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THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN THE BITS OF TURKMENISTAN

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Introduction

International investment law has a reputation for being an exotic (Koskenniemi 2014: 11), and obscure legal system that lets corporations sue States (Provost and Kennard 2015). The reputation is well earned, for the intricacies of the system have confused the many. Sufficient attention has already been paid by scholars, academics, and judges to the obvious inconsistencies and inaccuracies generated by it.² An argument could be made that, many of the issues associated with the regime have to do with the network of Bilateral Investment Treaties (BITs) that form the substantive legal base of the system.

In recent years, a number of States have reviewed their BITs and reintroduced a mandatory requirement to go through local legal machinery or exhaust local remedies³ before seeking remedies for alleged damages under international law (Brauch 2017: 1). One of the reasons for such a decision is that the international investment tribunals have had rather inconsistent approach to the interpretation of local remedies provisions in Investor State Dispute Settlement (ISDS) clauses in certain cases allowing investors to bypass the requirement.

Typology of The Local Remedies Rule in Investment Treaty Practice

Fragmented substantive nature of the international investment law regime leaves sufficient room for States to experiment with the local remedies rule. It also makes it rather challenging to postulate a single and universal example of exhaustion of local

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² For instance, see: Schreuer (2011); Schuetz (2010); Egli (2007); Diel-Gligor (2017).

³ For instance, see Article 14.3 on Exhaustion of Local Remedies, Notice and Consultations of the India's Model BIT.

remedies provision. There are only a handful of first-generation BITs and treaties with investment chapters that expressly require the ELR.⁴ The majority of BITs are either silent on the rule or have a substitute in form of a requirement to pursue local remedies before taking a dispute to an international tribunal (Brauch 2017). Although one might argue that the requirement to pursue domestic remedies for a certain period of time does not reflect the ELR.⁵ The present paper argues and treats the ELR and a mandatory requirement to pursue local remedies in the host State for a certain period as being of the same nature.⁶

Many BITs provide that investor may initiate international arbitration only after a specified period of negotiations, conciliations or meditation. It has to be noted that there seems to be a bit of a quibbling over the semantics, whether these sorts of time periods are to be labeled *cooling-off* or *waiting period*.⁷ They serve same practical purpose of solving the conflict and avoiding the need for an international arbitration. The rule is often seen as analogue of exhaustion of local remedies rule.⁸ During the cooling-off/waiting period parties to a dispute have to solve the dispute either through negotiations, conciliations or meditation procedures. Administrative or judicial remedies usually are not covered under this rubric (Brauch 2017: 2). In a number of cases tribunals had to elaborate whether such provisions constituted a bar to jurisdiction or were a mere procedural requirement that could be dismissed. The ICSID tribunals have not been consistent with regard to legal identity of the requirement. In certain cases, both the ICSID and other investment tribunals (Ethyl Corp'n. Arb., 1998); (Ronald S Lauder Arb., 2001: *para* 184) held that it was a mere procedural requirement and it could be overlooked for the benefit of other considerations such as the impossibility of reaching a settlement within established timeframe under a BIT, futility

⁴According to Brauch (2017), Agreement on Economic Co-operation between the Kingdom of the Netherlands and Malaysia 1971, Agreement on Economic Cooperation Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore, 1972, and Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Korea, 1974 (presently terminated).

⁵*Siemens AG v The Argentine Republic* (2004) Decision on Jurisdiction, para 104; *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision on Preliminary Questions on Jurisdiction ICSID (2005); *Hochtief v. the Argentine Republic*, Decision on Jurisdiction ICSID (2011), para. 48

⁶Brauch (2017: 2); see also, *WintershallAktiengesellschaft v. The Argentine Republic*, Award ICSID (2008), para. 124.

⁷ See Brauch (2017: 2) and Schreuer (2004: 238).

⁸*Ethyl Corporation v The Government of Canada* (1998) Decision on Jurisdiction, para. 84

of negotiations between the parties or for the sake of a procedural economy.⁹ And yet, in an *obiter dictum* in *Enron Corpn. Arb.* (2004: para 84) the Tribunal held that:

“Such requirement [cooling-off/waiting period] is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.”

In the *Murphy Exploration and Production Company International Arb.* (2010: 149) the Tribunal found that the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period is a fundamental requirement claimant must comply with to request arbitration under the ICSID rules.

On the other hand, there are cases where tribunals held that non-compliance with the waiting period could constitute a bar to part of the claim.¹⁰ It should be noted though that rather inconsistent approach of the tribunals to the subject matter could be justified either by the wording of the provision in the relevant legal instrument of the circumstances and the factual matrix of a case. However, there are also cases where investment tribunals reach a completely different conclusion from reading the very same ISDS provision.¹¹ In this sort of cases, it is important to look into reasoning and theoretical approach of the tribunals to understand their dispositions, tactics, techniques with regard to the matter.

Other than cooling-off or waiting period provisions there are ones classified as a fork-in-the-road provision. Fork-in-the-road clauses require the investors to submit an investment dispute either to the domestic courts or the international forum of his choice. They are attached to the consent provisions of certain BITs (Schreuer et al. 2010: 365). Once the investor starts proceedings in the domestic forum, it deprives him of the right to resort to international arbitration. Whatever choice the investor makes it is final. An important difference of a fork-in-the-road provision from an ELR clause is that it is not a precondition for an investor to submit a claim to the international arbitration. The provision wording might differ from one agreement to another. For this reason, it is not

⁹*Ethyl Corporation v The Government of Canada* (1998) Decision on Jurisdiction, para. 84; Ronald S. Lauder v. the Czech Republic, Final Award UNCITRAL (2001), para. 184.

¹⁰*Antoine Goetz et consorts v République du Burundi* (1999) Award, para. 90 – 93; Schreuer (2004: 238).

¹¹See, for example *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 and *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1

viable to postulate a single example as a universally representative. Despite differences in wording all of them serve single practical purpose – define finality of choice for the investor.¹²

Some investment treaties give priority to local administrative and judicial remedies. In order to bring a dispute in front of an international tribunal the investor has to bring the dispute before the competent tribunal of the host State. This sort of provisions are very similar in nature to the ELR.¹³

There are investment agreements that grant the investor to bring an arbitration case against the host State provided that they had initiated proceedings in the local courts first, but before a final judgment has been made.¹⁴

A number of investment agreements provide for more than one forum for an investor to have recourse in case of a dispute (Sauvant et al 2010: 440). Investment agreements also may have provisions that are similar to the ELR rule and ultimately can have effect upon the jurisdiction of a tribunal. It is important to understand interaction between fora as they are closely linked to the concept of ELR and jurisdiction of international tribunals.

It would be naïve to assume that the typology and formulations of rule given above represent an exhaustive list. In certain instances, it is difficult to draw a clear-cut line differentiating the legal pedigree of one provision from another. The difference between provisions outlined above is arbitrary and to a greater extent depends on the success of an argument one can put forward to make his case. And yet one should not be able to deny the usefulness of the typologies of the rule in organizing and further developing the analytical space for the purposes of the present paper.

BITS Requiring Exhaustion of Local Remedies

There are only three treaties concluded by the Netherlands in the early 1970s that expressly require “the exhaustion of all local administrative and judicial remedies” before taking a claim to the ICSID (Brauch 2017: 7). Despite the slight differences in

¹² For instance, see *Chile - Indonesia BIT*, 1999; Estonia Model BIT 2010.

¹³ See Article 8 of Argentina-UK BIT (1993)

¹⁴ See Article 9 (3) of Finland and El Salvador BIT (2002); Agreement Between the Government of the State of Israel and the Government of Ukraine for the Reciprocal Promotion and Protection of Investments 2010.

the wording, all of the provisions serve the same legal and practical purposes. It would not make much of a difference picking one or the other for the sake of providing an example. Article XI of the *Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore* reads:

*“The Contracting Party in the territory of which nationals of the other Contracting Party make or intend to make investments, shall after the exhaustion of all local administrative and judicial remedies, agree to any demand on the part of such nationals to submit, for arbitration or conciliation, to the Centre established by the Convention of Washington of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, any disputes that may arise in connection with the investments.”*¹⁵

The clause clearly reads that the investor has to exhaust local remedies before bringing the claim before the ICSID. The track record of the investment arbitration provides a number of examples where tribunals allowed to bypass a local litigation requirement by importing a dispute settlement provision from another BIT that did not containing such requirement. *The Maffezini case* (2000) was the first case that allowed bypassing the requirement, through the operation of the MFN clause.¹⁶ After *Maffezini*, several tribunals allowed to bypass an ELR clause by importing dispute settlement provisions of other treaties that did not have such requirement (Brauch 2017: 7). *The Tribunals in the TSA v. Argentina case* (1992), *the Teinver v. Argentina case* (2012), and *the İçkale v. Turkmenistan* (2014) case dismissed the ELR for various reasons that will be discussed further down the line. While the reasoning of some of the tribunals find justification and draw on exception allowed general international law such as the futility exception or unavailability of domestic remedies. Other tribunals justified their decision for reasons of “procedural economy”, dispensing the requirement as not to be “highly formalistic” or indicating that it would have been “waste of time and resources” to require investors to pursue local remedies (Brauch 2017: 21). It should be noted that these sorts of justification and reasoning do not find support in international law.

¹⁵Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore 1972.

¹⁶Decision on Objections to Jurisdiction.

ELR Waivers in Bilateral Investment Treaty Practice

Article 26 of the ICSID Convention has been interpreted as a waiver to claim the right of exhaustion of local remedies unless a treaty in question expressly affirms it. The article recognizes exhaustion of local remedies as an element of State's consent to arbitration.¹⁷ It has been recognized as the expression of self-contained and autonomous nature of the arbitration procedures under the ICSID Convention (Schreuer et al. 2010: 351). In other words, it makes arbitration procedures under the ICSID immune to the ELR requirement under general international law unless the requirement is contained in a relevant legal instrument. The reasoning found its practical expression in the *Generation Ukraine Arb.* (2003). The Tribunal stated that a logical consequence of exclusivity of ICSID arbitration vis-à-vis any other remedy and implied waiver contained in the second sentence of Article 26 is the waiver by Contracting States to the ICSID Convention of the local remedies rule.¹⁸

Bilateral Investment Treaties of Turkmenistan

As of January 2018, Turkmenistan concluded 26 BITs.¹⁹ Out of the existing 26²⁰ agreements signed by Turkmenistan 18 have been ratified, entered and continue to be in force.²¹ Turkmenistan does not have a model BIT, consequently each and every of the 26 BITs vary in sophistication, language and its legal pedigree. This proves legal appraisal of BITs concluded by Turkmenistan, in general, and the ISDS clauses contained in those agreements, in particular, a justifiable endeavor. However, an examination of all existing 26 BITs is fraught with difficulties. First, only 15²² out of 26 BITs are readily available online; Second, a certain level of difficulty is posed by a language barrier because some of the BITs are available either in English, French,

¹⁷Article 26, the ICSID Convention: "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."

¹⁸*Generation Ukraine v Ukraine* (2003) Award, para. 13.4

¹⁹UNCTAD, 'Turkmenistan'.

²⁰ The agreements on reciprocal promotion and protection of investment between Belgium – Turkmenistan and Luxemburg - Turkmenistan of 1989 are listed as two separate agreements on the UNCTAD's webpage. However, the two Agreements could be categorized as the one between the United Soviet Socialist Republics and the Government of the Kingdom of Belgium, and in the name of the Government of the Grand-Duchy of Luxemburg. This brings the total number of BITs to 26.

²¹UNCTAD, 'Turkmenistan'.

²² On UNCTAD's Investment Policy Hub page there are 16 BITs available online. However, the file attached to a BIT link between Uzbekistan and Turkmenistan is in fact one between Uzbekistan and the Republic of Turkey.

German, Russian, Romanian or Slovakian languages. The BITs available in French, German, Romanian and Slovakian language are beyond the scope of examination in this paper. It should also be noted right at the outset that other Treaties with Investment Provisions (TIPs) and Investment Related Instruments (IRIs) are not going to be examined in this paper either.

The BITs analyzed in the present paper are presented in a chronological order beginning from the ones Turkmenistan has inherited from the USSR: 1989 Belgium/Luxemburg – Turkmenistan, 1992 Turkey – Turkmenistan, 1994 Pakistan – Turkmenistan, 1995 Egypt – Turkmenistan, 1995 Israel- Turkmenistan, 1995 UK – Turkmenistan, 1998 UAE – Turkmenistan, 2006 India – Turkmenistan, 2008 Switzerland – Turkmenistan, 2009 Russia – Turkmenistan, 2011 Bahrain – Turkmenistan.

Article 10 of the *Agreement between the United Soviet Socialist Republics (USSR) and the Government of the Kingdom of Belgium, and the Government of the Grand-Duchy of Luxemburg* (1989 Belgium/Luxemburg – Turkmenistan) holds that “[t]he Parties shall endeavor to settle the dispute through negotiations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels.” In case parties to the dispute fail to resolve the dispute within six months from the notification, the dispute shall be submitted to international arbitration. Here the clause does not require exhaustion of local remedies but prescribes a mandatory six months’ period of negotiations or conciliation through diplomatic channels.

Article 7 of the *Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments* (1992 Turkey – Turkmenistan) holds that “[t]he investor and the concerned Party shall endeavor to settle these disputes by consultations and negotiations in good faith.” The second paragraph grants investors the right to submit the matter to the International Center for Settlement of Investment Disputes (ICSID), an ad hoc court of arbitration under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL) or the Court of Arbitration of the Paris International Chamber of Commerce. Paragraph 2 of Article 7 concludes saying that the investor can exercise the right “provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.” Rather unusual wording of the clause has already proved itself to be a challenging in its application under the ICSID (Demirkol 2016) and drew

to itself some academic attention.²³ Position of the present paper with regard the article is going to be presented further down the line.

Article 7 of the *Agreement between the Government of the Islamic Republic of Pakistan and the Government of Turkmenistan on the Reciprocal Promotion and Protection of Investment* (1994 Pakistan – Turkmenistan) prescribes six months' negotiations as the first step of ISDS. In case negotiations fail to resolve the dispute, the matter may be submitted to a competent court of the party hosting; if both contracting States are members ICSID, the dispute can be decided in the court of arbitration; if one or both of the Parties are not members of the Convention, the dispute will be settled by an Ad Hoc court of arbitration in accordance with the UNCITRAL rules. There is no requirement to exhaust local remedies.

Article 9 of the *Agreement between the Government of the Arab Republic of Egypt and the Government of Turkmenistan Concerning the Promotion and Reciprocal Protection of Investments* (1995 Egypt – Turkmenistan) urges to solve the disputes in an amicable way. In case they fail to resolve the dispute within six months, the matter can be presented before the court of arbitration in accordance with the UNCITRAL rules, unless the Parties otherwise agree.

Article 8 of the *Agreement between the Government of the State of Israel and the Government of Turkmenistan for the Promotion and Reciprocal Protection of Investments* (1995 Israel - Turkmenistan) holds that the Contracting Parties consent to submit any legal dispute arising between a Contracting Party and an investor of the other Contracting State to ICSID if the dispute cannot be resolved amicably or otherwise, within three months from written notification of its existence. Thus, international arbitration of disputes is the only option available under this BIT.

Article 8 of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments* (1995 UK – Turkmenistan) stipulates that unless the dispute had not been resolved amicably after a period of four months from the date of written notification, it can be submitted to ICSID; the Court of Arbitration of the International Chamber of Commerce; an international arbitrator or ad hoc arbitration

²³ For instance, see Demirkol (2016).

tribunal to be appointed by a special agreement or established under the Arbitration Rules of the UNCITRAL if an investor concerned so wishes.

Article 8 of the *Agreement between the Government of the United Arab Emirates and the Government of Turkmenistan for the Promotion and Reciprocal Protection of Investments* (1998 UAE – Turkmenistan) requires six months of negotiations prior to submitting the dispute to the competent court or the arbitration of the Contracting Party; an ad hoc arbitral tribunal in accordance with the Arbitration Regulation the UNCITRAL; the ICSID, in the case when both Contracting Parties are members of the Convention.

Article 9 of the *Agreement between the Government of the Republic of India and the Government of Turkmenistan for the Promotion and Protection of Investments* (2006 India – Turkmenistan) holds that any disputes between the investor and one of the Contracting Parties that could not have been solved amicably solved within six months may, if both Parties agree, can be submitted to competent judicial or administrative bodies of the Contracting State; to international conciliation under the Conciliation Rules of the UNCITRAL. If the component judicial or administrative remedies of a Contracting or international conciliation fail to settle the dispute, the matter may be referred to the ICSID, if both Parties are members of the Convention; the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings; dispute resolution in accordance with the Arbitration Rules of the UNCITRAL 1976, with certain modifications.

Article 8 of the *Agreement between the Government of the Swiss Federal Council and the Government of Turkmenistan for the Promotion and Reciprocal Protection of Investments* (2008 Switzerland – Turkmenistan) favors consultations as the first step in resolving disputes between the parties concerned. If within six months the consultations do not yield a solution, the investor may submit the case either to the ICSID; an ad hoc arbitral tribunal established under the Arbitration Rules of the UNCITRAL unless otherwise agreed. The Article also acts as an explicit expression of consent of the Contracting Parties to submit investment disputes to international conciliation or arbitration.

Article 9 the *Agreement between the Government of the Russian Federation and the Government of Turkmenistan on the Promotion and Reciprocal Protection of Investments* (2009 Russia – Turkmenistan) holds that if within six months the

negotiations do not solve the dispute, it can be submitted to the competent court of the host state; to the ICSID if the Convention is in force in both of the jurisdictions of the Contracting States or the ICSID Additional Facilities Rules if the Convention is not in force in one or both of the jurisdictions of the Contracting States; an ad hoc-arbitral tribunal established under the Arbitration Rules of the UNCITRAL.

Article 9 *the Agreement between the Government of the Kingdom of Bahrain and the Government of Turkmenistan for the Promotion and Protection of Investments* (2011 Bahrain – Turkmenistan) has a paragraph on consent of the Parties to submit disputes to international conciliation or arbitration and a waiver of sovereign immunities. Though it requires three months of consultations prior to submitting a dispute to the competent court of the host State; the ICSID arbitration; an ad hoc-arbitral tribunal established under the Arbitration Rules of the UNCITRAL unless otherwise agreed.

Most of the ISDS clauses in the BITs of Turkmenistan are straightforward in their wording and there should be no issues in their interpretation and application. However, out of the 15 available the ISDS clause in the one between Turkey – Turkmenistan of 1992 proved to be difficult in its application.

Application and Interpretation of ISDS Clauses in BITS of Turkmenistan

There are eight registered cases, six concluded and two still pending, against Turkmenistan under the ICSID: one was submitted by a Russian investor,²⁴ one by a German investor,²⁵ one by British/Turkish investor²⁶ and five cases were brought before the ICSID by Turkish investors.²⁷ The ISDS clause in the BIT of 1992 between Turkey – Turkmenistan has proved difficult in its application; it would not lend itself to easy interpretation. The application and interpretation of this particular clause is an instance that reflects a deeper issue of the approach of tribunals to the question of exhaustion of local remedies.

²⁴Mobile Tele Systems OJSC v. Turkmenistan (ICSID Case No.ARB(AF)/11/4)

²⁵Adem Dogan v. Turkmenistan (ICSID Case No.ARB/09/9)

²⁶Garanti Koza LLP v. Turkmenistan (ICSID Case No.ARB/11/20)

²⁷Kılıç İnşaat İthalat İhracat Sanayive Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No.ARB/10/1); İçkale İnşaat Limited Şirketi v. Turkmenistan (ICSID Case No. ARB/10/24); Muhammet Çap & Sehil İnşaat Endustrive Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6); Gökem İnşaat Sanayive Ticaret Limited Şirketi v. Turkmenistan (ICSID Case No.ARB/16/30); Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No.ARB/17/30)

The principle of exhaustion of local remedies is one of the primary rules of international customary law (Alder 1990: 641). Traditionally the rule concerned the protection of subjects of a State abroad where a State could adopt claims of its subject against another State. The rule was conditional: a subject of a State was not eligible for aid from his government unless he had sought redress from the foreign sovereign first.²⁸ Nowadays when not only States but also non-state actors are recognized as the direct beneficiaries of rights under international law, and non-state actors are entitled to institute proceedings against a State continuing as the party in interest, the rule remains to be of fundamental significance not only in relations among the states but also attaining ever greater importance in relations between a non-state actor vis-à-vis a State.²⁹ Thus, the importance of the rule is not limited or exclusive to the fields of diplomatic protection of aliens and state responsibility, it continues to be applied in highly specialized and exotic fields of law such as human rights and international investment law; it is one of the central elements in the process of establishing jurisdiction and admissibility of a case under the International Center for Settlement of Investment Disputes Convention (ICSID), for instance.

A number of ICSID tribunals have examined principle of consent through an offer made by the host state in a treaty that is subsequently accepted by the investor (Schreuer et al. 2009: 368). However, the Tribunal in *İçkale İnşaat Limited Şirketi v. Turkmenistan* (2014) disagrees with such approach. It stated that:

*“The Kılıç majority appears to have based its approach [to interpretation of the dispute settlement provision] on a contractual analogy which, as noted above, is both conceptually inaccurate and legally incorrect.”*³⁰

The Tribunal in the *Kilic* in its analysis of the matter employed the concepts of offer and acceptance from the theory of laws of contracts (Stone and Deveney 2015: 594). And for the Tribunal’s jurisdiction to come into force the investors had to accept the offer made by the State (Turkmenistan) without any alterations to it. The conventional theory of contracts holds that the offer must be accepted as it is; any alterations to it constitute a counter offer, thus compromising the opportunity to form a contract and result in

²⁸Martin D Brauch, ‘Exhaustion of Local Remedies in International Investment Law’ [2017] IISD Best Practice Series 1.

²⁹ United Nations (2003); Art. 35 (1) *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); Art. 46 (1)(a) *American Convention on Human Rights* (1969).

³⁰*İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24)para. 244

absence of the State's consent. Further, the Tribunal added that under the Article 26 of the Convention "*A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention*".³¹

It has to be noted that arbitration without a valid consent amounts to an excess of powers (Dolzer and Schreuer 2012: 456). Further, the Tribunal noted that even though there is no clear requirement to exhaust local remedies the Article provides "*a multi-layered, sequential dispute resolution system*" which is in accordance with the Article 26 of the Convention. And any failure to meet the requirements set in the Article result in absence of the Tribunal's jurisdiction.³²

The Defendant argued that the case still could not be arbitrated. The argument being, "...jurisdiction existed but its exercise was inadmissible, as certain requirements had not been met." The Defendant in its reasoning relied on *Abacat* case, where the Tribunal held that domestic litigation requirement was a matter of admissibility and not jurisdiction.³³ For this reason the Tribunal engaged in deliberations for the purpose of distinguishing between concepts of *jurisdiction* and *admissibility*. The conclusion reached was that limits imposed by a Contracting State on its consent to arbitration under ICSID are a matter of jurisdiction without prejudice to the matters of admissibility. To support its position, the Tribunal made a reference to the *Daimler* tribunal, which held that the procedural requirements were rules designed to preserve efficiency and integrity of domestic courts and had no effect on jurisdictions of the courts. Thus, all BIT dispute resolutions provisions were jurisdictional by their very nature.³⁴ Though this view resulted in dissenting opinions, it was used as the guiding principle in deciding the case.

The take of the *İçkale* Tribunal on the matter was rather different. Although the Parties agreed that the compliance with Article VII (2) of the BIT was a matter of jurisdiction.

³¹Kılıç İnşaat İthalat İhracat Sanayive Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No.ARB/10/1) | Decision on Article Vii2 of the Turkey-Turkmenistan BIT 1, 68.

³²Kılıç İnşaat İthalat İhracat Sanayive Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No.ARB/10/1) | Decision on Article Vii2 of the Turkey-Turkmenistan BIT 1 68 – 69.

³³Kılıç İnşaat İthalat İhracat Sanayive Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No.ARB/10/1) | Decision on Article Vii2 of the Turkey-Turkmenistan BIT 70.

³⁴Kılıç İnşaat İthalat İhracat Sanayive Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No.ARB/10/1) | Decision on Article Vii2 of the Turkey-Turkmenistan BIT 1, p. 70 – 71.

Yet the Tribunal decided that it was not bound by the Parties judgment and decided that it was a matter of *admissibility* rather than of *jurisdiction*.

The reasoning behind such approach is that the Article VII (2) is not a condition to submit a State Party (in this case Turkmenistan) to the jurisdiction of an international arbitration. In other words, the requirement to go through domestic litigation is not a condition Turkmenistan's consent to arbitrate under the BIT. Once the Treaty was ratified the consent has become unconditional. Yet the scope of consent is not unlimited but are regulated but is delaminated in various Articles in the Treaty (Article IX time, Article I (1) person and Article I (2) subject matter). The Tribunal notes that Article VII of the BIT does not only establish the consent of the State parties to arbitrate but also sets procedural requirements i.e. domestic litigation requirement. From this point of view, the Tribunal notes, the "provided that, if" clause is not about jurisdictional requirement that defines the scope of consent of the State parties to arbitrate but a procedural one. It defines steps to be taken to take a dispute to the international arbitration. In other words, it defines "how" the State parties' consent can be invoked by an investor not "*whether*" the State parties have given their consent. Hence, it is a matter of procedure not element of the State parties' consent. Consequently, all objections must be examined in light of admissibility of the case not jurisdiction of the Tribunal.³⁵

With respect to the *Kiliç*tribunal's analysis, the Tribunal held that the BIT is not a contract but a treaty concluded between two sovereign entities. Thus, notions of *offer* and *acceptance* do not hold any legal currency in the arbitration agreement between an investor and the State party on the basis of a privity of contract. The State party's consent is imputed by the virtue of the BIT while an investor's consent arises once dispute arises. The Tribunal adds that it is not that "... there are two strands of investment treaty jurisprudence on the issue, one of which it considers more persuasive."³⁶

There are three essential elements in an agreement governed by International Law: 1. capacity; 2. consensus *ad idem*; 3. intention to create legal relations (Qureshi & Ziegler 2011). When one and the same provision is being interpreted in radically two different

³⁵*İçkale İnşaat Limited Şirketi v. Turkmenistan (ICSID Case No. ARB/10/24) | Award.*

³⁶*İçkale İnşaat Limited Şirketi v. Turkmenistan (ICSID Case No. ARB/10/24) | Award.*

ways, it is clear that the tribunals are failing to give effect to the original intention of the contracting parties.

Further, the position of the present paper with regard to the interpretation is builds on the premise Under international law the lawmaking authority and control over the regime rests in the hands of sovereign entities - states. Nominally, sovereign states are all independent and equal. Hence, the value and authority of international law depends upon voluntary participation of states in its development, observance and enforcement (Bratspies 2015). As a rule, no state or entity may exercise jurisdiction over a State without its consent (Malanczuk 2002: 118). The consent of states ensures the validity of a norm in international law and there is no higher norm in the international system from which a valid norm could be drawn. In other words, the validity of all norms in international system of laws can be traced back to the same constituent norm –the consent of states. It could be argued that a state consent constitutes the very foundation of international legal order; it is the reason of validity of all the existing norms in international law.

The very same fundamental reasoning applies to the investment tribunals. They derive their authority not from any institutional arrangement with substantive laws but from the direct consent of States manifested in the investment treaty (Sornarajah 2015: 219).As such, “arbitration is a method of dispute settlement under which the decision maker derives its power from the parties’ agreement.”³⁷ Having this in mind, it is plausible to argue that the authority and jurisdiction of investment tribunals is directly dependent on the consent of the states. The interpretations and decisions of the ad hoc tribunals make have to reflect the nuances of the fundamental elements of international law such as the State consent. A tribunal exceeding the limits of the consent given in a legal instrument gives us sufficient grounds to call into question the legitimacy of the system and the authority used to formulate the decision (Sornarajah 2015: 299). Hence, the paper argues that when facing an ambiguous formulation of ELR provision the right of an investor to enjoy the protection of international law should be affirmed to the extent that it does not prejudice the very substance of international law i.e. the State consent. In other words, the right to arbitrate should be granted only on the condition that it does not prejudice the fundamental principles and rules of international law – State consent.

³⁷Schreuer (2010: 256); see also, Gaillard & Savage (eds.) (1999: para 7).

Further, an argument could be made that the ICSID is set against the background of International Law. Thus, the approaches of the tribunals to interpretation of the ELR clauses should be informed and subject to the principles of general international which the tribunals need to consider and give greater effect.

Conclusion

The jurisprudence in the field remains fragmented and there is good enough reason to assume that it will continue to diverge. Unlike domestic legal systems where a legal process is subject to a certain hierarchy of judicial bodies that ensure the correctness of legal standards and their consistency, international law lacks the luxury of it. Taking into consideration the practice in investment arbitration, that their certain decisions are moving away from the conventional wisdom under international law, there seems to be a need to restate such an elementary thesis that no State or entity may exercise jurisdiction over a state without its consent (Malanczuk 2002: 118). Under international law the lawmaking authority is in the hands of the community of sovereign States. The value and authority of international law depends upon voluntary participation of states in its development, observance and enforcement (Rosedar 2016). We can respect the diversity of ideas and approaches to the interpretation of ELR, but also respect the fact that not all approaches not all interpretations are ultimately reconcilable with the fundamental principles of international law. In other words, we need to respect the diversity of ideas and approaches to the extent they do not prejudice the fundamental principles of international law such as the state consent.

The rule of exhaustion of local remedies was first applied in and owes its origin to the field of diplomatic protection of aliens. The main theoretical divide that define the two different approaches to the rule, whether it is a substantive or a procedural matter, does not seem to have decisive role in ICJ practice. If the rule is treated as a substantive matter, there is no state responsibility for a wrongful act without prior exhaustion of local remedies. However, even when the rule has been described a procedural condition to the exercise of jurisdiction by the Court, it still qualified as a temporary bar to the initiation of international proceedings. Not complying with the requirement would result in inadmissibility of a claim and temporarily deprive the Court of its jurisdiction over the case. Namely, the Court is precluded from exercising jurisdiction and entertaining the case until the rule has been satisfied.

The situation with international investment tribunals is slightly different. In hopes to secure investments flows, tribunals tended to assume jurisdiction over cases beyond the

consent of the States. In certain instances, describing the rule as a matter of an admissibility of a case and not treating it as a temporary bar to the initiation of arbitration for the reasons like fairness and efficiency (Abaclat and Others Arb.2011), the reasonableness of the requirement (Urbaser SA and others Arb. 2012: paras 194, 202-203), and desire not to be too formalistic and not to waste time and resources (Teinver SA and Others Arb.2012: *para* 112). Disregarding the interests and the principles of general international law is a defect in the ICSID system created by practice of certain tribunals. It has raised questions as to the competence of those who sit on investment arbitration tribunals (Sornarajah 2015: 29). What they have not factored in into their reasoning that the states might go out of the system. In 2008, Ecuador terminated nine BITs – with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay (Ripinsky 2012). The similar trend continues in other Latin American States (Marques 2014). The ad hoc nature of the ISDS system, its fragmentation, lack of transparency and legitimacy is one of the major reasons for denunciation and withdrawal from the system (Davies 2015).

There are examples (Telefónica S. A. Arb. 2006: para 93) in case law where tribunals manage to protect the interests of investors without the violating the basic principles of international law, balancing interests of investors and the community of State.³⁸ As Sornarajah (2016: 274-275) argues with regimes found on institutional order the states have chance of correcting course taken by the tribunals (Sornarajah 2015: 274 - 275). In case of a system found on ad hoc tribunals only the members of the tribunals have the chance of correcting their own course. Without the proper institutional hierarchy to ensure the correctness of legal standards and their consistency all the discussion about the role of ELR in determining jurisdiction of tribunals or an admissibility of a case is nothing but mining of ore without the possibility of refining it.

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³⁸ For insistence, see Telefónica S.A. and The Argentine Republic, Decision of the Tribunal on Objections to Jurisdiction ICSID (2006). para. 93 (“[T]he Tribunal notes that this requirement, or precondition, is best qualified as a temporary bar to the initiation of arbitration. The objection is therefore technically an exception of inadmissibility raised by Argentina against the Claimant for not having complied with the requirement. The Tribunal notes that the inadmissibility of the claim would result in the Tribunal’s temporary lack of jurisdiction, that is until the condition of the Claimant having submitted its claims to the courts of Argentina as the host State and not having obtained a decision on the merits within eighteen months would not had been satisfied.”)

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