

# THE (IN)EFFECTIVENESS OF REQUIRING PRIOR EXHAUSTION OF LOCAL REMEDIES IN INVESTMENT ARBITRATION

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## SUMMARY

The international investment-law regime continues to be mired in a legitimacy crisis that has given rise to important multilateral reform efforts through the United Nations Commission on International Trade Law. A key reform proposal is centred on the introduction of an exhaustion-of-local-remedies requirement. This article critically evaluates the exhaustion-of-local-remedies rule in the context of international investment law, and challenges its interpretation where such clauses already exist in contemporary investment law. The article concludes that investment tribunals have subverted these clauses in various ways, and considers the legal challenges states would need to address to best prevent the subversion of these clauses by investment tribunals in future.

## 1 INTRODUCTION

International investment law is currently mired in an unprecedented legitimacy crisis that has given rise to important multilateral reform efforts.<sup>1</sup> The United Nations Commission on International Trade Law (UNCITRAL) specifically established Working Group III to spearhead multilateral discussions on procedural reforms to the system of investor-state dispute settlement (ISDS).<sup>2</sup> One reform proposal is the introduction of a rule requiring the exhaustion of local remedies before a dispute could be

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<sup>1</sup> Langford "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions" 2020 21 *The Journal of World Investment & Trade* 167 168.

<sup>2</sup> Langford 2020 *The Journal of World Investment & Trade* 170.

submitted to international arbitration.<sup>3</sup> This would align ISDS with other areas of international law, such as international human rights law, where the prior exhaustion of local remedies is usually required.

Recent treaty practice has also seen states increasingly resort to the inclusion of clauses requiring exhaustion of local remedies or prior recourse to local courts. These clauses are usually time bound, and most reform proposals in fact seem to encourage the use of time-bound prior-recourse-to-local-courts requirements.

In principle, this contribution considers these proposals to be admirable. However, in instances where these clauses have been included in treaties, investment tribunals have found several ways around these clauses.<sup>4</sup> This article considers the rationale for the exhaustion-of-local-remedies rule before analysing three ways in which investment tribunals have subverted such clauses. The methods used to subvert an explicit exhaustion-of-local-remedies rule include: (i) an expansive interpretation of the object and purpose of an investment treaty; (ii) the application of a most-favoured-nation (MFN) clause; and (iii) the use of a so-called futility exception. This article critically analyses these three methods used to subvert exhaustion-of-domestic-remedies clauses and their implications for the reform proposals.

## 2 THE EXHAUSTION-OF-LOCAL-REMEDIES RULE

The exhaustion-of-local-remedies rule is a well-established rule of customary international law.<sup>5</sup> In the *Interhandel* case, the International Court of Justice (ICJ) explained that the purpose of this rule was to allow the state in whose territory the alleged internationally wrongful act occurred an opportunity to remedy the violation “within the framework of its own domestic legal system”.<sup>6</sup>

While the exhaustion of local remedies is a principle of customary international law, it does not generally apply where individuals have been granted direct access to international courts or tribunals.<sup>7</sup> In the human-rights context, the requirement for the exhaustion of local remedies does not arise from customary international law, but rather from the provisions of the various human-rights treaties.<sup>8</sup> Therefore, it is not surprising that investment

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<sup>3</sup> UNCITRAL Fifty Second Session 8–26 July 2019 *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session* (1–5 April 2019) A/CN.9/970 par 30.

<sup>4</sup> See, e.g., *Abaclat (formerly Giovanna a Beccara) v Argentine Republic*, ICSID Case No ARB/07/5 Decision on Jurisdiction and Admissibility (4 August 2011) par 580 (*Abaclat* case).

<sup>5</sup> *Interhandel (Switzerland v United States of America)* ICJ Judgment: Preliminary Objections (21 March 1959) (*Interhandel* case) par 27.

<sup>6</sup> *Ibid.*

<sup>7</sup> Dimerkol and Willcocks “Exhaustion of Local Remedies” *Jus Mundi* (undated) <https://jusmundi.com/en/document/wiki/en-exhaustion-of-local-remedies?> (accessed 2022-06-16).

<sup>8</sup> See UNGA *International Covenant on Civil and Political Rights* 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976 art 41(1)(c); Organisation of African Unity *African*

tribunals have generally rejected jurisdictional challenges based on a failure to exhaust domestic remedies in the absence of such a requirement in the applicable treaty.<sup>9</sup> The tribunal in *EDF International SA v Argentine Republic*<sup>10</sup> (*EDF case*) explained that article 26 of the ICSID Convention showcases a clear intention not to require the exhaustion of local remedies.<sup>11</sup>

The tribunal noted that article 26 demonstrates that ICSID arbitration is “to the exclusion of any other remedy” unless otherwise stated.<sup>12</sup> It is therefore not open to states to argue that an implied provision requiring the exhaustion of remedies prior to arbitration exists where they chose not to include one in the applicable treaty consenting to arbitration.<sup>13</sup> The *EDF* tribunal emphasised that holding otherwise would contradict the plain meaning of article 26, and invite states to mandate the exhaustion of local remedies without giving investors expecting a clear path to arbitration fair warning of such a stipulation.<sup>14</sup>

This approach has also been applied in non-ICSID arbitrations, where investment tribunals have interpreted the consent to arbitration as a tacit waiver of the rule requiring the exhaustion of local remedies.<sup>15</sup> Therefore, international investment tribunals usually only require the prior exhaustion of local remedies where the exhaustion of such remedies is required for a breach to be complete, such as in a denial-of-justice claim,<sup>16</sup> or where the treaty (expressly) requires such exhaustion of local remedies.

In the UNCITRAL discussions, some states have argued that requiring the exhaustion of local remedies may grant states the opportunity to improve their own domestic legal institutions. South Africa has argued that the ISDS system takes away international pressure upon states to improve their domestic legal system, government mechanisms and practices by allowing large investors to bypass these systems.<sup>17</sup> The South African submissions also argue that the interpretation of domestic law by international tribunals may in some instances be problematic, particularly where arbitrators interpret domestic law “from a commercial rather than public policy

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*Charter on Human and Peoples' Rights* CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986 art 55.

<sup>9</sup> *Gavrilovic v Republic of Croatia*, ICSID Case No ARB/12/39 Award (26 July 2018) (*Gavrilovic case*) par 889.

<sup>10</sup> ICSID Case No ARB/03/23 Award (11 June 2012).

<sup>11</sup> *EDF case supra* par 1126.

<sup>12</sup> *EDF case supra* par 1126.

<sup>13</sup> *EDF case supra* par 1127.

<sup>14</sup> *EDF case supra* par 1127.

<sup>15</sup> *RosInvestCo UK Ltd v Russia* SCC Case No Abr V 079/2005 Award on Jurisdiction (5 October 2007) par 153; *Bank Melli Iran and Bank Saderat Iran v Kingdom of Bahrain* PCA Case No 2017–25 Final Award (09 November 2021) par 517.

<sup>16</sup> *Big Sky Energy Corporation v Republic of Kazakhstan* ICSID Case No ARB/17/22 Award (24 November 2021) par 451; *Manchester Securities Corporation v Republic of Poland* PCA Case No 2015–18 Award (07 December 2018) par 483; *Philip Morris Brand Sàrl (Switzerland) v Oriental Republic of Uruguay* ICSID Case No ARB/10/7 Award (8 July 2016) par 499.

<sup>17</sup> UNCITRAL *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission From the Government of South Africa* (17 July 2019) A/CN.9/WG.III/WP.176 par 44.

perspective”.<sup>18</sup> The prior exhaustion of local remedies would also allow local courts to pronounce upon these issues of domestic law, and, in general, an international tribunal ought then to defer to the domestic court’s interpretation of domestic law.<sup>19</sup>

South Africa’s submission in this respect is not without merit as controversy over the correct interpretation of domestic law has a precedent in international investment law. In the case of *Perenco v Ecuador*,<sup>20</sup> Ecuador brought a counterclaim against Perenco over pollution caused by its subsidiaries. This counterclaim was adjudged in terms of Ecuadorian domestic law, and in interpreting the domestic law, the tribunal found that the strict-liability regime in Ecuador does not apply retrospectively. Ecuador disagreed with this interpretation and argued on annulment that the tribunal had “so grossly misapplied Ecuadorian law that it should be considered that it did not apply Ecuadorian law at all”.<sup>21</sup> The annulment committee noted that, even if Ecuador’s interpretation were correct, it would not allow the annulment committee to set aside the award. It found that the tribunal was merely required to identify the proper law and endeavour to apply it.<sup>22</sup> Not even a gross misapplication or misinterpretation of domestic law would render an award annulable.<sup>23</sup> Therefore, states have a clear interest in seeking the inclusion of such a rule, albeit that the status of this rule as a jurisdictional or admissibility issue is uncertain, as is discussed in the section that follows.

### 3 EXHAUSTION OF LOCAL REMEDIES: AN ADMISSIBILITY OR JURISDICTIONAL ISSUE

There have been substantial inconsistencies by tribunals in determining whether prior-recourse-to-local-remedies clauses are jurisdictional in nature, or whether they speak to an admissibility issue.<sup>24</sup> In the field of investment law, it has been said that while jurisdiction refers to the tribunal’s ability to hear a case, admissibility is a characteristic of the dispute that has been presented to the tribunal, which may result in its rejection even if it falls within the tribunal’s jurisdiction – for example, if local remedies have not been exhausted when necessary.<sup>25</sup> In terms of customary international law, the exhaustion of local remedies is ordinarily regarded as an admissibility issue rather than a jurisdictional issue as such. Notwithstanding this general position, Abi-Saad has noted that where the requirement of exhaustion of

<sup>18</sup> *Submission from the Government of South Africa* par 45.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Perenco Ecuador Limited v Republic of Ecuador* ICSID Case No ARB/08/6 Decision on Annulment (28 May 2021) (*Perenco Ecuador case*).

<sup>21</sup> *Perenco Ecuador case supra* par 584.

<sup>22</sup> *Perenco Ecuador case supra* par 587.

<sup>23</sup> *Perenco Ecuador case supra* par 96.

<sup>24</sup> *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* ICSID Case No ARB/10/1 Award (2 July 2013); *İçkale İnşaat Limited Şirketi v Turkmenistan* ICSID Case No ARB/10/24 Award (8 March 2016).

<sup>25</sup> *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss v Kingdom of Spain* ICSID Case No ARB/15/23 Decision on Jurisdiction and Admissibility (19 April 2021) par 192.

local remedies is stipulated as “conditions in the jurisdictional title”, they become limits to jurisdiction as well.<sup>26</sup> He notes that, in bilateral investment treaties (BITs), prior-recourse-to-local-remedies clauses and exhaustion-of-local-remedies clauses are usually stipulated as conditions to the state’s consent to arbitration.<sup>27</sup> Therefore, exhaustion-of-local-remedies clauses in investment arbitration should usually be treated as a jurisdictional issue rather than an admissibility issue.

While Abi-Saad’s reasoning is appealing, and in the authors’ view correct, the issue remains unsettled in arbitral practice. Despite this uncertainty over the correct interpretation, the consequences of interpreting a failure to exhaust local remedies as an admissibility issue rather than a jurisdictional requirement is not always immediately apparent. The Singapore Court of Appeal noted:

“The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-splitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of jurisdiction is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID ad hoc committee pursuant to Art 52 of the ICSID Convention (for ICSID arbitrations), whereas a decision of the tribunal on admissibility is not reviewable.”<sup>28</sup>

This finding has also been supported by some other ICSID tribunals,<sup>29</sup> but does not enjoy universal support.<sup>30</sup> The tribunal in *Urbaser* questions the correctness of such broad general statements, as a decision on admissibility can be reviewed before an annulment committee where it is alleged “that the tribunal had ‘manifestly exceeded its powers’”.<sup>31</sup> The tribunal finds that this possibility to review issues on admissibility on these grounds renders “the distinction wrong in theory and useless in practice”.

Notwithstanding the views expressed by the *Urbaser* tribunal, a practical distinction between admissibility and jurisdiction arises from the fact that admissibility issues are more likely to be addressed with the merits.<sup>32</sup> Therefore, in bifurcated proceedings, an interpretation of the exhaustion-of-local-remedies requirement as an admissibility issue could prolong the proceedings, particularly where the tribunal is likely to find the case

<sup>26</sup> *Murphy Exploration & Production Company International v The Republic of Ecuador (II)*, PCA Case No 2012–16 Separate Opinion of Georges Abi-Saab (Partial Award on Jurisdiction) (13 November 2013) (*Murphy* case) par 20.

<sup>27</sup> *Murphy* case *supra* par 21.

<sup>28</sup> *Swissbourgh Diamond Mines (Pty) Limited v Kingdom of Lesotho* PCA Case No 2013–29 Judgment of the Singapore Court of Appeal (27 November 2018).

<sup>29</sup> *Supervision y Control SA v Republic of Costa Rica* ICSID Case No ARB/12/4 Award (18 Jan 2017) par 270.

<sup>30</sup> *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentina Republic* ICSID Case No ARB/07/26 Decision on Jurisdiction (19 Dec 2012) (*Urbaser* case) par 117.

<sup>31</sup> *Urbaser* case *supra* par 117.

<sup>32</sup> *Urbaser* case *supra* par 270.

inadmissible in either event.<sup>33</sup> However, Reinisch notes that while a tribunal is compelled to dismiss a claim over which it does not have jurisdiction, it has discretion in relation to claims that are potentially inadmissible.<sup>34</sup> Therefore, in instances where a tribunal regards exhaustion of local remedies as an admissibility issue, it may still find in favour of a claimant, notwithstanding a failure to have prior recourse to local remedies.

The supposed distinction between jurisdiction and admissibility has also contributed to some tribunals interpreting a prior-recourse-to-local-courts clause as requiring a balancing of interest rather than a strict prerequisite to the exercise of jurisdiction.<sup>35</sup> It is accordingly clear that treating the exhaustion-of-local-remedies requirement as an admissibility issue rather than a jurisdictional issue has profound practical implications. In their reform efforts, states should ideally expressly indicate that the exhaustion of local remedies is a condition to their consent to arbitration, where this is their intention. In the section that follows, this article considers the subversion of the exhaustion-of-local-remedies clause through interpreting the object and purpose of the treaty, which interpretation also arises as a consequence of treating such issues as admissibility issues rather than jurisdictional ones.

#### **4 SUBVERTING THE EXHAUSTION-OF-LOCAL-REMEDIES RULE THROUGH AN EXPANSIVE INTERPRETATION OF THE OBJECT AND PURPOSE OF THE TREATY**

It is an accepted principle of treaty interpretation that clauses in a treaty must be accorded their ordinary meaning in line with the object and purpose of the agreement.<sup>36</sup> However, in investment-treaty arbitration, this seemingly benign principle has given rise to substantial controversy. Some scholars argue that tribunals have been quick to resort to the object and purpose of the treaty to grant investors overly extensive protection. These concerns have also extended to the interpretation of prior-recourse-to-local-litigation clauses. For example, in *Abaclat*, the parties had conflicting views regarding the consequences of non-compliance with the prior-recourse-to-local-courts requirement.<sup>37</sup> The tribunal stated that the claimant's non-compliance with the 18-month-litigation requirement is in itself not sufficient to preclude the claimant from resorting to arbitration.<sup>38</sup> Rather, it is whether non-fulfilment of

<sup>33</sup> See for example, *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Republic of Ecuador II* PCA Case No 2009-23 Third Interim Award on Jurisdiction and Admissibility (27 February 2012) where admissibility issues stood aside to be heard along with the merits in bifurcated proceedings.

<sup>34</sup> Reinisch "Jurisdiction and Admissibility in International Investment law" in Gattini, Tanzi and Fontanelli (eds) *General Principles of Law and International Investment Arbitration* (2018) 130.

<sup>35</sup> *Abaclat* case *supra*; the balancing of interest approach is discussed in more detail under heading 4 of this article.

<sup>36</sup> Art 31 of the United Nations *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331. Adopted: 23/05/1969; EIF 27/01/1980.

<sup>37</sup> *Abaclat* case *supra*.

<sup>38</sup> *Abaclat* case *supra* par 580.

the requirement can be considered incompatible with the object and purposes of the treaty. The tribunal suggested that this would require a careful consideration of the “interests at stake”.<sup>39</sup> In adopting this weighing-of-interest approach, which is allegedly permitted when interpreting a treaty in light of its object and purpose, the interests of the state in being afforded an opportunity to resolve the dispute through its own legal framework must be weighed against the claimant’s interests in accessing “an efficient dispute resolution mechanism”.<sup>40</sup>

The *Abaclat* tribunal concluded that where it appears that the opportunity afforded to a state would have been merely theoretical or could not have resulted in a resolution of the dispute within 18 months, it would be “unfair” to demand that the investor pursue such matter in the local courts.<sup>41</sup> According to the tribunal, this disregard of the prior-recourse-to-local-courts rule would not result in any “real harm” to the state, but would supposedly deprive the investor of an essential path to dispute resolution.<sup>42</sup> It is not clear on what basis the tribunal concluded that the investor would supposedly have been deprived of an important path to dispute resolution, as the treaty does not contain any fork-in-the-road clause. The investor would have been free to approach an international arbitral tribunal after having litigated before domestic courts for a period of 18 months.

The *Abaclat* decision has faced substantial criticism. In *Urbaser*, the tribunal concluded that *Abaclat*’s legal reasoning, or rather lack thereof, is incorrect. The tribunal emphasised that neither the purpose, nor the object, nor the policy underlying this 18-month rule gives rise to a weighing-of-interests standard.<sup>43</sup> The *Urbaser* tribunal also stated that such a test, or standard cannot merely be imposed as an amendment to the treaty language by election of a tribunal.<sup>44</sup> Quoting the tribunal in *ICS v Argentina*, it cautioned, “judicially-crafted exceptions must find support in more than a tribunal’s personal policy analysis of the provisions at issue.”<sup>45</sup> Therefore, if there is to be any weighing of interests, such interests must be weighed in line with the provisions as negotiated and agreed upon by the states. Mere resort to the object and purpose of the treaty does not accordingly provide an adequate basis for the creation of a so-called balancing-of-interests test.

A similar nonsensical approach was followed by the tribunal in *Hochtief*, where the tribunal decided that they could elect to exempt the investor from compliance with the 18-month local-litigation provision, as it viewed this provision as redundant, considering that it brings no benefit to the investor.<sup>46</sup> In *Urbaser*, the tribunal stated that such an interpretation would not coincide with the prevailing understanding of investment-treaty law, as such a

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<sup>39</sup> *Abaclat case supra* par 581.

<sup>40</sup> *Abaclat case supra* par 582.

<sup>41</sup> *Abaclat case supra* par 583.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Urbaser case supra* par 146.

<sup>44</sup> *Urbaser case supra* par 147.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Hochtief AG v Argentine Republic* ICSID Case No ARB/07/31 Decision on Jurisdiction (24 October 2011) par 87.

provision should attend to both parties' concerns.<sup>47</sup> The *Urbaser* tribunal noted that while it may be true that investment treaties aim to promote international investments, they are also aimed at providing "a reasonable and negotiated balance between prospective investor's interests and those of the states".<sup>48</sup> One cannot accordingly bypass an exhaustion-of-local-remedies or prior-recourse-to-local-courts clause merely because it does not benefit the investor.

## 5 SUBVERTING THE EXHAUSTION-OF-LOCAL-REMEDIES RULE THROUGH THE MFN CLAUSE

While the precise formulation of MFN clauses may differ somewhat, these clauses generally require a state to afford the other contracting party or its nationals no less favourable treatment than that which it accords to any third state.<sup>49</sup> In international investment law, it is generally accepted that investors can rely on an MFN clause to effectively import more favourable substantive clauses from other treaties.<sup>50</sup> However, the extent to which an MFN clause permits an investor to rely on a more favourable dispute resolution clause has been more controversial, with some tribunals allowing this<sup>51</sup> and others rejecting it.<sup>52</sup>

The first case in which a tribunal permitted an investor to rely on a more favourable dispute resolution clause in another treaty was the case of *Maffezini v Spain*.<sup>53</sup> Article X of the Spain-Argentina BIT required the investor to have prior recourse to local courts but subject to the condition that the dispute may be referred to international arbitration if the dispute remains unresolved after 18 months. It was uncontested that Mr Maffezini had not submitted any dispute to the local courts and instead sought to rely upon the MFN clause to import a dispute-resolution clause into the then Chile-Spain BIT where no such prior recourse to local courts was required.<sup>54</sup>

<sup>47</sup> *Urbaser case supra* par 141; *CMS Gas Transmission Company v The Argentine Republic* ICSID Case No ARB/01/8 Award (12 May 2005) par 360.

<sup>48</sup> *Urbaser case supra* par 141.

<sup>49</sup> Claxton "The Standard of Most Favoured Nation Treatment in Investor State Dispute Settlement Practice" in Chaisse, Choukroune and Jusoh (eds) *Handbook of International Investment Law and Policy* (2021) 271.

<sup>50</sup> *Vladimir Berschader and Moïse Berschader v Russia* Case No 080/2004, Award (21 April 2006).

<sup>51</sup> *Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd, VTEL Middle East and Africa Limited v Republic of Iraq* ICSID Case No ARB/17/10 Award (3 April 2020) par 195; *Camuzzi International SA v Argentine Republic (II)*, ICSID Case No ARB/03/7 Decision on Jurisdiction (10 June 2005) par 34; *Emilio Agustín Maffezini v The Kingdom of Spain* ICSID Case No ARB/97/7 Decision of the Tribunal on Objections to Jurisdiction (25 Jan 2000) (*Maffezini case*).

<sup>52</sup> *Plama Consortium Limited v Republic of Bulgaria* ICSID Case No ARB/03/24 Decision on Jurisdiction (8 Feb 2005) par 184 (*Plama case*); *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13 Decision on Jurisdiction (29 Nov 2004) par 116–118; *ICS Inspection and Control Services Limited v The Argentine Republic (I)* PCA Case No 2010–09 Award on Jurisdiction (10 Feb 2012) par 309 (*ICS case*).

<sup>53</sup> *Supra*.

<sup>54</sup> *Maffezini case supra* par 21.



In the absence of a sufficiently broad MFN clause, provisions in a treaty with a third state would be *res inter alios acta* concerning Mr Maffezini.<sup>55</sup> However, if the subject matter to which the clause applies is covered by the basic treaty, it follows that matters treated more favourably in the third-party treaty would entitle the beneficiary of the basic treaty to this more favourable treatment by operation of the MFN clause.

According to the tribunal in *Maffezini*, where there is an MFN clause present, a matter would only be *res inter alios acta* where “a matter [is] not dealt with in the basic treaty”.<sup>56</sup> The tribunal noted that the base treaty indicates that the MFN clause applies to “all matters subject to this Agreement”.<sup>57</sup> As the dispute-resolution clause formed part of the agreement, the tribunal found that there was nothing prohibiting the claimant from relying on the more favourable treatment in the Chile-Spain BIT.<sup>58</sup> The only limitation in this respect arises from public-policy considerations.<sup>59</sup> The tribunal gave examples of some of these public-policy considerations, which it considers may bar reliance on the MFN clause including a requirement of the exhaustion of local remedies.<sup>60</sup> However, it appears that in the view of the tribunal these policy considerations would only apply to actual exhaustion of local remedies and not to a time-bound prior-recourse-to-local-courts requirement.

In contrast, the tribunal in *Plama v Bulgaria*,<sup>61</sup> while agreeing with the *Maffezini* tribunal that an MFN clause may sometimes apply to dispute-resolution provisions, found that there is a general presumption that the MFN clause in the base treaty does not permit one to import dispute-settlement provisions set out in another treaty unless there is “no doubt that the Contracting parties intended to incorporate them”.<sup>62</sup> The tribunal in *Plama* cautioned that the findings in *Maffezini* ought not to be treated as general principles guiding future tribunals.<sup>63</sup> It saw the *Maffezini* decision as having arisen from a “curious requirement” that appeared nonsensical.<sup>64</sup> Where no such “curious requirement” is present, a tribunal ought not to resort too readily to the MFN clause in matters concerning dispute resolution. The tribunal remarked:

“It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.”

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<sup>55</sup> *Maffezini case supra* par 45.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Maffezini case supra* par 53.

<sup>58</sup> *Maffezini case supra* par 56.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Maffezini case supra* par 63.

<sup>61</sup> *Supra.*

<sup>62</sup> *Plama case supra* par 223.

<sup>63</sup> *Plama case supra* par 224.

<sup>64</sup> *Ibid.*

In a dissenting opinion in *Impregilo v Argentina (I)*,<sup>65</sup> arbitrator Stern agreed with the *Plama* tribunal in principle. However, she warned that it could perhaps have been better reasoned, as it is difficult to see why dispute settlement clauses should be excluded merely because they are “specifically negotiated”.<sup>66</sup> After all, is it not presumed that all provisions in the treaty are specifically negotiated.

She also rejected the approach in *Maffezini*, and quoted a statement by Douglas wherein he explained that the MFN clause had never before been used to import more favourable dispute-resolution provisions.<sup>67</sup> Douglas argued that the MFN clause has a provenance stretching back hundreds of years, and yet never before had it been used to import more favourable dispute-resolution provisions.<sup>68</sup> Arbitrator Stern noted that the *Maffezini* tribunal and its followers have completely misinterpreted the *Ambatielos*<sup>69</sup> case. She pointed out that these tribunals often overlook a critical aspect of that case, namely that the MFN clause had not been used to alter the conditions of access to a procedure but was merely used to afford the Greek nationals the “substantive protection of an administration of justice”.<sup>70</sup>

Paparinskis also notes that while the broad use of the term “administration of justice” might to the modern eye seem to “extend to procedural rights of international dispute settlement”, that term ought to be viewed in line with the case and legal arguments that was before court at the time.<sup>71</sup> He agrees with arbitrator Stern that the *Ambatielos* case and award extends no further than the substantive rules of denial of justice.<sup>72</sup> Therefore, it would appear that the *Ambatielos* case is not directly apposite to the question of the extent to which the MFN clause can apply to dispute-resolution provisions. Paparinskis accordingly argues that the ordinary meaning of “treatment” would traditionally not extend to procedures for the resolution of disputes, but the parties may naturally depart from this where they intended to do so.

In some post-*Plama* cases, there has been a clearer attempt properly to articulate the general presumption against an MFN clause being applicable to dispute resolution beyond the so-called specifically negotiated argument. In *Daimler v Argentina*,<sup>73</sup> the tribunal noted that while the BIT in that case clearly entitles an investor to receive compensation for violations of the MFN clause, this question arises separately from whether or not the tribunal has the jurisdiction to rule on the MFN-based claim. The tribunal explained:

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<sup>65</sup> *Impregilo SpA v Argentine Republic (I)* ICSID Case No ARB/07/17 Award Concerning and Dissenting Opinion of Professor Brigitte Stern (21 June 2011) (*Impregilo* case).

<sup>66</sup> *Impregilo* case *supra* par 23 (*Impregilo* case).

<sup>67</sup> *Impregilo* case *supra* par 6.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ambatielos, Greece v the United Kingdom*, Judgment, 1952 ICJ 28 (July 1).

<sup>70</sup> *Impregilo* case *supra* par 34.

<sup>71</sup> Paparinskis “MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama?” 2011 *ICSID Review* 14 28.

<sup>72</sup> Paparinskis 2011 *ICSID Review* 27–28.

<sup>73</sup> *Daimler Financial Services AG v Argentine Republic* ICSID Case No ARB/05/1 Award (22 August 2012) (*Daimler* case).

“[S]ince the Claimant has not yet satisfied the necessary condition precedent to Argentina’s consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction.”<sup>74</sup>

The tribunal held that the MFN clause could therefore only be used to bypass a prior-recourse-to-local-courts requirement if it is clear from the treaty that the parties intended for the conditions precedent to accessing international arbitration to be altered by virtue of the MFN clause.<sup>75</sup>

In the recent award of *Kimberly-Clark v Venezuela*,<sup>76</sup> the tribunal noted that its conclusion (that “the MFN clause cannot serve the purpose of importing consent to arbitration when non[e] exists under the basic treaty”) has been enjoying greater support in more recent awards.<sup>77</sup> The tribunal emphasised that an MFN clause does not actually automatically incorporate the provisions of other treaties into the base treaty. Therefore, as with any other substantive provision, a tribunal only has the power to determine if there was a breach of the MFN clause if it has jurisdiction to do so.<sup>78</sup> This contribution agrees with this interpretation, which also accords with the centuries-old understanding of how the MFN clause generally operates. The reliance by tribunals on treaty practice seemingly supporting the opposite conclusion is frankly misplaced. State practice is generally not relevant to the question of treaty interpretation, and is quite useless concerning the MFN clause, considering that there is no customary international law standard on MFN. Where states deliberately depart from the general rules within a specific treaty, that is of course their prerogative, but should have no influence whatsoever on the interpretation of other treaties where this has not been done.

## 6 SUBVERTING THE EXHAUSTION OF LOCAL-REMEDIES RULE THROUGH THE “FUTILITY” EXCEPTION

The futility exception is recognised under customary international law. The exception was initially developed in the context of diplomatic protection and not *per se* in systems where individuals were granted procedural status.<sup>79</sup> A

<sup>74</sup> *Daimler* case *supra* par 199–200.

<sup>75</sup> *Daimler* case *supra* par 204.

<sup>76</sup> *Kimberly-Clark Dutch Holdings, BV, Kimberly-Clark SLU, and Kimberly-Clark BVBA v Bolivarian Republic of Venezuela* ICSID Case No ARB(AF)/18/3 Award (5 November 2021) (*Kimberly-Clark* case).

<sup>77</sup> *Kimberly-Clark* case *supra* par 186; *ST-AD GmbH v Republic of Bulgaria* PCA Case No 2011–06 Award on Jurisdiction (18 July 2013) Exh RL-0035 par 398; *Hochtief* case *supra* par 79; *Enrique Heemsen and Jorge Heemsen v Bolivarian Republic of Venezuela* PCA Case No 2017–18 Award (29 October 2019) Exh RL-0009 par 408; *Venezuela US, SRL (Barbados) v Bolivarian Republic of Venezuela* PCA Case No 2013–34 Interim Award on Jurisdiction (on the Respondent’s Objection to Jurisdiction *Ratione Voluntatis*) (26 July 2016) Exh. CS-0019 par 105. See also, *Kiliç* case *supra* par 7.8.6–7.9.1.

<sup>78</sup> *Kimberly-Clark* case *supra* par 167.

<sup>79</sup> *Gavrilovic* case *supra* par 889.

primary purpose of the futility exception under customary international law is also to prevent states from allowing “the matter to drag on unconscionably”.<sup>80</sup> For the futility exception to be applicable, it does not need to be included specifically in the BIT. BITs have an article on “applicable law” that states that applicable rules and principles of law regulate the BIT. Thus, unless specifically excluded, the futility exception can be applicable through customary international law.

In investment law, there are two main types of exhaustion-of-local-remedies clause, either time bound or not. Exhaustion-of-local-remedies clauses that are not time bound can easily give rise to the futility exception, as it may lead to claimants not having effective recourse available because of a delay in a country’s judicial system. However, in the case of a time-bound clause, such as in *Urbaser v Argentina*<sup>81</sup> (where it specifically stated if a dispute has been submitted to the local courts and remains unresolved after 18 months, it can be submitted to international arbitration), it is more difficult to make use of the futility exception. In such instances, there is generally no need to apply the futility exception, as the clause is time bound. The claimant would be able to submit a claim to international arbitration if it has attempted to exhaust local remedies and has not been able to obtain redress, for example within 18 months, depending on the specific clause. Accordingly, a matter cannot drag on indefinitely. Tribunals have, however, applied the futility exception in relation to time-bound clauses. If a party alleges that it would be futile to submit a case to the local courts, they must provide evidence to that effect.

However, some tribunals have interpreted the time-bound provisions to require the state, effectively, to prove that it would be possible to resolve an investor-state dispute within this time period.<sup>82</sup> The tribunal in *Urbaser v Argentina* held that the exhaustion-of-local-remedies clause “can only impose a duty on an investor to the extent that the Host State can meet its obligation of making available a competent court capable of meeting the target of rendering a decision on the substance within 18 months”.<sup>83</sup> It makes this finding notwithstanding its explanation that the clause does not impose an obligation on the domestic courts to resolve this dispute within this time period. According to the tribunal, the principle of *effet utile* demands this interpretation, as the exhaustion-of-local-remedies requirement would be deprived of its meaning if there is no likelihood of the dispute being resolved within 18 months.<sup>84</sup>

While at first this reasoning may seem to make sense intuitively, it is problematic for several reasons. If it were to be applied more generally, similar clauses in other BITs would virtually immediately be rendered redundant. If, for example, we consider the People’s Republic of China-Belgium BIT, which provides that prior recourse is limited to three months, it

<sup>80</sup> Mollengarden “The Utility of Futility: Local Remedies Rules in International Investment Law” 2019 58 *Virginia Journal of International Law* 403 420.

<sup>81</sup> *Supra*.

<sup>82</sup> *Urbaser case supra* par 192.

<sup>83</sup> *Urbaser case supra* par 193.

<sup>84</sup> *Ibid*.

seems impossible that any dispute would ever be resolved within such a short space of time. A 2013 study by the Organisation for Economic Co-operation and Development (OECD) found that the average time to resolve a commercial dispute within Belgium is around 505 days.<sup>85</sup> Therefore, if the tribunal in *Urbaser* were correct, and the obligation is conditional on the state demonstrating that it should at least be theoretically possible to resolve an investor-state dispute at first instance within the stipulated time period, Chinese investors could never be required to have prior recourse to Belgian courts.

Similarly, the Swiss-Egypt BIT provides that disputes must be submitted to the local courts before they may be submitted to international arbitration. This provision is subject to a stipulation that, if the dispute had not been resolved in the local courts within six months, the matter may then be referred to international arbitration. As with the Belgian courts, it is highly unlikely that the Swiss courts would be able to resolve an investor-state dispute within six months. The same OECD study indicates that Swiss courts take, on average, 390 days to resolve a commercial dispute at first instance,<sup>86</sup> while, in Egypt, sources indicate that such disputes often take in excess of a thousand days,<sup>87</sup> well beyond the 6-month time period. This BIT was concluded in 2010 – not long before the completion of the OECD study – making it clear that, at the time the BIT was concluded, there was no reasonable possibility of a dispute being resolved within six months. Therefore, an interpretation that only requires an investor to have prior recourse to local courts if the dispute is reasonably likely to be resolved within six months would deprive this clause of any meaning and render it *void ab initio*.

It is a well-established principle of treaty interpretation that an interpretation rendering a clause redundant must be avoided.<sup>88</sup> The principle of contemporaneity can perhaps act as a counterbalance to these seemingly conflicting interpretations of the principle of effectiveness. If it is clear that, at the time of the conclusion of a treaty, a dispute would not have been capable of resolution within the time-bound period, the mere fact that a dispute is unlikely to be resolved within that time period would not be sufficient to excuse a claimant's failure to attempt prior recourse to domestic courts. This interpretation would avoid a situation where clauses are effectively rendered *void ab initio*.<sup>89</sup>

Nevertheless, it would be prudent for states contemplating time-bound exhaustion-of-local-remedies clauses to consider the prescribed time

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<sup>85</sup> OECD *What Makes Civil Justice Effective?* (2013) 11.

<sup>86</sup> *Ibid.*

<sup>87</sup> McMullen "The Development of Egyptian Alternative Dispute Resolution" (6 September 2013) <https://mediate.com/the-development-of-egyptian-alternative-dispute-resolution/> (accessed 2023-01-23).

<sup>88</sup> (1) *Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Gürış İnşaat ve Mühendislik Anonim Şirketi (Gürış Construction and Engineering Inc) v Syrian Arab Republic* ICC Case No 21845/ZF/AYZ Final Award Partial Dissenting Opinion of Nassib G Ziade (31 August 2020).

<sup>89</sup> *ICS case supra* par 317.

carefully. It is difficult to see the purpose of establishing a particularly short time period such as three months. These short time periods risk turning the clause into a mere waiting period. However, while the purpose of a shorter time-bound exhaustion-of-local-remedies clause might be more difficult to ascertain, this does not in itself mean that such clauses serve no purpose. Paparinskis correctly notes that possible benefits of the clause are to provide a state with greater clarity on the merits of the case, which may improve the chances for successful negotiations.<sup>90</sup>

## 7 CONCLUSION

In this article, it has become apparent that the introduction of an exhaustion-of-local-remedies requirement seems increasingly likely as part of the multilateral reform efforts underway through UNCITRAL Working Group III. However, most states appear to prefer a time-bound clause, and it seems more likely that this option will be followed than a strict exhaustion-of-local-remedies clause. In their efforts to reform the investment-law system, states need to remain cognisant of the existing interpretation of such time-bound clauses, and the methods used by arbitral tribunals and investors to subvert these clauses.

States should ideally express a clear view on the nature of the exhaustion-of-local-remedies clause – that is, whether it should be treated as affecting the jurisdiction of the tribunal or as an admissibility issue. From this article, it should be clear that where an exhaustion-of-local-remedies clause is stipulated as a condition to a state's consent to arbitration, it ought to be treated as a jurisdictional issue rather than an admissibility issue.<sup>91</sup> Notwithstanding this position, it is equally clear that tribunals have not always followed this approach.

The implication of treating such clauses as an admissibility issue rather than a jurisdictional issue also has profound practical implications. As showcased in this article, treating the exhaustion-of-local-remedies requirement as an admissibility issue may confer much broader discretion upon a tribunal to excuse non-compliance than states had intended at the time of concluding the treaty. It also gives rise to the problematic balancing-of-interest approach, where tribunals effectively rewrite treaties to offer investors more favourable treatment.<sup>92</sup>

In their reform efforts, states also need to pay adequate attention to the formulation of any MFN clauses. This article has clearly showcased the dangers of a broad MFN clause being used to subvert the exhaustion-of-local-remedies clause.<sup>93</sup> Despite this danger, the authors maintain the view that the ordinary meaning of “treatment” would not extend to procedures for the resolution of disputes. In so doing, this article does not lose sight of the fact that some states seek to include provisions for dispute resolution within

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<sup>90</sup> Paparinskis 2011 *ICSID Review* 54.

<sup>91</sup> See heading 3 above.

<sup>92</sup> See heading 4 above.

<sup>93</sup> See heading 5 above.

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the meaning of “treatment”.<sup>94</sup> Although such an extension of the term “treatment” to dispute-resolution procedures is the prerogative of those states, it is irrelevant to the interpretation of other treaties where states did not have a similar intention to expand the ordinary meaning of “treatment” to include provisions for dispute settlements. This interpretation accords best with the centuries-old understanding of the MFN clause, as correctly pointed out by Paparinskis.

This article has also critiqued the interpretation of the futility exception by some tribunals.<sup>95</sup> In particular, it is argued that the interpretation requiring a state to prove that it would theoretically be possible to resolve an investor-state dispute within the minimum time period during which parties must litigate before domestic courts risks rendering many time-bound prior-recourse-to-local-remedies clauses effectively *void ab initio*. As showcased in this article, few (if any) courts would be able to resolve an investor-state dispute within the short time periods often stipulated in such treaties.<sup>96</sup> This interpretation should be rejected for this reason alone, as a treaty must be interpreted in such a manner that it contains no nugatory provisions.<sup>97</sup> Nevertheless, states should use the multilateral reform efforts to clarify the purpose of such prior-recourse-to-local-remedies clauses and the extent to which it actually demands possible resolution of the dispute within the stipulated time period.

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<sup>94</sup> See for example, Albania-United Kingdom BIT art 3(3).

<sup>95</sup> *Urbaser case supra*.

<sup>96</sup> See heading 6 above.

<sup>97</sup> *Güris case supra*.