exclusive forum choice clauses, fork-in-the-road clauses do not establish that domestic remedies should be the first step before escalating the dispute to the international level; if the investor chooses to resort to domestic remedies, that choice forecloses the option of resorting to international arbitration.

### 2.2 Exhaustion of Local Remedies in Customary International Law

The origins of the ELR rule lie in the context of customary international law, following the logic that, “before a state may exercise diplomatic protection, the foreign national must have sought redress in the host state’s domestic legal system” (Newcombe & Paradell, 2009, p. 6). Below we review the suggested codification of the rule by the United Nations International Law Commission (ILC), as well as the decisions of the International Court of Justice (ICJ) in the *Interhandel* and *ELSI* cases, which dealt with the ELR rule in the context of diplomatic protection.

<sup>1</sup> *Interhandel* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, at 27 (Mar. 21). Retrieved from <http://www.icj-cij.org/docket/files/34/2299.pdf>.

<sup>2</sup> See *infra* Section 3.1.3.

<sup>3</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 104 (Aug. 3, 2004). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf>. See also *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction (June 17, 2005), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0354.pdf>; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, para. 48 (Oct. 24, 2011), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0405.pdf> (“There would be no question under Article 10(3) of the effectiveness of the available remedies: recourse would be obligatory even in cases where it was perfectly clear that the courts could provide no remedy—for example, in cases where legislation has effectively left the court with no option except to decide the dispute against the Claimant.”)

<sup>4</sup> *Ambiente Ufficio S.P.A. v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, para. 602 (Feb. 8, 2013). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf>.

<sup>5</sup> *Wintershall Aktiengesellschaft v. The Argentine Republic*, ICSID Case No. ARB/04/14, Award, para. 124 (Dec. 8, 2008). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0907.pdf>.



## 2.2.1 ILC Draft Articles on Diplomatic Protection

The ELR requirement as a condition for the exercise of diplomatic protection is considered by the ILC as a “principle of general international law” supported by judicial decisions, State practice, treaties and the writings of jurists.<sup>6</sup> The ILC suggested the codification of ELR in Articles 14 and 15 of its Draft Articles on Diplomatic Protection.

A state may only exercise diplomatic protection—or “present an international claim in respect of an injury to a national or other person”—after the injured person has exhausted all local remedies. These are defined as the legal remedies available before administrative or judicial courts, whether ordinary or special, of the allegedly injuring state. While the specific remedies available vary across states, the foreign national must appeal its case to the highest court of the allegedly injuring state, as far as domestic law permits. For the foreigner to satisfy the requirement, the arguments raised in the domestic proceedings must be the same as those intended to be raised in the international proceedings.<sup>7</sup>

In exceptional circumstances, a foreigner does not need to exhaust local remedies:<sup>8</sup>

- *Futility or ineffectiveness*: Local remedies need not be exhausted if they “are obviously futile,” “offer no reasonable prospect of success,” or “provide no reasonable possibility of effective redress.” The foreigner must prove not only a low likelihood of success, but the inability of the domestic system to provide effective relief.<sup>9</sup>
- *Undue delay* caused by the allegedly responsible state in the conduct of domestic proceedings is another exception. No precise time limit can be abstractly determined, as this depends on circumstances such as the volume of work required for the case to be thoroughly examined.<sup>10</sup>
- *Lack of a relevant connection between the foreigner and the allegedly responsible state* is an exception that covers circumstances in which requiring ELR would be unreasonable or unfair, or cause great hardship.<sup>11</sup>
- *Waiver of the requirement by the allegedly responsible state*: The waiver may appear in a pre-existing treaty, a contract between the state and the foreigner or an ad hoc arbitration agreement, or be implied or inferred from the state’s conduct.<sup>12</sup>

International investment agreements create special rules of international law, excluding or departing substantially from the rules on diplomatic protection. In particular, according to the ILC, “[s]uch treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to [ELR].” Therefore, the draft articles on diplomatic protection “do not apply to the extent they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.”<sup>13</sup>

## 2.2.2 The *Interhandel* Case

In *Interhandel*, the United States objected to the ICJ’s jurisdiction on the grounds that *Interhandel*, the Swiss-based company whose claims Switzerland espoused, had not exhausted local remedies available in U.S. courts. The ICJ understood this to be an objection to admissibility rather than jurisdiction. It noted that ELR “is a well-established rule of customary international law” generally applied in diplomatic protection claims, to give “the State where the violation occurred ... an opportunity to redress it by its own means, within the framework of its domestic legal system,” before resorting to international proceedings. ELR is applicable, according to the court, when domestic proceedings are pending and when both the domestic and international proceedings “are designed to obtain the same result.”<sup>14</sup>

<sup>6</sup> Text of the Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 1 [Hereinafter 2006 ILC Draft Articles].

<sup>7</sup> *Id.* para. 1–2; *Id.* cmt. 4, 6.

<sup>8</sup> *Id.* art. 15, para. a–c, e (We do not comment on para. d as it represents, in ILC’s words, “an exercise in progressive development” rather than the attempted codification of customary international law. 2006 ILC Draft Articles art. 15, cmt. 11).

<sup>9</sup> *Id.* art. 15, cmt. 2; *Id.* cmt. 4.

<sup>10</sup> *Id.* cmt. 5.

<sup>11</sup> *Id.* cmt. 7.

<sup>12</sup> *Id.* cmt. 12–14.

<sup>13</sup> *Id.* art. 17, cmt. 1; *Id.* art. 17.

<sup>14</sup> *Interhandel*, *supra* note 1 at 27.



Considering that proceedings initiated by Interhandel were still pending before a U.S. district court, the majority of the ICJ held that Switzerland's application was inadmissible. The court also upheld the objection with respect to Switzerland's alternative claim that the United States was obligated to submit the dispute to arbitration or conciliation. The court reasoned that "the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission."<sup>15</sup>

### 2.2.3 The *ELSI* Case

The *ELSI* case concerned an alleged breach of Italy's obligations under the 1948 United States–Italy Treaty of Friendship, Commerce and Navigation (FCN Treaty) with respect to its treatment of Raytheon–Elsi S.p.A. (previously Elettronica Sicula S.p.A., or *ELSI*), an Italian corporation owned by two U.S. corporations. In particular, the United States claimed that a requisition order by the Mayor of Palermo led to *ELSI*'s bankruptcy. Italy objected to the admissibility of the claim, arguing that the two U.S. corporations had not exhausted local remedies available in Italy.<sup>16</sup>

The United States argued that the ELR rule did not apply as it was not mentioned in the dispute settlement provision of the FCN Treaty. While agreeing that treaty parties can confirm or set aside the application of the rule, the ICJ found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."<sup>17</sup>

Holding that the ELR rule was applicable, the court turned to whether local remedies had been exhausted, examining the various domestic proceedings initiated. It noted that the substance of the domestic and international claims was the same, despite the different parties, arguments and bodies of law involved. Importantly, it remarked:<sup>18</sup>

The local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.

The ICJ concluded that Italy failed to demonstrate that there remained domestic remedies to be pursued and exhausted. Therefore, it found that the ELR rule was satisfied and proceeded to the merits of the case.<sup>19</sup>

## 2.3 Exhaustion of Local Remedies in International Human Rights Law

The application of the ELR rule in the context of international human rights law differs significantly from its customary international law origins, particularly with respect to the actors and the interests involved. While in cases of diplomatic protection the rule applies to relationships between a state and a foreigner, under international human rights law it applies to relationships between a state and its own nationals as well. In addition, in the context of diplomatic protection, the rule is intended to protect state sovereignty; in turn, in international human rights law, the main interest to be protected is that of the victim of alleged human rights violations. The protection of this interest often results in an attenuation of state sovereignty (D'Ascoli & Scherr, 2007).

Accordingly, we can consider the ELR rule provided for in human rights treaties and developed through human rights case law as an autonomous rule, which, even though it was originally influenced by the earlier customary international law rule, developed differently to serve different functions (D'Ascoli & Scherr, 2007, p. 18). Even so, as studying the ELR rule in the human rights context could prove useful for an assessment of its potential role in international investment law, we briefly review how the rule is phrased and interpreted under UN and regional human rights systems.

<sup>15</sup> *Id.* at 29.

<sup>16</sup> Elettronica Sicula S.p.A. (*ELSI*) (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, 28 I.L.M. 1109 (July 20).

<sup>17</sup> *Id.* para. 50. See also Dixon, M. (1992, p. 1).

<sup>18</sup> *ELSI*, *supra* note 16, para 59.

<sup>19</sup> *Id.* para. 63.



### 2.3.1 Exhaustion of Local Remedies in International Human Rights Treaties

The ELR rule is present in all major global and regional international human rights regimes. Under the UN system, the International Covenant on Civil and Political Rights (ICCPR) determines that the Human Rights Committee “shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law,” allowing for the non-application of the ELR rule when remedies are “unreasonably prolonged.”<sup>20</sup> With similar language, the Optional Protocol to the ICCPR also emphasizes the application of the rule to communications by individuals to the committee.<sup>21</sup>

Similarly, but without the “unreasonably prolonged” exception, the European Convention on Human Rights provides that the European Court of Human Rights “may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.”<sup>22</sup>

The American Convention on Human Rights requires pursuit and exhaustion of local remedies “in accordance with generally recognized principles of international law” before the submission of petitions or communications to the commission. However, it also provides for three cases in which the rule can be dispensed with:<sup>23</sup>

- a. If the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated.
- b. If the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.
- c. If there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

The African Charter on Human and Peoples’ Rights provides that the Commission “can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.” The rule applies to individual submissions to the commission as well as to communications transmitted to it by non-state actors.<sup>24</sup>

### 2.3.2 Exhaustion of Local Remedies in International Human Rights Case Law

In human rights case law, the ELR rule tends to be interpreted more broadly and flexibly rather than strictly and restrictively, for the benefit of the alleged victims of human rights violations.<sup>25</sup> As consistently applied by the international and regional human rights bodies, the remedies that must be exhausted must have the following characteristics, which are to a certain extent intertwined:

- *Availability*: The applicant must: be able to pursue the remedy without difficulties or impediments, whether practical or legal; have conditions of exercising the remedy; and make use of it in the circumstances of the case. The remedy must exist not only in theory but also in practice, and have a certain degree of immediacy.
- *Effectiveness*: The remedy must exist in the domestic legal system and provide effective means of redress in relation to the case, with a reasonable prospect of success and without undue delay. An applicant need not exhaust futile or unhelpful remedies.
- *Adequacy or sufficiency*: The remedy must be capable of providing redress to the applicant in relation to the specific harm alleged.

<sup>20</sup> International Covenant on Civil and Political Rights art. 41, para. 1(c), (Dec. 19, 1966), 999 U.N.T.S. 171. Retrieved from [https://treaties.un.org/doc/Publication/UNTS/Volume 999/volume-999-I-14668-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf).

<sup>21</sup> Optional Protocol to the International Covenant on Civil and Political Rights art. 5, para. 2(b), (Dec. 19, 1966), 999 U.N.T.S. 302. Retrieved from [https://treaties.un.org/doc/Publication/UNTS/Volume 999/volume-999-I-14668-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf).

<sup>22</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 35, para. 1, (Nov. 4, 1950), 213 U.N.T.S. 221. Retrieved from [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>23</sup> American Convention on Human Rights art. 46, paras. 1(a)–(b), 2, (Nov. 22, 1969), O.A.S.T.S. No. 36. Retrieved from [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf).

<sup>24</sup> African (Banjul) Charter on Human and Peoples’ Rights, (June 27, 1981), O.A.U. Doc. No. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Retrieved from [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf).

<sup>25</sup> This section is based on D’Ascoli & Scherr (2007), pp. 12–15).





The case law of human rights bodies, in line with the above characteristics and with the text of the treaties and conventions, recognizes several exceptions or limitations to the ELR rule:

- *Unavailability*: local remedies that are very difficult to access need not be exhausted.
- *Lack of effectiveness or adequacy*: an applicant need not exhaust remedies if there are serious reasons to believe that they do not offer real prospects of success or effectiveness. For this determination, the human rights body must look at domestic jurisprudence, and the applicant must provide some evidence of the existence of such jurisprudence. In cases of systematic human rights violations, human rights bodies have recognized a presumption of the ineffectiveness of local remedies.
- *Denial of justice or undue delay*: an applicant does not need to exhaust domestic remedies if local courts “refuse to administer justice, or they are not independent and impartial, or they render judgments which are manifestly unfair,” or when the local remedy is “unreasonably prolonged.” (D’Ascoli & Scherr, 2007, p. 13).
- *Disciplinary, administrative, discretionary or extraordinary remedies*: in cases of serious human rights violations, human rights bodies have considered a presumption that merely disciplinary and administrative remedies are inadequate and ineffective. Also excluded from the application of the rule are non-judicial remedies leading to discretionary decisions and extraordinary remedies (including applications for annulment or review).



## 3.0 Exhaustion of Local Remedies in International Investment Law

### 3.1 Exhaustion of Local Remedies in Investment Treaty Practice

Unlike in the context of the major human rights systems, in which ELR is the rule rather than the exception, very few agreements in the universe of over 3,000 bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) expressly require ELR. It only appears in some first-generation BITs and in more recent BITs concluded by Argentina, Romania, Turkey, the United Arab Emirates and Uruguay, among others. Very few treaties expressly waive the rule—notably, treaties concluded by countries including Austria, Belgium, Luxembourg, the Belgium–Luxembourg Economic Union (BLEU) and Saudi Arabia. The vast majority of treaties is silent on the applicability of the ELR rule. We review below some examples of those treaty texts.

#### 3.1.1 The Treaty is Silent on Exhaustion of Local Remedies

The vast majority of investment treaties neither requires nor waives the exhaustion of administrative or judicial remedies in the host state before the initiation of international proceedings against it (Government of Canada, 2004; Republic of France, 2006; Federal Republic of Germany, 2008; Republic of India, 2003; Italian Republic, 2003). We discuss case law on the consequences of this approach in Section 3.2.1.

#### 3.1.2 The Treaty Requires Exhaustion of Local Remedies

The condition that ICSID arbitration or conciliation could only be initiated “after the exhaustion of all local administrative and judicial remedies” was included, with slightly varying language, in three BITs concluded by the Netherlands in the early 1970s: with Malaysia (1971), Singapore (1972) and South Korea (1974, presently terminated).<sup>26</sup>

The 1976 Germany–Israel BIT also provided that: “Local judicial remedies shall be exhausted before any dispute is submitted to an arbitral tribunal.”<sup>27</sup>

The 1978 Egypt–Sweden BIT, expressly including the rule, also excluded it when “the application of such remedies [was] unreasonably prolonged,” mirroring the language of the ICCPR.<sup>28</sup>

The 1981 Romania–Sri Lanka BIT requires ELR by employing language similar to that contained in Article 26 of the ICSID Convention: “However, each Contracting Party hereby requires the exhaustion of local administrative or judicial remedies as a condition of its consent to conciliation or arbitration by the Centre.”<sup>29</sup>

<sup>26</sup> Agreement on Economic Co-operation between the Kingdom of the Netherlands and Malaysia, Malay.–Neth., art. 12, (June 15, 1971), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1959>; Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore, Neth.–Sing., art. XI, (May 16, 1972), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2079>; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Korea, Neth.–S. Kor., art. 6, (Oct. 17, 1974), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3120>. (Subsequent Dutch treaties with Senegal (1979), the Philippines (1985) and other BIT partners show that the language remained essentially the same, except for the exclusion of the requirement to exhaust “all local and administrative judicial remedies.”); See Accord relatif à l’encouragement et la Protection des Investissements entre le Royaume des Pays-Bas et la République du Sénégal, Neth.–Sen., art. 10, (Aug. 3, 1979), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2077>; Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, Neth.–Phil., art. 9, para. 1, (Feb. 27, 1985), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2073>.

<sup>27</sup> Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments, Ger.–Isr., (June 24, 1976), art. 10, para. 5, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1344>.

<sup>28</sup> Agreement between the Government of Sweden and the Government of the Arab Republic of Egypt on the Mutual Protection of Investments, art. 8, Egypt–Swed., (July 15, 1978). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1112>.

<sup>29</sup> Agreement on the Mutual Promotion and Guarantee of Investments, Rom.–Sri Lanka, art. 7, para. 2, (Feb. 9, 1981). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2210>.



Two other BITs negotiated by Romania—with Ghana (1989) and Denmark (1994)<sup>30</sup>—require ELR, applicable only to disputes concerning the amount of compensation for expropriation.

The 2002 China–Côte d’Ivoire BIT, in line with most investment treaties negotiated by China, although silent on judicial remedies, requires exhaustion of the “domestic administrative review procedure specified by the laws and regulations” of the host state.<sup>31</sup>

The original text of the 2006 SADC Protocol on Finance and Investment included an ELR requirement (the current text, which is not quoted here, no longer includes it, as the treaty was amended to exclude investor–state arbitration):<sup>32</sup>

Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.

The most recent example available of a BIT requiring the exhaustion of both administrative and judicial remedies is the 2007 Albania–Lithuania BIT:<sup>33</sup>

If such a dispute cannot be settled amicably within six months from the date of the written notification provided in paragraph 1, and an [sic] domestic judicial and administrative remedies have been exhausted, the Contracting Party or the investor shall be entitled to submit the dispute either to [ICSID or ad hoc UNCITRAL arbitration].

In addition to treaties, particularly as a response to the increasing number of investor–state arbitration cases and to the far-reaching interpretations of investment tribunals, several investment treaty models expressly refer to the ELR rule. Published in 2005, the IISD Model International Agreement on Investment for Sustainable Development, in its article on investment disputes, included the ELR rule, but granted the investor the possibility to plead exceptions to the rule based on unavailability of remedies or a “demonstrable lack of independence or timeliness” (Mann, von Moltke, Peterson, & Cosbey, 2005, art. 45, paras. B and C):

**Article 45: Investor/investment–state disputes**

- (B) A dispute between an investor or investment and a host state may not be commenced until domestic remedies are exhausted in relation to the underlying issues pleaded in relation to a breach of the Agreement.
- (C) Where such remedies are unavailable due to the subject of the dispute or a demonstrable lack of independence or timeliness of the judicial or administrative processes implicated in the matter in the host state, an investor may plead this in an application before a panel as a preliminary matter. (Mann, von Moltke, Peterson, & Cosbey, 2005, art. 45, paras. B and C)

<sup>30</sup> Agreement between the Government of the Republic of Ghana and the Socialist Republic of Romania on the Mutual Promotion and Guarantee of Investments, Ghana–Rom., art. 4, para. 3, (Sept. 14, 1989) (not in force), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1459>; Agreement on the Mutual Promotion and Guarantee of Investments, Den.–Rom., art. 4 para. 2, (June 14, 1994), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1027>.

<sup>31</sup> Agreement between the Government of the People’s Republic of China and the Government of the Republic of Côte d’Ivoire on the Promotion and Protection of Investments, China–Côte d’Ivoire, art. 9, para. 3, (Sept. 30, 2002) (not in force). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/722>.

<sup>32</sup> Southern African Development Community Protocol on Finance and Investment, Southern African Development Community Annex 1, art. 28, para. 1, (June 18, 2006). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2730>.

<sup>33</sup> Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, Alb.–Lith., art. 8, para. 2, (Mar. 28, 2007). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/20>.



## Annex A: Investor–state dispute settlement

### Article 5: Conditions and limitations on consent of each Party

No claim may be submitted to arbitration by an investor or investment unless the claimant has demonstrated that the requirement for the exhaustion of local remedies has been complied with or the claimant has been granted a request to a panel for a finding that it is not in a viable position to exhaust local remedies. In the event of the latter case, the Notice of Arbitration shall be accompanied by an express written waiver of any such rights conditional on the initiation of an arbitration. (Mann et al., 2005, annex A, art. 5, para. 2)

The model BIT adopted by the SADC in 2012 includes elaborate language requiring exhaustion of local administrative remedies and pursuit of local remedies for a reasonable period of time. It also lists exceptions: local remedies do not need to be pursued in the absence of “reasonably available” remedies capable of “providing effective relief” in a “reasonable period of time” (SADC, 2012, art. 28, para. 4):

A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment

(a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State, or

(b) unless the claimant State Party demonstrates to the tribunal established under this Article that there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.

The East African Community (EAC) Model Investment Treaty, adopted in February 2016, also requires exhaustion of administrative remedies and pursuit of judicial remedies, incorporating the same language of the SADC Model BIT (EAC, 2016).

Finally, it is important to note that, although not in a treaty or treaty model, South Africa also provides in its domestic law for ELR as a condition to international arbitration relating to foreign investments. The country’s 2015 Protection of Investment Act provides that “[t]he government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies.”<sup>34</sup>

### 3.1.3 The Treaty Requires Pursuit of Local Remedies

Several treaties require investors to *pursue* local remedies in the host state for a certain period—ranging from as long as five years to as short as three months—before resorting to investor–state arbitration. A few other treaties require investors to exhaust local remedies as a condition to accessing international arbitration, but provide for a time limit after which this condition disappears. Both are grouped here under the same category and exemplified below.

The 1975 France–Morocco BIT (terminated in 1999) required ELR exhaustion as a condition to ICSID arbitration, but providing that the condition would “disappear” after two years of the date of first referral to local courts.<sup>35</sup> The 1983 BLEU–Rwanda BIT expressly requires exhaustion of administrative and judicial remedies, but at the same time provides that the requirement “cannot be invoked” after 18 months from the investor’s written

<sup>34</sup> Protection of Investment Act 22 of 2015, (Dec. 15, 2015), §12 para. 5 (S. Afr.). Retrieved from [http://www.gov.za/sites/www.gov.za/files/39514\\_Act22of2015ProtectionOfInvestmentAct.pdf](http://www.gov.za/sites/www.gov.za/files/39514_Act22of2015ProtectionOfInvestmentAct.pdf).

<sup>35</sup> Accord entre le Gouvernement de la République Française et le Gouvernement du Royaume du Maroc sur la Protection, l’encouragement et la Garantie Reciproques des Investissements, Fr.–Morocco, (July 15, 1975) (terminated May 30, 1999), art. 10. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1259>.



notification of the dispute.<sup>36</sup> More recently, the 1992 Jordan–Romania BIT states that the exhaustion condition “cannot be opposed” by the respondent state after six months from the date of the first procedural act before domestic courts.<sup>37</sup>

Under several BITs concluded by countries including Korea,<sup>38</sup> Turkey<sup>39</sup> and the United Arab Emirates (UAE),<sup>40</sup> a dispute may only be submitted to arbitration if it continues to exist after litigation in domestic courts for a specified time.

Several BITs concluded by Argentina—many of which were discussed extensively in investment arbitration case law—require that local remedies be pursued for a specified period without the issuance of a final decision or with the persistence of the dispute after a final decision is made. See, for example, the Argentina–United Kingdom BIT:<sup>41</sup>

(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.

<sup>36</sup> Convention concerning the Reciprocal Encouragement and Protection of Investments, Bel.–Lux.–Rwanda, (Nov. 2, 1983), art. 10, paras. 3–4. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2975>.

<sup>37</sup> Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of Romania on the Mutual Promotion and Protection of Investments, Jordan–Rom., (July 2, 1992), art. 8, paras. 3–4. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1752>.

<sup>38</sup> Agreement between the Government of the Republic of Korea and the Government of the Republic of Indonesia Concerning the Promotion and Protection of Investments, Indon.–S. Korea, (Feb. 16, 1991), art. 9, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1622>. See also Agreement between the Government of the Republic of Korea and the Government of the Republic of the Philippines for the Promotion and Protection of Investments, Phil.–S. Kor., (Apr. 7, 1994), art. 9, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1821> (similar language, but requiring pursuit of local language for three months only).

<sup>39</sup> Agreement between the Government of Romania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, Rom.–Turk., (Jan. 24, 1991), art. 6, para. 4, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2986>; Agreement between the Republic of Turkey and the Republic of Cuba Concerning the Reciprocal Promotion and Protection of Investments, Cuba–Tur., (Dec. 22, 1997), art. VI, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/916>; Agreement for the Reciprocal Promotion and Protection of Investments, S. Kor.–Turk., (May 14, 1991), art. 10, para. 2, Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1840>.

<sup>40</sup> Agreement between the United Arab Emirates and the Belgian–Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, Belg.–Lux.–U.A.E., (Mar. 8, 2004), art. 12, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/425>; Agreement between the Government of the United Arab Emirates and the Government of Azerbaijan on the Promotion and Reciprocal Protection of Investments, Azer.–U.A.E., (Nov. 20, 2006), art. 11, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/243>; Agreement between the Government of the United Arab Emirates and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, U.A.E.–Uzb., (Oct. 26, 2007), art. 9, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2368>.

<sup>41</sup> 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 the Protection of Investments, Arg.–U.K., (Dec. 11, 1990). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/126>. See also *Convenio para la Promoción y la Protección Recíproca de las Inversiones*, Arg.–Bel.–Lux, (June 28, 1990), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/75>; *Vertrag zwischen der Bundesrepublik Deutschland und der Argentinischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen*, Arg.–Ger., (Apr. 9, 1991), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/92>; Agreement between the Government of the Republic of Korea and the Government of the Republic of Argentina on the Promotion and Protection of Investments, Arg.–S.Kor., (May 17, 1994), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/102>; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and The Argentine Republic, Arg.–Neth., (Oct. 20, 1992), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/107>; See also *Convenio entre la República del Perú y la República Federal de Alemania sobre Promoción y Protección Recíproca de Inversiones*, Ger.–Peru, (Jan. 30, 1995), art. 10, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1391>; Agreement between the Federal Republic of Germany and the United Arab Emirates for the Promotion and the Reciprocal Protection of Investments, Ger.–U.A.E., (June 21, 1997), art. 8, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1443> (24-month limitation); *Acuerdo de Fomento y Recíproca Protección de las Inversiones entre la República Oriental del Uruguay y la República Popular de Hungría*, Hung.–Uru., (Aug. 25, 1989), art. 10, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1556>; *Acuerdo entre el Gobierno de la República Italiana y el Gobierno de la República de Venezuela sobre Promoción y Protección de las Inversiones*, It.–Ven., (June, 1990), art. 8, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3381>; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Jamaica, Jam.–Neth., (Apr. 18, 1991), art. 9, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1721>.



(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;

The 1992 Uruguay–Spain BIT also provides for a local litigation requirement, but instead of referring to the persistence of the dispute after the final decision, it refers to cases in which the court “decision is manifestly unjust or contravenes the provisions of this Agreement or any other norm of international law.”<sup>42</sup> The 1991 Uruguay–Poland BIT, in turn, refers to cases in which the final decision breaches a norm of international law, including the provisions of the BIT itself, and cases of denial of justice.<sup>43</sup>

The 2010 Malta–Serbia BIT requires pursuit of local remedies—without establishing a minimum duration of time—before the investor can resort to international arbitration.<sup>44</sup> The 2013 Netherlands–UAE BIT (not in force) requires pursuit of local remedies without a time limitation, but only regarding disputes concerning investments in the UAE.<sup>45</sup>

Oddly, the 2011 Bangladesh–UAE BIT (not in force) provides that the dispute may be submitted to domestic arbitration centres for purposes of ELR.<sup>46</sup>

In many treaties, China requires the exhaustion of its domestic administrative review procedure, the duration of which must not exceed three months.<sup>47</sup> Similarly, many Colombian BITs provide for the exhaustion of administrative or judicial remedies as required by domestic law, but determine that the domestic procedures shall not exceed six months at most (Government of the Republic of Colombia, 2008, art. IX, para. 1).<sup>48</sup>

Finally, under the 2015 Indian Model BIT, investment disputes must be submitted to host state courts or administrative bodies for at least five years for the purpose of “exhausting all judicial and administrative remedies ... for at least a period of five years” (Government of the Republic of India, 2015, art. 15, para. 2). In addition to the time limitation, the model provides for exceptions to the rule based on lack of availability of remedies capable of reasonably providing relief (Government of the Republic of India, 2015, art. 15):

<sup>42</sup> Agreement on the Reciprocal Promotion and Protection of Investments, Spain–Uru., (Apr. 7, 1992), art. XI, para. 3(a). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2287>. See also Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Oriental Republic of Uruguay for the Promotion and Protection of Investments, U.K.–Uru., (Oct. 21, 1991), art. 8, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2372>.

<sup>43</sup> Acuerdo de Protección y Promoción de las Inversiones, Pol.–Uru., (Aug. 2, 1991), art. X, paras. 2–3, Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2190>. See also Acuerdo entre la República Oriental del Uruguay y la Unión Económica Belgo-Luxemburguesa en materia de Promoción y Protección recíprocas de Inversiones, Bel.–Lux.–Uru., (Nov. 4, 1991). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/427>.

<sup>44</sup> Draft Agreement between the Government of the Republic of Serbia and the Government of the Republic of Malta for the Reciprocal Promotion and Protection of Investments, Malta–Serb., (July 2, 2010), art. 9, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3170>.

<sup>45</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Arab Emirates, Neth.–U.A.E., (Nov. 26, 2013), art. 9, paras. 2–3. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4774>.

<sup>46</sup> Agreement between the Government of the United Arab Emirates and the Government of the People’s Republic of Bangladesh for the Promotion and the Reciprocal Protection of Investment, (Jan. 17, 2011) (not in force), art. 9, para. 3. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/276>. See also Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People’s Republic of China concerning the Encouragement and Reciprocal Protection of Investments, Eth.–China, (May 11, 1998), art. 9, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/732>; Agreement between the Government of the People’s Republic of China and the Government of the State of Qatar concerning the Encouragement and Reciprocal Protection of Investments, China–Qatar, (Apr. 9, 1999), art. 9, paras. 2–3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/772>.

<sup>47</sup> Protocol to the Agreement between the Belgium–Luxembourg Economic Union and the Government of the People’s Republic of China on the Reciprocal Promotion and Protection of Investments, Bel.–Lux.–China, (June 6, 2006), art. 8, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/339>.

<sup>48</sup> See also Agreement between the Swiss Confederation and the Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments, Egypt–Switz., (June 7, 2010), art. 12, paras. 2–3. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1113>.



## Article 15

### Conditions Precedent to Submission of a Claim to Arbitration

15.1 In respect of a claim that the Defending Party has breached an obligation under Chapter II, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. ...

For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.

Provided, however, that the requirement to exhaust local remedies shall not be applicable if the investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor.

15.2 Where applicable, if, after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this chapter by transmitting a notice of dispute (“notice of dispute”) to the Defending Party.

### 3.1.4 The Treaty Affirms the States’ Right to Require Exhaustion of Local Remedies

The final part of Article 26 of the ICSID Convention affirms the states’ right to require ELR as a condition of consent to treaty arbitration:<sup>49</sup>

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State *may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention* [emphasis added].

Possibly inspired by the ICSID Convention, the arbitration clauses of some treaties reproduce the language emphasized in the quote above.<sup>50</sup> Such language, merely affirming a right to require, cannot be considered as a requirement, and its use in investment agreements creates interpretation difficulties. Note that such formulation does not clarify, for example, whether states may exercise their right to require ELR even after the investor has initiated arbitration.

### 3.1.5 The Treaty Waives Exhaustion of Local Remedies

Several treaties provide that consent to arbitration implies renunciation of the requirement, or waiver of the right to require, that domestic administrative or judicial remedies be exhausted. This is the case of several BITs signed by Belgium, Luxembourg and BLEU, the earliest being the one between Belgium and Indonesia in 1970.<sup>51</sup> With

<sup>49</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 26, (Mar. 18, 1965), 17 U.S.T. 1270, 575 U.N.T.S. 159.

<sup>50</sup> Agreement between the Government of Jamaica and the Government of the Swiss Confederation for the Reciprocal Promotion and Protection of Investments, Jam.–Switz. (Dec. 11, 1990), art. 9, para. 4, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1723>; Agreement between the Government of the United Arab Emirates and the Government of the Socialist Republic of Viet Nam for the Protection and Promotion of Investments, U.A.E.–Vietnam, (Feb. 16, 2009) (not in force), art. 10, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2370>. See also Agreement between the Government of the People’s Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments, China–Uzb., (Apr. 19, 2011), art. 12, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3357>.

<sup>51</sup> Agreement on the Encouragement and Reciprocal Protection of Investments, Belg.–Indon., (Jan. 15, 1970). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/370>.



slightly different wording, the provision continues to appear in recent BLEU treaties.<sup>52</sup> It also appears in various BITs concluded by other countries, notably from Central and Eastern Europe, including Armenia, Bulgaria, Czech Republic, Croatia, Moldova, Montenegro and Serbia.<sup>53</sup>

Austria has included similar language as of its very first treaty—concluded with Malaysia in 1985—and many subsequent ones.<sup>54</sup> In a notable exception, the 1999 Austria–India BIT qualifies the waiver, providing that, “[i]n case of arbitration ..., the Contracting Party shall not require the exhaustion of domestic administrative or judicial remedies *unless proceedings have been initiated thereunder*” (emphasis added).<sup>55</sup> Therefore, under the treaty, states generally waive their right to require ELR, but reserve the right to require it if local proceedings have already been initiated.<sup>56</sup>

In the opposite direction, several agreements concluded by Saudi Arabia, with some variety in wording, provide that states waive the right to require ELR once the investor initiates arbitration proceedings.<sup>57</sup>

Finally, although not directly waiving the ELR rule itself, Chapter 11 of the NAFTA tacitly waives it, as the text requires investors or investments to “waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach ..., except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.”<sup>58</sup>

<sup>52</sup> Agreement between the Belgium–Luxembourg Economic Union, on the one hand, and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments, Belg.–Lux.–Mont., (Feb. 16, 2010), art. 12, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/389>; Acuerdo entre la Unión Económica Belgo–luxemburguesa y el Gobierno de la República de Cuba para la Promoción y Protección Recíproca de Inversiones, Belg.–Lux.–Cuba, (May 19, 1998), art. 9, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/351>; Convention entre l’Union Economique Belgo–Luxembourgeoise et la République du Burundi concernant l’encouragement et la protection reciproques des investissements, Bel.–Lux.–Bur., (Apr. 13, 1989), art. 8, para. 3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/335>.

<sup>53</sup> See, e.g., Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Croatia on the Reciprocal Promotion and Protection of Investments, Croat.–Jordan, (Oct. 10, 1999), art. 10, para. 2(b), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/866>; Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Armenia and the Kingdom of the Netherlands, Arm.–Neth., (June 10, 2005), art. 9, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/140>; Agreement on Promotion and Reciprocal Protection of Investments Between the Government of the Republic of Serbia and the Government of the Republic of Indonesia, Indon.–Serb., (Sept. 6, 2011) (not in force), art. 11, para. 4, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3172>; Agreement between the Government of Montenegro and the Government of the Republic of Moldova on Promotion and Reciprocal Protection of Investments, Mold.–Montenegro, (June 20, 2014) (not in force), art. 8, para. 2(b), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4750>; Agreement between the Czech Republic and the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investments, Bulg.–Czech, (Mar. 19, 1997), art. 9, para. 4, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/523>.

<sup>54</sup> Agreement between the Republic of Austria and Malaysia for the Promotion of Protection of Investments, Austria–Malay., (Apr. 12, 1985), art. 9, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/201>. See also Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan, Austria–Taj., (Dec. 15, 2010), art. 15, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3308>.

<sup>55</sup> Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments, Austria–India, (Nov. 18, 1999), art. 9, para. 4. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/192> [Hereinafter 1999 Austria–India BIT].

<sup>56</sup> Compare 1999 Austria–India BIT, with Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria, Austria–Nig., (Apr. 8, 2013) (not in force), art. 15. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2972> (prohibiting the investor from submitting a dispute to arbitration “if a court or administrative tribunal of the Contracting Party has rendered a final and binding decision on the merits,” that is, if local remedies have been exhausted).

<sup>57</sup> Agreement between the Czech Republic and the Kingdom of Saudi Arabia Concerning the Encouragement and Reciprocal Protection of Investments, Czech–Saudi Arabia, (Nov. 18, 2009), art. 11, para. 4. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/978>.

<sup>58</sup> North American Free Trade Agreement, (Dec. 17, 1992), 32 I.L.M. 289, 605 (1993), ch. 11, art. 1122 [hereinafter NAFTA]. Retrieved from <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>





### 3.1.6 Hybrid Cases

Two Australian BITs concluded in 1991—with Hungary and Poland<sup>59</sup>—contain both an express requirement and an express waiver of ELR. An investor may submit to international arbitration a dispute arising under the article on expropriation and nationalization, even without recourse to local remedies; therefore, in this respect, the treaty expressly waives the ELR rule. In turn, with respect to disputes under any other provision, the text expressly requires ELR. Similarly, the 1993 Poland–UAE BIT allows the referral of disputes concerning expropriation and transfers to international arbitration without ELR, but expressly requiring ELR for all other disputes.<sup>60</sup>

Another hybrid case is that of the 1991 Romania–Kuwait BIT. It allows an investor to submit to ICSID arbitration any dispute regarding the amount of compensation in case of expropriation or regarding transfers, subject to a time-limited ELR requirement. For other types of disputes, however, only through specific agreement may the parties to the dispute submit it to international arbitration, and subject to ELR without a time limitation.<sup>61</sup>

Yet another hybrid case is that of the 2006 BLEU–Botswana BIT (not in force). The treaty provides for the submission of any dispute to host state courts for the pursuit of local remedies, but allows referral to international arbitration six months thereafter. However, it determines that consent to international arbitration implies a waiver of the ELR rule, as typically provided for in BLEU BITs.<sup>62</sup>

## 3.2 Exhaustion of Local Remedies in International Investment Case Law

Investment tribunals in both ICSID and non-ICSID cases have generally held that, under international investment law, the ELR requirement is waived unless expressly required. Our analysis of the treatment of the ELR in investment case law begins (Section 3.2.1) with the consolidation of the reversal of the traditional international law understanding that ELR applies unless expressly waived.

Many investment tribunals have discussed the nature of the requirement—whether it consists in a jurisdictional condition of the host state’s consent to international arbitration or in a procedural condition of admissibility of an investor’s claim (Section 3.2.2). Despite the conceptual differences, the distinctions have not led to significantly different outcomes. In particular, tribunals have taken consistent views when analyzing the situations under which the requirement can be set aside and determining the practical legal consequences of its non-application. Our overview of situations in which tribunals have determined that investors may or may not bypass the requirement (Section 3.2.3) can be relevant to government officials who are considering including the requirement in their treaties or facing arbitration cases in which an investor attempts to bypass the requirement.

Furthermore, even in the absence of express treaty language on an ELR requirement, certain tribunals have implied it as a substantive element of certain claims—namely, when investors argue that a denial of justice occurred or that a host state court decision amounted to expropriation. Our analysis of this line of cases (Section 3.2.4) can serve as a guidance for policy-makers, who could consider expressly confirming or rejecting this trend in the treaties they negotiate.

<sup>59</sup> Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments, Austl.–Hung., (Aug. 15, 1991), art. 12, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/153>; Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, Austl.–Pol., (May 7, 1991), art. 13, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/163>.

<sup>60</sup> Agreement between the Government of the United Arab Emirates and the Government of the Republic of Poland for the Promotion and Protection of Investments, Pol.–U.A.E., (Jan. 31, 1993), art. 9, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2187>.

<sup>61</sup> Agreement between Romania and the State of Kuwait for the Reciprocal Promotion and Protection of Investments, Kuwait–Rom., (May 21, 1991), art. 10, paras. 3(b) and (4). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3528>.

<sup>62</sup> Agreement between the Belgium–Luxembourg Economic Union and the Republic of Botswana on the Reciprocal Promotion and Protection of Investments, Bel.–Bots.–Lux., (June 7, 2006) (not in force), art. 12, para. 2. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/331>.



### 3.2.1 Case Law Interpreting Silence on Exhaustion of Local Remedies as Waiver

#### A. Within the Context of the ICSID Convention

Academics and ICSID tribunals have consistently interpreted ICSID Convention Article 26 as diverting ICSID arbitrations from the customary international law rule of ELR. The provision reads:<sup>63</sup>

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

The ILC, after endorsing the holding of the ICJ in the *ELSI* case that an important principle of customary law such as the ELR rule could not be “tacitly dispensed with, in the absence of any words making clear an intention to do so,” concluded that a “waiver of local remedies must not be readily implied.” Even so, the ILC acknowledged that waivers are frequent in international law, and saw in the language of ICSID Convention Article 26 “the best-known example” of an express waiver of the ELR rule.<sup>64</sup>

According to the tribunal in *Lanco International v. Argentina*, the rule of exclusivity of forums in the first sentence of Article 26 “means that there is no need to exhaust domestic procedures before initiating ICSID arbitration, unless otherwise stipulated.”<sup>65</sup> Referring to earlier ICSID cases,<sup>66</sup> the *Lanco* tribunal continued that “the second sentence is precisely the waiver, by the Contracting State party, of the prior [ELR] requirement, a requirement that the State may reserve to itself.” Importantly, it indicated that states could require exhaustion as a condition for ICSID arbitration: “(i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause.”<sup>67</sup>

In *Generation Ukraine v. Ukraine*, the tribunal recalled the *Lanco* reasoning. In particular, it held that, should a state wish to require ELR as a condition of consent to ICSID arbitration, the requirement “must be contained in the instrument in which such consent is expressed”—in the case at hand, the investment treaty containing the arbitration clause.<sup>68</sup>

The tribunal in *Maffezini v. Spain* confirmed the understanding that, under traditional international law, ELR is required unless expressly or implicitly waived. However, it read ICSID Convention Article 26 as making it clear that, “unless a Contracting State has conditioned its consent to ICSID arbitration on the prior [ELR], no such requirement will be applicable,” thus reversing the international law rule.<sup>69</sup>

According to the tribunal in *EDFI v. Argentina*, recognizing an implicit ELR requirement “would conflict with the plain reading of Article 26, as well as invite States to mandate [ELR] without giving fair warning of such a stipulation to investors who enter a treaty expecting a clear path to arbitration.”<sup>70</sup>

<sup>63</sup> ICSID Convention, *supra* note 49, art. 26; see also International Bank for Reconstruction and Development. (Mar. 18, 1965). *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, para. 32.

<sup>64</sup> 2006 ILC Draft Articles, *supra* note 6, Art. 15, cmts. 14–15.

<sup>65</sup> *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, para. 37 (Dec. 8, 1998). Retrieved from [http://www.italaw.com/sites/default/files/case-documents/ita0450\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0450_0.pdf).

<sup>66</sup> *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4; *Mobil Oil Corporation et al. v. New Zealand*, ICSID Case No. ARB/87/2.

<sup>67</sup> *Lanco*, *supra* note 65, paras. 38–39.

<sup>68</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, para. 13.5 (Sept. 16, 2003). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0358.pdf>.

<sup>69</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, para. 22 (Jan. 25, 2000). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1487.pdf>. See also *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, para. 69 (Apr. 26, 2005), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0011.pdf>; *Saipem S.p.A. v. the People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, para. 175 (June 30, 2009), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0734.pdf>.

<sup>70</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, paras. 1126–1127 (June 11, 2012). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita1069.pdf>.



The line of cases presented above shows that there is a consolidated view in international investment case law that “Article 26 of the ICSID Convention constitutes an express waiver of the rule of exhaustion of local remedies in ICSID arbitrations.”<sup>71</sup>

## B. Outside the Context of the ICSID Convention

In the first investment arbitration case in the context of the 1987 Agreement for the Promotion and Protection of Investments of the Association of Southeast Asian Nations (ASEAN), *Yaung Chi Oo v. Myanmar*, the respondent objected to the tribunal’s jurisdiction, arguing that the claimant had failed to exhaust local remedies. The tribunal dismissed the objection simply noting that the case was not brought under the domestic law of Myanmar and did not require espousal by the claimant’s home state, and that the 1987 agreement did not contain an ELR requirement.<sup>72</sup>

In *Nykomb v. Latvia*, the first investor–state case under the Energy Charter Treaty (ECT), Latvia argued that disputes breaches of contract must be settled by the proper forum—in this case, Latvian courts—before initiating international arbitration under the ECT. The tribunal understood that Latvia did not intend for its argument to be interpreted as a defence of the applicability of the ELR rule as a procedural requirement under international law. Even so, it saw fit to state its view that the ECT does not contain a general ELR obligation; “on the contrary, according to ECT Article 26(4) the investor has the option of requesting Treaty arbitration even if it has agreed to the jurisdiction of a local forum.” It went as far as to affirm—in a questionable holding—that “no such general obligation to exhaust local remedies can be derived from ... international law in general.”<sup>73</sup>

In the NAFTA context, the *Waste Management II* tribunal affirmed that the NAFTA, “in common with almost all investment treaties,” does not require the exhaustion of local remedies, which remain available until an international dispute is initiated under NAFTA Chapter 11.<sup>74</sup> The tribunal later clarified that Chapter 11, rather than requiring ELR exhaustion as a procedural condition for NAFTA arbitration, requires a waiver of any remaining remedies, including those before administrative and judicial courts of the host state.<sup>75</sup>

In a legal opinion prepared for the respondent in the UNCITRAL case *CME v. Czech Republic*, Christoph Schreuer and August Reinisch stated that, in order to take due account of Czech court decisions on matters of Czech law, the tribunal should await the final decision of pending proceedings in the Czech courts on the matters before the tribunal.<sup>76</sup> Unpersuaded, the tribunal affirmed that doing so would amount to injecting into the applicable BIT an ELR requirement, on which the BIT was silent. It further rejected the ELR rule by expressing concerns about its policy implications: “Arbitration under a bilateral investment treaty would involve a high risk, always being threatened by the Damocles’ sword of annulment on the basis that local remedies had not been exhausted.”<sup>77</sup>

In *Mytilineos v. Serbia and Montenegro*, the UNCITRAL tribunal acknowledged the importance of the ELR rule and recalled that many arbitral tribunals dispensed with it, both in ICSID arbitrations and in other contexts. It reasoned that the same interpretation should be adopted as to the Greece–Serbia and Montenegro BIT, whose fork-in-the-road clause consisted in a tacit waiver of the requirement, according to the tribunal. In line with the *CME* decision, it also indicated policy reasons why “BITs granting private investors direct access to international

<sup>71</sup> Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1370.pdf>.

<sup>72</sup> Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, paras. 40–41 (Mar. 31, 2003). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0909.pdf>.

<sup>73</sup> Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, S.C.C., Award at 10 (Dec. 16, 2003). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0570.pdf>.

<sup>74</sup> Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings, para. 30 (June 26, 2002). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0898.pdf>.

<sup>75</sup> Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, paras 116, 133 (Apr. 30, 2004), 43 I.L.M. 967 (2004).

<sup>76</sup> CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Legal Opinion, paras. 245–247 (May 22, 2002). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0961.pdf>.

<sup>77</sup> CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award, paras. 412–413 (Mar. 14, 2003). Retrieved from [http://www.italaw.com/documents/CME-2003-Final\\_001.pdf](http://www.italaw.com/documents/CME-2003-Final_001.pdf).



arbitration do not require local remedies to be exhausted”: including such a requirement, in the tribunal’s view, “would seriously undermine the effectiveness of this form of dispute settlement.”<sup>78</sup>

### C. Summary of Key Issues

ICSID tribunals have consistently held that, unless expressly required, the ELR requirement cannot be implied in international investment law, a position that they justified by the language of the waiver under ICSID Convention Article 26. However, several tribunals have dispensed with the ELR rule even when the ICSID Convention and the waiver under its Article 26 do not apply. In practice, sometimes based mostly on policy reasons as exemplified by the two UNCITRAL cases above, tribunals have established the understanding that the reversal of the ELR rule (“waived unless required”) extends to non-ICSID arbitration as well (Sornarajah, 2010, p. 221).

#### 3.2.2 Case Law on the Procedural or Jurisdictional Legal Nature of the Requirement

Several tribunals (particularly when faced with requirements to pursue local remedies for a certain period of time, contained in many Argentinian BITs) have discussed whether ELR is a condition of admissibility of a claim (a procedural requirement) or a condition of consent to arbitrate a dispute (a jurisdictional requirement). As the *Abaclat v. Argentina* tribunal explained, although the lack of admissibility and the lack jurisdiction both lead to a tribunal’s refusal to hear a case, they have different natures and consequences:<sup>79</sup>

- (i) While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment;
- (ii) Whereby a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body;
- (iii) Whereby a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will, in principle, not prevent the claimant from resubmitting its claim, provided it cures the previous flaw causing the inadmissibility.

Following ICJ jurisprudence, several investment tribunals consider ELR requirements as admissibility conditions. In turn, other tribunals see it as a jurisdictional requirement—many of them based on the wording of ICSID Convention Article 26, which, as seen above,<sup>80</sup> refers to ELR as a possible “condition of its consent to arbitration.”

The tribunals in the cases of *Abaclat*, *Hochtief* and *Teinver*<sup>81</sup> against Argentina—all interpreting similar time-limited requirements to pursue local remedies contained in the applicable BITs—referred to them as procedural requirements. In particular, *Abaclat* understood the requirement to “relate to the conditions for implementation of Argentina’s consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration.”<sup>82</sup> *Hochtief*, building on ICJ case law, reasoned that, in theory, Argentina could accept or “pardon” the claimant for not complying with the requirement. As such, the requirement must be regarded “as a condition relating to the manner in which the right to have recourse to arbitration must be exercised—as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal.”<sup>83</sup>

<sup>78</sup> *Mytilineos Holdings SA v. the State Union of Serbia & Montenegro and the Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, paras. 189, 204–208, 220–222 (Sept. 8, 2006). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0549.pdf>.

<sup>79</sup> *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, para. 247 (Aug. 4, 2011). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf>.

<sup>80</sup> See *supra* Section 3.2.1.A.

<sup>81</sup> *Abaclat*, *supra* note 79; *Hochtief*, *supra* note 3, para. 96; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. the Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, paras. 135–136 (Dec. 21, 2012). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1090.pdf>. See also *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. the Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf>. (The *Philip Morris* tribunal did “not consider it necessary to characterize the 18-month domestic litigation requirement as pertaining to jurisdiction or to admissibility” (para. 142) and, regardless of this characterization, upheld the holding of the *Teinver* tribunal).

<sup>82</sup> *Abaclat*, *supra* note 79, para. 496.

<sup>83</sup> *Hochtief*, *supra* note 3, para. 96.



In turn, in *Maffezini v. Spain* and in the cases of *Siemens*, *Wintershall*, *Impregilo*, *Daimler* and *ICS*<sup>84</sup> against Argentina, the tribunals regarded the time-limited requirement to pursue local remedies in the applicable BIT as a mandatory condition of consent, which, if not complied with by the investor, should prompt a tribunal to dismiss the case on jurisdictional grounds, absent an alternative basis to establish its jurisdiction. Elaborating on the mandatory nature of the requirement, *Wintershall* stressed that it saw no reason to bypass the requirement: “There can be no presumption, as between Contracting States, that a particular stipulation is ex facie oppressive or that, for any other reason, it should be dispensed or disregarded.”<sup>85</sup>

The ICSID tribunal in *Ömer Dede and Serdar Elhüseyni v. Romania*<sup>86</sup> also declined jurisdiction as it verified that the claimants failed to comply with either of the alternative jurisdictional conditions under the 1996 Romania–Turkey BIT:<sup>87</sup> ELR or expiry of a one-year local litigation period.

Notably, the *Daimler* tribunal, in support of the characterization of the pursuit requirement as jurisdictional, categorically affirmed that “all BIT-based dispute resolution provisions ... are by their very nature jurisdictional.”<sup>88</sup> In the same sense, the *Kiliç v. Turkmenistan* tribunal held, interpreting an ELR requirement in the Turkey–Turkmenistan BIT:<sup>89</sup>

When such conditions [precedent] are set out in the [dispute resolution provisions] of a BIT (as conditions of the Contracting Parties’ offer to arbitrate), which are the very source of an ICSID tribunal’s jurisdiction, compliance with them constitutes a jurisdictional requirement, in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised.

As evidenced by the cases referenced above, the theoretical difference between ELR as a procedural or jurisdictional condition has not led to significantly different outcomes. Whether understood to be jurisdictional or procedural, the application of the requirement has been similar, as well as the application of the exceptions to the requirement, as discussed below (Section 3.2.3).

### 3.2.3 Case Law on Bypassing the Requirement to Exhaust Local Remedies

#### A. Availability, Futility, Ineffectiveness and Other Customary International Law Exceptions to the Exhaustion of Local Remedies Rule

The tribunal in *Loewen v. United States*, in the context of a denial of justice claim, considered whether the ELR rule was excused where there was no available and adequate domestic remedy. According to the NAFTA tribunal, reasonable availability must be assessed “in the light of [the investor’s] situation, including its financial and economic circumstances.”<sup>90</sup> Pointing out that Loewen failed to justify why it concluded a settlement agreement instead of filing an appeal, the tribunal was unconvinced that the settlement agreement was the only course of action reasonably available, and held that Loewen failed to exhaust local remedies.

<sup>84</sup> Maffezini, *supra* note 69; Siemens, *supra* note 3; Wintershall, *supra* note 5, para. 127; Impregilo S.p.A v. Argentine Republic, ICSID Case No. 07/17, Award, paras. 90, 94 (June 21, 2011), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0418.pdf>; Daimler Financial Services AG v Argentine Republic, ICSID Case No ARB/05/1, Award, para. 193 (Aug. 22, 2012), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita1082.pdf>; ICS Inspection and Control Services Limited v. The Argentine Republic, P.C.A. Case No. 2010–9, Award on Jurisdiction, paras. 262, 326–327 (Feb. 10, 2012), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0416.pdf>.

<sup>85</sup> Wintershall, *supra* note 5, paras. 125, 145.

<sup>86</sup> Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22, Award, paras. 186, 262 (Sept. 5, 2013). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw5010.pdf>.

<sup>87</sup> Agreement between the Government of Romania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, Rom.–Turk., (Jan. 24, 1991), art. 6, para. 4. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2986>.

<sup>88</sup> Daimler, *supra* note 84, para. 193.

<sup>89</sup> Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, para. 6.2.9 (July 2, 2013), retrieved from [http://www.italaw.com/sites/default/files/case-documents/italaw1515\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf); Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments, Turk.–Turkm., (May 2, 1991), art. VII, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4785>.

<sup>90</sup> The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF) 98/3, Award, para. 169 (June 26, 2003). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>.



The *Abaclat v. Argentina* tribunal analyzed the consequences of non-compliance with a time-limited local litigation requirement in light of notions of fairness and efficiency, through a weighing of the interests of the host state and the investor. It reasoned that insisting on the litigation requirement would do no harm to Argentina, but would deprive the investor of access to arbitration. Further, it concluded that none of the local remedies available would have been able to effectively resolve the dispute in 18 months, and that they would have been burdensome and caused delays. Accordingly, it held that Abaclat's non-compliance with the requirement did not preclude resorting to arbitration. Similarly, the *Urbaser v. Argentina* tribunal reviewed the various possible domestic litigation paths and concluded that none was suitable for purposes of reaching "a decision on the substance" within the established time limit. It held that "a proceeding that can in no reasonable way be expected to reach that target is useless and unfair to the investor."<sup>91</sup>

Invoking *Abaclat*, the claimant in the UNCITRAL case *ICS v. Argentina* also relied on the futility exception to ELR. Holding that the exception could be implicit, the tribunal seemed to point to a higher threshold of "obvious futility, where the relief sought is patently unavailable." It could not conclude that local remedies would have been completely ineffective, and found no compelling reason to exempt ICS from complying with the requirement.<sup>92</sup>

In *Ambiente Ufficio v. Argentina*, the tribunal confirmed that the futility exception applies to both the requirements to pursue and to exhaust local remedies. It upheld the "well-reasoned and well-balanced restatement of the threshold applicable to the futility exception" in the ILC Draft Articles on Diplomatic Protection, and considered that the threshold was arguably lower in time-limited pursuit vis-à-vis full exhaustion. It upheld the exception, finding that claimants did not have a "reasonable possibility to obtain effective redress from the local courts."<sup>93</sup> Endorsing *Ambiente Ufficio* and the ILC threshold, the *Giovanni Alemanni v. Argentina* tribunal also upheld the exception.<sup>94</sup>

The tribunal in *İçkale v. Turkmenistan* was also faced with a futility allegation, based on alleged unfairness of proceedings and lack of independence in the courts of Turkmenistan. The majority did not accept the arguments, and agreed with Turkmenistan that the local litigation requirement contained in the Turkey–Turkmenistan BIT did not provide for a futility exception.<sup>95</sup> Arbitrator Carolyn Lamm dissented, indicating that, despite the lack of express treaty language, the futility exception was available under customary international law.<sup>96</sup>

## **B. Flexible Application of the Requirement to Exhaust Local Remedies on Grounds of Procedural Economy**

The claimant in the *TSA v. Argentina* case had pursued local remedies for 15 months when it was notified of the decision on appeal, and subsequently decided to initiate ICSID proceedings, three months short of complying with the 18-month local litigation requirement under the Argentina–Netherlands BIT. The tribunal considered that, at that point in time, it was "most unlikely" that a decision could have been obtained, giving the claimant "a fair chance of obtaining satisfaction at the national level," before the expiry of the 18-month period. Therefore, although acknowledging that the ICSID proceedings were prematurely initiated, the tribunal considered that it would be "highly formalistic" to reject jurisdiction based on the failure to observe the 18-month period, and held that such rejection would not prevent the initiation of new ICSID proceedings.<sup>97</sup>

The tribunal in *Teinver v. Argentina* considered that the claimants had not fulfilled the local litigation requirement under the Argentina–Spain BIT at the time of initiation of the arbitration, but that the domestic court

<sup>91</sup> Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction, paras. 194, 202–203 (Dec. 19, 2012). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw1324.pdf>.

<sup>92</sup> ICS Inspection, *supra* 84 note, paras. 265, 269, 273.

<sup>93</sup> Ambiente Ufficio, *supra* note 4, paras. 597, 601–611, 615–621.

<sup>94</sup> Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, paras. 306, 317 (Nov. 17, 2014). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf>.

<sup>95</sup> İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, para. 260 (Mar. 8, 2016). Retrieved from [http://www.italaw.com/sites/default/files/case-documents/italaw7163\\_1.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7163_1.pdf).

<sup>96</sup> *Id.*, Partially Dissenting Opinion, para. 13.

<sup>97</sup> TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, paras. 108–112 (Dec. 19, 2008). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0874.pdf>.



proceedings continued thereafter and that the 18 months had passed during the course of the arbitration. In these circumstances, the tribunal held the claimants to have satisfied the requirement, as forcing claimants to “start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources.”<sup>98</sup>

In *İçkale v. Turkmenistan*, although the majority rejected the claimant’s attempt to invoke futility, it considered that the essential aspects of the dispute had been subjected to local court proceedings between the contracting states, which resulted in the termination of several contracts at issue. The majority concluded that it would not be appropriate to require the claimant to also resort to local remedies, and held the claims admissible.<sup>99</sup>

### C. Importation of Dispute Settlement Provisions from Treaties that do not Require Exhaustion of Local Remedies Through a Most-Favoured-Nation (MFN) Clause

The *Maffezini v. Argentina* tribunal found that the claimant failed to submit the case to Spanish courts for a minimum of 18 months as required by the Argentina–Spain BIT, and reasoned that, had this been Maffezini’s only argument, it would have needed to decline jurisdiction.<sup>100</sup>

However, Maffezini had also argued that, through operation of the MFN clause included in the Argentina–Spain BIT, it was entitled to the more favourable treatment granted by Spain to Chilean investors under the Chile–Spain BIT,<sup>101</sup> which does not include a 18-month local litigation requirement. After examining the literature, case law and Spain’s treaty practice, the tribunal was sympathetic to the application of the MFN clause of the Argentina–Spain BIT to dispute settlement provisions. It considered that “the requirement for the prior resort to domestic courts spelled out in the Argentina–Spain BIT does not reflect a fundamental question of public policy,” and affirmed jurisdiction.<sup>102</sup>

*Maffezini* was the first in a series of cases in which tribunals reasoned in favour of allowing of an investor to bypass a local litigation requirement provided in a BIT through the importation, by operation of the MFN clause contained in the same BIT, of dispute settlement provisions in other BITs that do not contain a time-limited requirement to pursue local remedies before recourse to arbitration.<sup>103</sup> However, several other tribunals held that investors could not rely on the BIT’s MFN clause to bypass the requirement.<sup>104</sup>

### D. Summary of Key Issues

Where the local remedies requirement is explicitly included in investment treaties, investment tribunals have generally been consistent in interpreting that an investor only needs to exhaust local remedies that are “reasonably available” in light of the investor’s situation and that offer “a real chance in practice” or a “reasonable possibility” of obtaining effective redress or adequately and effectively resolving the dispute by reaching a decision on its substance. Tribunals have set aside the ELR requirement when investors successfully demonstrated that recourse to local remedies served no substantial purpose, imposed a significant burden on the investor and the courts or caused substantial delays.

<sup>98</sup> *Teinver*, *supra* note 81, paras. 135–136. See also Philip Morris, *supra* note 81 (The *Philip Morris* tribunal did “not consider it necessary to characterize the 18-month domestic litigation requirement as pertaining to jurisdiction or to admissibility” [para. 142] and, regardless of this characterization, upheld the holding of the *Teinver* tribunal).

<sup>99</sup> *İçkale*, *supra* note 95, para. 262–263.

<sup>100</sup> *Maffezini*, *supra* note 69, paras. 36–37.

<sup>101</sup> Acuerdo entre la República de Chile y el Reino de España para la Protección y Fomento Recíprocos de Inversiones, Chile–Spain, (Oct. 2, 1991), art. 10, para. 2. Retrieved from [http://www.sice.oas.org/Investment/BITSbycountry/BITS/CHI\\_Spain\\_s.pdf](http://www.sice.oas.org/Investment/BITSbycountry/BITS/CHI_Spain_s.pdf).

<sup>102</sup> *Maffezini*, *supra* note 69, paras. 40, 64.

<sup>103</sup> See also Siemens, *supra* note 3; Camuzzi International S.A. v. The Argentine Republic, ICSID Case No. ARB/03/7, Decision on Jurisdiction (June 10, 2005), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0110.pdf>; Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Objections to Jurisdiction (June 17, 2005), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0108.pdf>; Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0807.pdf>; Telefónica S.A. v. The Argentine Republic, Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (May 25, 2006), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0856.pdf>; National Grid plc v. Argentine Republic, UNCITRAL, Decision on Jurisdiction (June 20, 2006), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0553.pdf>; Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic/ AWG Group Ltd. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction (Aug. 3, 2006), retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0049.pdf>; Impregilo, *supra* note 84; Hochtief, *supra* note 3; *Teinver*, *supra* note 81.

<sup>104</sup> *Wintershall*, *supra* note 5, para. 197; *ICS Inspection*, *supra* note 84; *Kiliç*, *supra* note 89.



Most tribunals have held that the futility exception to the ELR rule, recognized in customary international law, is also available under international investment law, even when not explicitly provided for in the applicable treaty. Some have applied—whether or not explicitly referring to it—the threshold for the futility exception established in the ILC Draft Articles, while one tribunal has upheld a higher threshold of “obvious futility” or “patent unavailability” to set aside the ELR requirement. One tribunal also indicated that the threshold could be lower in time-limited pursuit of local remedies vis-à-vis full exhaustion.

Some tribunals have also dispensed with the ELR requirement for reasons of procedural economy. Even acknowledging that the proceedings were prematurely initiated, before fulfilling an ELR requirement, tribunals have indicated that it would be “highly formalistic” or “a waste of time and resources” to require investors to re-file them once the ELR requirement were met. One tribunal held that the investor did not need to exhaust local remedies considering that the home and host states had already litigated the essential aspects of the dispute before host state courts.

Finally, in several cases after *Maffezini*, tribunals have allowed investors to bypass an ELR requirement by importing, through the MFN clause of the same treaty, dispute settlement provisions of other treaties that do not require ELR. However, other tribunals have rejected the possibility of such importation.

### 3.2.4 Case Law on Exhaustion of Local Remedies as a Substantive Standard

#### A. Exhaustion of Local Remedies as a Substantive Standard in Denial of Justice Claims

ELR has been interpreted as a requirement a claimant must fulfill to succeed in a claim of denial of justice. Although not required by investment agreements, the ELR requirement “seems now to have been carried over specifically for denial of justice claims,”<sup>105</sup> as shown in the following overview of the relevant case law.

In the NAFTA context, the tribunal in *Mondev v. United States* was the first to discuss the relationship between ELR and denial of justice. The tribunal recognized the investor’s prerogative under NAFTA Chapter 11 to choose between pursuing local remedies in the host state and, in the alternative, waiving them and commencing international arbitration. Accordingly, it interpreted that the fair and equitable treatment standard under NAFTA Article 1105(1)—which encompasses a guarantee against a denial of justice—must be applied regardless of whether the investor sought local remedies, and concluded that “under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule ‘are interlocking and inseparable’.”<sup>106</sup> Scholars later criticized this holding, as it suggests that under NAFTA the investor does not need to exhaust local remedies before bringing a denial of justice claim (Dumberry, 2014, p. 251). While the tribunal did not uphold an ELR requirement, we note that the investor had already brought his claim before the highest domestic courts (Klafter, 2005, p. 424).

Contradicting *Mondev*, the NAFTA tribunal in *Loewen v. United States* concluded that, for a court decision to amount to a denial of justice at the international level, that decision must be final, issued by a court of last resort of the state’s judiciary; decisions by lower courts, where effective and adequate appeals are reasonably available, could not engage a state’s international responsibility.<sup>107</sup> The tribunal concluded that, by failing to bring the case to the U.S. Supreme Court, Loewen had failed to pursue local remedies and, therefore, could not succeed in his denial of justice claim.

The tribunal in *Waste Management II* recalled that NAFTA Chapter 11 dispenses with the procedural requirement to exhaust local remedies. Even so, following the *Loewen* decision, the tribunal highlighted that, for an investor to succeed in a denial of justice claim, “the [domestic judicial] system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim.”<sup>108</sup>

<sup>105</sup> *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, para. 107 (May 18, 2010). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0043.pdf>.

<sup>106</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, para. 96 (Oct. 11, 2002). Retrieved from <http://www.italaw.com/documents/Mondev-Final.pdf>.

<sup>107</sup> *Loewen*, *supra* note 90, para. 169.

<sup>108</sup> *Waste Management*, *supra* note 75, paras. 97, 116.





In the same sense, but outside the NAFTA context, the claimants in *Jan de Nul and Dredging International v. Egypt* argued that their judicial proceedings before Egyptian lower courts amounted to a denial of justice. Citing *Loewen*, the tribunal considered that the claimants were complaining of a failure of a local court rather than of the Egyptian judiciary as a whole, and found no sufficient basis for a denial of justice claim.<sup>109</sup>

The UNCITRAL tribunal in *Chevron-Texaco v. Ecuador* considered that Article II(7) of the Ecuador–United States BIT, under which the state parties commit to “provide effective means of asserting claims and enforcing rights with respect to investment,” sets out a stand-alone “effective means” standard, which is independent of customary international law on denial of justice. Although convinced that ELR is required in case of denial of justice claims, the tribunal distinguished the case and held that the claims were not subject to the same strict requirement. Under this standard, the claimants were required to use all available remedies that could have rectified the wrong, even if there was not a high likelihood of success. While Ecuador indicated three remedies that the claimants failed to pursue, the tribunal was not convinced that any of them could have been effective and, accordingly, held that they did not need to be exhausted.<sup>110</sup>

In *Pantehniki v. Albania*, the claimant complained of a denial of justice by the Albanian local courts. The sole arbitrator in the case indicated that the claims did not need to be examined in depth, recalling that a “denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole.”<sup>111</sup> He dismissed the denial of justice claim as the claimant failed to bring its case to the Albanian Supreme Court to review the performance of the lower courts.

## B. Exhaustion of Local Remedies as a Substantive Standard in Expropriation Claims

The ICSID tribunal in *Generation Ukraine v. Ukraine*, analyzing the investor’s claim of indirect expropriation, pointed out that it does not suffice for an investor to argue that the investment lost its value and then point to some government action or administrative fault to claim that an internationally wrongful expropriation occurred. It held that, in these cases, the investor’s failure to seek redress before domestic authorities may disqualify the international claim, “not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction.”<sup>112</sup> With these words, the tribunal suggested that pursuit of local remedies may be a substantive requirement for an international claim of expropriation to succeed.

The role of local remedies in the context of an expropriation claim was also analyzed in *Parkerings v. Lithuania*. Without affirming an ELR requirement, the tribunal indicated that an investor must first seek a preliminary determination of the existence of a contractual breach under the contractually chosen forum before it can bring an international claim that such breach amounted to indirect expropriation. Only if the investor demonstrates that she was legally or practically denied the possibility of seeking local remedies should a tribunal decide whether her international rights were violated. Turning to the facts, the tribunal found that the claimant could have complained about the alleged contractual breach before Lithuanian courts. That it did not do so or show “any objective reason to question the Lithuanian Courts’ ability to dispose of the case fairly, competently, impartially and within a reasonable period of time” was decisive for the tribunal to reject the indirect expropriation claim.<sup>113</sup>

The tribunal’s analysis in *Helnan v. Egypt* follows this line of cases. Hotel management company Helnan argued that Egypt had indirectly expropriated its contractual rights when the Egyptian Ministry of Tourism downgraded Helnan’s hotel from five to four stars. While Helnan tried to reverse the decision by writing several times to the ministry, it never pursued a challenge before Egyptian courts. The holding in *Generation Ukraine*, according

<sup>109</sup> Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, paras. 258–260 (Nov. 6, 2008). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0440.pdf>.

<sup>110</sup> Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, UNCITRAL, Partial Award on the Merits, paras. 242, 321, 326, 330–332 (Mar. 30, 2010). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf>.

<sup>111</sup> Pantehniki S.A. Contractors and Engineers v. the Republic of Albania, ICSID Case No. ARB/07/21, Award, para. 96, (July 30, 2009). Retrieved from <http://www.italaw.com/documents/PantehnikiAward.pdf>.

<sup>112</sup> Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, para. 20.30 (Sept. 16, 2003). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0358.pdf>.

<sup>113</sup> Parkerings–Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, paras. 448–449, 463 (Sept. 11, 2007). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>.



to the *Helnan* tribunal, was very relevant to the circumstances in the case at hand: absent a challenge before Egyptian courts, Egypt's downgrading decision could not be seen as a treaty breach; "it needs more to become an international delict."<sup>114</sup>

*Saipem v. Bangladesh* turned away from the above case law. Saipem argued that a substantive ELR requirement in judicial expropriation claims would only exist if the expropriation also consisted in a denial of justice. This was not necessarily the case, according to the claimant, as denial of justice concerns the process (how the legal system functions), while the issue in an expropriation is the final outcome (whether a taking of property occurred). The tribunal agreed with Saipem's analysis and held that it "tend[ed] to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court."<sup>115</sup>

In *Arif v. Moldova*, the claimant complained of measures by Moldovan lower courts that allegedly expropriated his border duty-free shops. Moldova objected arguing that the claim could not be raised to the international level before the investor exhausted local remedies. Similarly to *Saipem*, the arbitrators in *Arif* highlighted the difference between a denial of justice claim, in which the conduct of the judicial system as a whole matters, and an expropriation claim, in which what is relevant is the individual action of a court as a state organ. Importantly, they rejected Moldova's objection, holding that, "as a matter of principle, ... court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made)."<sup>116</sup> Thus, the *Arif* tribunal explicitly rejected the existence of an ELR requirement in a judicial expropriation claim absent a denial of justice claim.

### C. Summary of Key Issues

Tribunals have consistently interpreted that, before bringing a denial of justice claim in an international proceeding, an investor must exhaust local remedies, obtaining a final decision by the highest court of the host state, even when this is not explicitly required in the applicable treaty. Most tribunals have rejected denial of justice claims based on judicial decisions given by courts other than the highest court of the host state. Accordingly, tribunals have incorporated an ELR requirement as a substantive standard of denial of justice claims.

Some tribunals have also considered ELR as a substantive requirement of indirect expropriation claims, suggesting that, absent a challenge to the allegedly expropriatory measures before the domestic courts of the host state, those measures could not amount to a treaty breach. In the context of expropriation by a court, however, other tribunals have indicated that decisions by lower courts can amount to expropriation and that, in those cases, ELR is not a substantive requirement; in this context, ELR would only be required if the claim of judicial expropriation is accompanied by a claim of denial of justice.

<sup>114</sup> *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, para. 148 (July 3, 2008). Retrieved from <http://www.italaw.com/sites/default/files/case-documents/ita0399.pdf>.

<sup>115</sup> *Saipem*, *supra* note 69, para. 181.

<sup>116</sup> *Arif*, *supra* note 71, paras. 345, 347.



## 4.0 Conclusion: Policy Options to Consider

### A. Expressly Requiring Exhaustion of Local Remedies

Not many investment agreements contain either express ELR requirements, waivers or renunciations. In fact, most investment agreements are silent on whether the investor must exhaust local remedies in the host state before initiating international arbitration against it.

Investment tribunals—under the ICSID Convention as well as in other contexts—have consistently implied waiver from investment treaties that are silent on the applicability of the ELR rule, reversing the customary international law presumption that it should apply unless clearly waived. Accordingly, states that wish the ELR rule to apply to the ISDS mechanism in an investment agreement should expressly and unequivocally indicate it, for example, by stating that the investor “shall” or “must” exhaust local remedies before initiating international arbitration. This is the case with the recent models, such as the SADC and Indian models, which, in response to interpretations by investment tribunals, include an ELR requirement. See, for example, the language of the SADC Model BIT (SADC, 2012, art. 28, para. 4(a)):

A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment

(a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State.

While proposing specific measures to strengthen domestic legal systems is beyond the scope of this paper, we stress that states that consider adopting a policy to require ELR in the investment agreements they negotiate should also consider taking measures to strengthen their domestic legal systems. In particular, states should adopt laws and regulations aimed at ensuring that their domestic legal systems provide foreign investors with reasonably available remedies that are capable of providing effective redress within a reasonable period of time. Those measures would be useful in preventing investors from bypassing the requirement by invoking the futility exception to the ELR rule (Section H below).

We recommend against replicating the language of ICSID Convention Article 26 or otherwise affirming that states “may” require ELR. This language, merely affirming the right to require ELR, cannot be considered as an ELR requirement, and its use in investment agreements creates interpretation difficulties. Note that such formulation does not clarify, for example, whether states may exercise their right to require exhaustion even after the investor has initiated arbitration. If used, this formulation should be accompanied with clarification on how and when states may exercise such right.

### B. Explicitly Requiring ELR with Respect to Disputes Pertaining to Certain Subject Matter Areas

Among the treaties providing for ELR, most require it for any investor–state dispute under the treaty. In a few cases, however, treaties determine its selective application. For example, we have seen treaties that expressly require ELR in disputes concerning expropriation or transfers. Contracting states may wish to consider subjecting investment disputes concerning certain subject matters to domestic litigation before elevating them to the international plane.

### C. Providing for Exhaustion of Local Remedies as a Substantive Requirement

A consistent body of international investment case law has held that, to succeed in a claim of denial of justice, an investor must have exhausted local remedies in the respondent state. The rationale for this line of cases is consistent with that of the ELR rule in customary international law: before international proceedings may be initiated, the state must have had the opportunity to correct its conduct; in the case of an alleged denial of justice,



this means giving the state's highest judicial court an opportunity to correct any missteps of lower courts. Some tribunals have indicated, although not as forcefully, that ELR may be a substantive requirement of an indirect expropriation.

In view of the case law, and recalling our considerations in Section B above on the potential for selective ELR requirements depending on the subject matter of the dispute, states may consider expressly providing for ELR as a substantive requirement of certain treaty standards such as denial of justice and indirect expropriation. In addition, the provision could clarify the legal nature of the remedies to be exhausted (Section D below) and refer to the possible exceptions to the ELR rule (Section H below).

#### **D. Determining the Legal Nature of the Remedies to Be Exhausted: Administrative or Judicial**

In treaties requiring ELR, we have found mentions of “local remedies” generically, “local administrative and judicial remedies” in a comprehensive manner, and specific references to the need to exhaust either “domestic administrative review procedures” or “local judicial remedies.” At least two treaty models mandate exhaustion of administrative remedies and mere pursuit (with or without a time limit) of judicial remedies. States negotiating an ELR requirement should phrase it as clearly and specifically as possible to avoid misinterpretation regarding the legal nature of the remedies to be exhausted.

#### **E. Clearly Choosing Between Requirements to Exhaust or Pursue Local Remedies**

Among investment agreements requiring ELR, the requirement as understood in traditional international law tends to appear more frequently in the older treaties. The more recent ones, in turn, normally refer to pursuit of local remedies, with or without a specified time limit, or to ELR with a specified time limit. Tribunals have interpreted that those references, unlike references to ELR without time limits, do not require a final decision by the state's highest court. At the same time, they have held time-limited pursuit requirements and ELR requirements to be similar as to their purpose and as to the applicability of customary international law exceptions such as futility.

States negotiating pursuit or ELR requirements with specific time limits will encounter at least one practical problem: determining the appropriate time limit. While a short period—three or six months—may be enough to exhaust administrative remedies, many if not most judicial systems would not be able to reach a final decision on a moderately complex investment-related dispute in the same period, or even in longer periods, such as 12 or 18 months. On the other hand, requiring pursuit or exhaustion of local remedies for several years—the 2015 Indian Model BIT, for example, requires ELR “for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question” (Government of the Republic of India, 2015, art. 15, para. 2)—might invite investors to attempt to set aside the application of the ELR rule on grounds of futility or undue delay.

An option that could avoid having to choose a time limit could be to include, following the example of the SADC Model BIT, an ELR requirement without reference to specific time limits but with a reference to a “reasonable period of time” (SADC, 2012).

#### **F. Providing for Explicit Language on the Legal Nature of the ELR Requirement**

Many pages of international arbitral awards have been dedicated to the debate on whether the ELR requirement consists in a procedural condition of the admissibility of a claim or a jurisdictional condition of the respondent state's consent to international arbitration. The ICJ considers the ELR rule as a condition of admissibility, a position that seems appropriate given that the jurisdiction of the ICJ is based on its Statute,<sup>117</sup> while ELR is a rule or principle of customary international law. On the other hand, most ICSID tribunals consider it as a condition of consent, which also appears to be an appropriate interpretation, in light of the wording of ICSID Convention Article 26: “[a] Contracting State may require the exhaustion of local administrative or judicial remedies *as a condition of its consent to arbitration under this Convention*” (emphasis added).<sup>118</sup>

<sup>117</sup> Statute of the International Court of Justice art. 36, (June 26, 1945), 59 Stat. 1055, 33 U.N.T.S. 993. Retrieved from <http://www.icj-cij.org/documents/?p1=4&p2=2>.

<sup>118</sup> ICSID Convention, *supra* note 49, art. 26.



Without going as far as stating that we are before “a distinction without a difference,”<sup>119</sup> in most cases the conceptual difference between the two interpretations has not led to differences in the outcomes of the decisions. Whether jurisdictional or procedural, the condition has been applied based on the same standards or set aside in view of the same exceptions. Even so, for improved clarity in treaty texts, we recommend that states include in the investment agreements they negotiate explicit language on the legal nature of the requirement. If drafted as a jurisdictional condition of the states’ consent to international arbitration, the ELR requirement may arguably be made more difficult to bypass, given that, in theory, non-compliance with it by the investor would necessarily lead investment tribunals to declare that they lack jurisdiction.

### **G. Carefully Considering Other Conditions or Qualifications Attached to Exhaustion of Local Remedies**

Many treaties determine that the investor may resort to international arbitration either if the domestic legal system has not rendered a final decision within a specified time period or if, after a final decision has been rendered, “the parties are still in dispute.”<sup>120</sup> Some treaties provide that recourse to arbitration is only possible if the decision of the host state court is manifestly unjust, violates international law (including the provisions of the treaty itself), or consists in a denial of justice.<sup>121</sup>

Such language can be useful to narrow down the instances in which the investor may initiate arbitration. This would emphasize the understanding that recourse to international proceedings after the exhaustion of local remedies serves the purpose of ensuring the state’s compliance with international law, and not of giving the investor a right to an international appeal.

### **H. Expressly Providing for Exceptions and Flexible Application of the Requirement**

In line with the exceptions to the ELR rule recognized in customary international law, investment tribunals have held that foreign investors do not need to fulfil treaty-based ELR requirements in a number of circumstances, including where no remedies are available or there is no real chance in practice that the remedies available could effectively resolve the dispute. In some cases, investment tribunals have also overlooked non-compliance with requirements to pursue local remedies for reasons of procedural economy.

To give guidance to tribunals, states that wish to include ELR requirements in their investment treaties could specify the possible exceptions to the requirement. For example, inspired by the ILC Draft Article 15, the SADC Model BIT dispenses with the ELR rule when the investor establishes that “there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time” (SADC, 2012, art. 28, para. 4(b)).

### **I. Bypassing the Requirement Through the Operation of the MFN Clause**

The *Maffezini* tribunal was the first to allow an investor to bypass an ELR requirement through the importation, by operation of the MFN clause contained in the same treaty, of dispute settlement provisions in other investment agreements that do not contain the requirement. After *Maffezini*, several investment tribunals have allowed the use of MFN to import allegedly “more favourable” dispute settlement clauses from other agreements.

The expansive interpretation of MFN clauses—often in ways that the contracting states did not envision when concluding the treaty—has become a controversial issue in international investment policy. To address this issue, the 2012 SADC Model BIT recommends against the inclusion of an MFN clause (SADC, 2012, art. 28, para. 4), and the 2015 Indian Model BIT does not include one (Government of the Republic of India, 2015, art. 15,

<sup>119</sup> ICS Inspection, *supra* note 84, para. 261.

<sup>120</sup> See, e.g., 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, Arg.–U.K., (Dec. 11, 1990). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/126>.

<sup>121</sup> U.K.–Uruguay BIT, *supra* note 42. See also Poland–Uruguay BIT, *supra* note 43; BLEU–Uruguay BIT, *supra* note 43; Agreement on the Reciprocal Promotion and Protection of Investments, Spain–Uru., (Apr. 7, 1992), art. XI, para. 3(a), retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2287>.



para. 2). Other recent treaties, while maintaining an MFN clause, increasingly include language clarifying that “treatment ... does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements.”<sup>122</sup>

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<sup>122</sup> Comprehensive and Economic Trade Agreement, Can.–E.U., (Oct. 30, 2016), art. 8.7, para. 4. See also European Union–Vietnam Free Trade Agreement, E.U.–Vietnam, (Feb, 2016), art. 4, para. 6, retrieved from [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154210.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf); Trans-Pacific Partnership (TPP), (Jan., 26, 2016), ch. 9, art. 9.5, para. 3, retrieved from <http://www.tpp.mfat.govt.nz/text>; Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, Georgia–Switz., (June 3, 2014), art. 4, para. 5, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4814>; Agreement between the Swiss Federal Council and the Government of the Republic of Tunisia on Reciprocal Promotion and Protection of Investments, Switz.–Tunis., (Oct. 16, 2012), art. 5, para. 5, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4912>; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, Col.–U.K., (Mar. 17, 2010), art. III, para. 2, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3253>; Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Can.–China, (Sept. 9, 2012), art. 5, para. 3, retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476>.



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