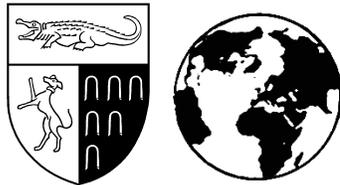


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## EXHAUSTION OF LOCAL REMEDIES IN INVESTOR-STATE DISPUTE SETTLEMENT: AN IDEA WHOSE TIME HAS COME?

Matthew C. Porterfield<sup>†</sup>

### I. INTRODUCTION

The proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union presents an opportunity to reconsider an old idea: requiring foreign investors to exhaust local remedies before bringing investor-state claims. Globally, investor-state dispute settlement (ISDS) procedures are facing unprecedented scrutiny, with dozens of countries reevaluating their approach to investor protection under international investment agreements (IIAs), including bilateral investment treaties (BITs) and the investment chapters of free trade agreements.<sup>1</sup> The proposal to include ISDS in TTIP has become particularly controversial—the European Commission (EC) received nearly 150,000 responses in an online public consultation on ISDS in TTIP, with 97% of respondents

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<sup>†</sup> Deputy Director and Adjunct Professor, Harrison Institute for Public Law, Georgetown University Law Center.

1. See United Nations Conference on Trade and Development, *WORLD INVESTMENT REPORT 2015—REFORMING INTERNATIONAL INVESTMENT GOVERNANCE*, at 108 (June 2015), <http://unctad.org/en/PublicationsLibrary/wir2015en.pdf> (“[A]n increasing number of countries are reviewing their model IIAs in line with recent developments in international investment law. At least 50 countries or regions are currently revising or have recently revised their model IIAs. This trend is not limited to a specific group of countries or regions but includes at least 12 African countries, 10 countries from Europe and North America, 8 Latin American countries, 7 Asian countries and 6 economies in transition. In addition, at least 4 regional organizations have reviewed or are reviewing their models.”).

expressing opposition.<sup>2</sup>

In the United States, ideologically diverse organizations ranging from the Sierra Club to the Cato Institute have also objected to including ISDS in TTIP.<sup>3</sup> Critics object to both the substantive and procedural rights afforded to foreign investors and question the need for ISDS given the generally high functioning judicial systems and strong protections for property rights in the United States and Europe.<sup>4</sup>

Supporters of ISDS contend that foreign investors might nonetheless receive inadequate protection in domestic courts in the United States and the EU.<sup>5</sup> They further argue that it is important to establish in TTIP a broad template for investor protection that can be used for future agreements with other countries (China in particular) with less well-developed legal systems.<sup>6</sup>

The debate over ISDS threatens to derail the broader negotiations on TTIP. Adopting the local remedies rule in TTIP is arguably the single reform with the greatest potential to reduce political opposition to ISDS while still providing investors with

2. Eur. Comm'n, *Consultation on Investment Protection in EU-US Trade Talks* (Jan. 13, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234> ("The vast majority of replies, around 145,000 (or 97%), were submitted through various on-line platforms of interest groups, containing pre-defined, negative answers.").

3. See *The Transatlantic Free Trade Agreement: What's at Stake for Communities and the Environment* THE SIERRA CLUB 5 (June 2013), [http://action.sierraclub.org/site/DocServer/TTIP\\_Report.pdf?docID=13541](http://action.sierraclub.org/site/DocServer/TTIP_Report.pdf?docID=13541) ("The Sierra Club strongly opposes the inclusion of investor-state dispute settlement in the TTIP . . ."); Daniel J. Ikenson, *A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement*, CATO INST. (Mar. 4, 2014), <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state> ("Purging both the TPP and the TTIP of ISDS makes sense economically and politically [and] would assuage legitimate concerns about those negotiations . . .").

4. See, e.g., Christiane Gerstetter and Nils Meyer-Ohlendorf, *Investor-State Dispute Settlement under TTIP – A Risk for Environmental Regulation?*, ECOLOGIC INST. 4 (Dec. 2013), <http://www.ecologic.eu/sites/files/publication/2014/investor-state-dispute-settlement-under-ttip-hbs.pdf> ("[T]here are no strong arguments for including ISDS rules in TTIP. Both the US and the EU have highly evolved, efficient rule of law legal systems. There is no evidence that investors have ever lacked appropriate legal protection through these systems.").

5. See, e.g., Eur. Comm'n, *FAQ on the EU-US Transatlantic Trade and Investment Partnership*, EUR. COMM'N 9 (June 17, 2013), [http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc\\_151351.pdf](http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151351.pdf) ("Although the EU and the US are developed economies, investors can still come across problems affecting their investments which their domestic courts systems are not always able to deal with effectively. That is why we believe there is a clear added value in including provisions in the TTIP that protect investors.").

6. See *id.* ("[A]s it brings together the world's two major economies, the TTIP will set standards for the future"); see also Adam Behsudi, *Froman: For TTIP, "High Standard" Means ISDS*, POLITICO (Oct. 31, 2014), <http://www.politico.com/morningtrade/1014/morningtrade15912.html> (quoting U.S. Trade Representative Michael Froman as stating "[I]t's hard to imagine a high-standard agreement—this is intended to be an agreement that's a model for the rest of the world—it's hard to imagine a high-standard agreement that doesn't have the high standard of investment protections as well").

access to investor-state arbitration when domestic remedies are inadequate. Moreover, the local remedies rule is sufficiently flexible that it could become part of a template for investment treaties that could be used with all countries regardless of their standards for protection of property rights or the capacity of their judicial systems.

## II. THE CURRENT APPROACH TO THE LOCAL REMEDIES RULES IN ISDS

The local remedies rule originally developed as a limitation on the right of reprisal, well before the rise of the modern system of international law.<sup>7</sup> The rule remains “an important principle of customary international law”<sup>8</sup> and is applied both in diplomatic protection cases<sup>9</sup> and in international human rights law.<sup>10</sup>

The rule was incorporated in numerous IIAs drafted during the 1970s and 1980s<sup>11</sup> and is also included in the draft model BIT recently released by India.<sup>12</sup> The exhaustion requirement, however, is rarely applied in current ISDS practice. A few IIAs explicitly reject the local remedies rule,<sup>13</sup> but most do not address the issue. Under these treaties the existence of an arbitration clause is often interpreted

7. See *cf.* AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 22 (2d ed. 2004) (“The requirement that local remedies should be resorted to seems to have been recognized in the early history of Europe, before the modern national state had been born . . .”).

8. Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S.A. v. Italy), Judgement, 1989 I.C.J. Rep. 1989 (July 20), para 31.

9. See, e.g., U.S. DEP’T STATE, *Bilateral Investment and Other Bilateral Claims*, <http://www.state.gov/s/l/c7344.htm> (“Under international law and practice the United States does not formally espouse claims on behalf of U.S. nationals unless the claimant can provide persuasive evidence demonstrating that certain prerequisites have been met. The most important of these requirements [include] that all local remedies have been exhausted or the claimant has demonstrated that attempting to do so would be futile . . .”).

10. See AMERASINGHE, *supra* note 7, at 303 (“The rule of local remedies has been expressly incorporated . . . in the European Convention on Human Rights . . . the American Convention on Human Rights . . . and the International Covenant on Civil and Political Rights . . .”).

11. See Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, ORG. ECON. CO-OPERATION DEV. 13-14 (2012), [http://www.oecd.org/investment/investment-policy/WP-2012\\_2.pdf](http://www.oecd.org/investment/investment-policy/WP-2012_2.pdf).

12. See MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, art. 14.3, [https://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf). India is currently negotiating IIAs with both the United States and the EU.

13. See, e.g., Agreement Between on the Promotion and Reciprocal Protection of Investments, Cambodia-Croat., art. 10 May 18, 2001, (entered into force June 15, 2002), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/572> (“In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. *This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted . . .*”).

as a waiver of the exhaustion requirement, particularly in arbitrations brought under the ICSID Convention.<sup>14</sup> A small minority of IIAs requires some recourse to domestic courts before bringing an international claim, although most of these treaties only require an investor to pursue local remedies for a limited period of time (frequently eighteen months).<sup>15</sup>

Even with this last category of IIAs, investment tribunals have in most instances been reluctant to require investors to pursue local remedies. In some cases, tribunals have permitted investors to use most favored nation (MFN) provisions to bypass local remedies requirements by invoking dispute settlement provisions in other IIAs that permit claims to be submitted directly to international arbitration.<sup>16</sup> Tribunals have also excused investors from compliance with local remedies provisions by holding that recourse to the domestic courts would be futile.<sup>17</sup>

The local remedies rule has gained some traction in the context of challenges to judicial measures. In *Loewen Group v. United States*,<sup>18</sup> a Canadian funeral parlor operator claimed that its right to fair and equitable treatment had been violated in a civil trial in the Mississippi judicial system, in which it had been ordered to pay hundreds of millions of dollars in damages and deprived of the ability

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14. Article 26 of the ICISD Convention states, “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.” Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature Mar. 18, 1965, entered into force Oct. 14, 1966). This provision has been widely construed to reverse the normal rule requiring an explicit waiver of the exhaustion requirement—i.e., under Article 26, exhaustion is not required unless explicitly required by a State. See AMERASINGHE, *supra* note 7, at 269 (“[I]t is clear that by virtue of Article 26 of the ICSID Convention the rule of local remedies is waived where it otherwise would apply in circumstances where ICSID arbitration is the relevant means of dispute settlement . . .”).

15. See Pohl et. al., *supra* note 11, at 13-14.

16. This approach has become closely associated with the Decision of the Tribunal on Objections to Jurisdiction in *Maffezini v. Spain*, ICSID Case No. ARB/97/97 (Jan. 25, 2000) [hereinafter *Maffezini* Decision on Objections to Jurisdiction]. *Maffezini* involved a claim by an investor under the Argentina-Spain BIT, which contained a provision requiring the investor to seek a remedy through the domestic courts for a period of eighteen months before pursuing investor-state arbitration. The tribunal held that the investor could use the BIT’s MFN provision to invoke the dispute settlement provisions of the Chile-Spain BIT, which did not require the investor to pursue local remedies. See *id.*, ¶¶ 38-64.

17. See, e.g., *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 620 (Feb. 8, 2013) (holding that the exhaustion requirement under the Argentina-Italy BIT to pursue claims in domestic court for at least eighteen months did not to apply to Italian bondholders’ claims over Argentina’s sovereign debt default given that Argentine law did not “offer[] Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile”).

18. *Loewen Group, Inc. v. U.S.*, ICSID Case No. ARB[AF]/98/3, Award (June 25, 2003).

to appeal unless it posted a bond for 125% of the award. A tribunal convened under NAFTA's investment chapter held that the rule of "judicial finality"<sup>19</sup> barred Loewen's claim because it had not filed a petition for certiorari to the U.S. Supreme Court.<sup>20</sup> The approach taken by the *Loewen* tribunal, however, has not been widely followed.

## II. REQUIRING EXHAUSTION OF LOCAL REMEDIES IN TTIP

### A. Benefits of including the local remedies rule in TTIP

The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law.<sup>21</sup> Applied in the context of investor-state disputes, the rule could also help to both strengthen and integrate the domestic and international systems for investor protection.

#### *i. Supporting the rule of law and strengthening domestic legal systems*

The rule of law requires that legal standards be sufficiently clear that they can be understood by those that are subject to them.<sup>22</sup> Despite the dramatic growth in the number of ISDS claims brought each year,<sup>23</sup> the vast majority of disputes concerning the regulation of investment—both foreign and domestic—will likely continue to be addressed under domestic law by domestic courts. Accordingly, for host States with less developed legal systems, funneling disputes with foreign investors through the domestic courts would promote the rule of law by helping to clarify relevant domestic legal standards, e.g., the regulatory approval procedures for licenses and permits and the rules governing the vesting of development or resource extraction

19. *Id.*, ¶ 158.

20. *Id.*, ¶¶ 207-17. *See also* Apotex v. U.S., Award on Admissibility and Jurisdiction, 79-99 (June 14, 2013) (holding a claim by a generic drug manufacturer under Chapter 11 of NAFTA based on the refusal of U.S. courts to award it a declaratory judgment of patent non-infringement to be barred for failure to exhaust all judicial remedies, including seeking judicial review by the U.S. Supreme Court).

21. *See* AMERASINGHE, *supra* note 7, at 58 ("[T]he rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute.").

22. *See* LON FULLER, THE MORALITY OF LAW 63 (2d ed. 1969) ("[T]he desideratum of clarity represents one of the most essential ingredients of legality.").

23. The first treaty-based ISDS claim was brought in 1987. *See* Asian Agric. Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990). By the end of 2014, there were a total of 608 known ISDS disputes. *See* 2015 World Investment Report, *supra* note 1, at 112, 114 fig. III.7.

rights.<sup>24</sup>

An exhaustion requirement would also strengthen these legal systems by providing them with the opportunity to address investor claims subject to the potential for subsequent review by investment tribunals. As the United Nations Conference on Trade and Development has noted,

“[R]ather than focusing exclusively on ISDS, domestic reforms aimed at fostering sound and well-working legal and judicial institutions in host States are important. This may ultimately help remedy some of the host-State institutional deficiencies which IIAs and the ISDS mechanism were designed to address.”<sup>25</sup>

### ***ii. Improving the decision making of investment tribunals***

If an investor decides to pursue ISDS after a dispute has been heard in the domestic courts of the host State, the arbitral tribunal would benefit from the courts’ characterization of the relevant domestic law. For example, the initial pursuit of a dispute through domestic courts could provide guidance on whether any property rights had vested under local law, rather than leaving the tribunal to a highly subjective inquiry into whether the investor’s “legitimate expectations” have been frustrated by a regulatory decision, as many tribunals have done in the context of interpreting the “fair and equitable treatment” (FET) provisions of IIAs.<sup>26</sup> Similarly, judicial pronouncements on the relevant standards of protection for property rights could provide tribunals with evidence of relevant state practice for the purpose of defining standards of protection such as FET and “indirect expropriation” that are intended to reflect customary international law.<sup>27</sup>

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24. See 2015 World Investment Report, *supra* note 1, at 149 (asserting that national courts “are well-suited to interpret and apply the domestic laws of the host State.”).

25. *Id.*

26. See Matthew C. Porterfield, *State Practice and the (Purported) Obligation Under Customary International Law to Provide Compensation for Regulatory Expropriations*, 37 N.C. J. INT’L L. & COM. REG. 159, 166-71 (2011) (discussing interpretations of FET by investment tribunals to include a right to a stable and predictable regulatory environment that does not frustrate investors’ legitimate expectations).

27. See, e.g., 2012 U.S. MODEL BILATERAL INV. TREATY, Art. 5(1) (“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”); Annex A (“The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation.”); Annex B (“The Parties confirm their shared understanding that . . . Article 6 [Expropriation and Compensation] . . . is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”).

Deferring an investor-state claim until after domestic courts have addressed a dispute would also promote compliance with the principle—espoused by both the U.S. Congress and the European Parliament—that IIAs should not provide investors with greater substantive rights than the comparable protection provided to citizens under domestic law.<sup>28</sup> A tribunal, for example, would presumably hesitate to find that the United States had engaged in the indirect expropriation of an asset of a European investor if the U.S. courts had determined that the relevant measure did not constitute a “regulatory taking” under the Fifth Amendment to the U.S. Constitution.<sup>29</sup>

### **iii. Clarifying the relationship between domestic and international dispute settlement procedures**

Applying the local remedies rule could also help clarify and integrate the respective roles of domestic courts and the ISDS system. Domestic judicial systems would reassume their roles as the primary fora for disputes involving claims by foreign investors, and investor-state tribunals would provide an extra layer of protection against any deficiencies in domestic legal processes. Moreover, the local remedies rule would be compatible with the desire to harmonize the varying approaches taken by States to investor protection in IIAs, given that it would provide a consistent standard for determining whether and when ISDS was appropriate in any dispute against a State—i.e. whether or not the investor has pursued all reasonably available domestic remedies.

## **B. Addressing objections to the local remedies rule through the futility exception**

The objections to implementation of the local remedies rule appear to be based primarily on concerns over the potential additional cost or delay to which investors would be subjected.<sup>30</sup> There is no

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28. See *Defending Public Safety Employees’ Retirement Act*, H.R. 2146 §102(b)(4) (stating that the principle trade negotiating objectives of the United States include “ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States”) (2015); *Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, P8\_TA-PROV(2015)0252, *European Parliament Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* (2014/2228(INI)) at 15, (“[TTIP should] ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors.”).

29. See Porterfield, *supra* note 26 at 187-88 (discussing Congress’s efforts to link the standard for expropriation under U.S. IIAs to the standard for regulatory takings under the Constitution).

30. See, e.g., Christian Tietje et al., *The Impact of Investor-State-Dispute*

evidence, however, that arbitration is generally less expensive or faster than domestic litigation, with ISDS costs averaging over eight million dollars<sup>31</sup> and claims typically taking more than four years to resolve.<sup>32</sup> Observance of the local remedies rule could actually reduce the cost of a subsequent ISDS proceeding by clarifying the factual record and relevant domestic legal context. And presumably some percentage of disputes would be resolved to the investors' satisfaction in domestic fora, thereby eliminating any costs for international arbitration in those cases.

Moreover, under the local remedies rule, only reasonably available domestic remedies must be pursued. Investors could proceed directly to investor-state arbitration if attempting to exhaust local remedies would be futile because, for example, the domestic courts lack jurisdiction to hear a claim.<sup>33</sup>

Imposition of the local remedies rule could nevertheless impose additional costs on investors who chose to pursue ISDS after exhausting domestic remedies. Those costs would be incurred when an investor concluded that the "reasonably available" domestic remedies were nonetheless inadequate and ISDS could provide a more favorable resolution of the claim. This situation, however, should be relatively rare under the TTIP if the U.S. Congress and the European Parliament succeed in ensuring that foreign investors are not provided greater rights than those enjoyed by citizens under domestic law.<sup>34</sup>

### C. Support for the local remedies rule

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*Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, MINISTER FOR FOREIGN TRADE & DEV. COOPERATION, MINISTRY OF FOREIGN AFFS., NETHERLANDS 95 (2014), <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isd-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isd-in-the-ttip.pdf> ("[I]t would not seem advisable to include [an exhaustion] requirement as the potential benefits would not outweigh the significant costs in terms of added time and financial burden.").

31. *Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012*, ORG. FOR ECON. COOPERATION & DEV. 18 (2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf> ("[L]egal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases.").

32. See Joongi Kim, *Streamlining the ICSID Process: New Statistical Insights and Comparative Lessons from Other Institutions*, 11 *TRANSNAT'L DISPUTE MGMT.* 2 (2014) ("An analysis of pending and concluded cases that have been registered with ICSID shows that awards require over four years to be rendered.").

33. See, e.g., *Panevezys-Saldutiskis Railway Case (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 18 (Feb. 28) ("There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief, nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given.").

34. See *supra* note 28 and accompanying text.

There are indications of significant support for the local remedies rule within the European Union. In 2011, the European Parliament adopted a resolution on the EU's international investment policy that stated that "changes must be made to the present [investor-state] dispute settlement regime," including recognizing "the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process."<sup>35</sup> The Council of the European Union also alluded to the exhaustion requirement in its June 2013 mandate for the TTIP negotiations, stating that "[c]onsideration should be given . . . to the appropriate relationship between ISDS and domestic remedies."<sup>36</sup> The European Commission did not solicit comments on the potential to include the local remedies rule in TTIP during its public consultation on ISDS. The Commission did suggest, however, that it might be receptive to an exhaustion requirement, acknowledging "the general solidity of developed court systems such as the US and the EU"<sup>37</sup> and stating that "[d]omestic remedies would be preferable" to ISDS if not for the "possib[ility] that investors will not be given effective access to justice."<sup>38</sup>

In response to the overwhelming opposition to ISDS expressed in the public consultation, European Trade Commissioner Cecilia Malmström released a concept paper calling for the replacement of the current system of ad hoc investor-state arbitration with a "permanent investment court with tenured judges."<sup>39</sup> The European Parliament endorsed this approach in a Resolution on TTIP in July 2015.<sup>40</sup> In September 2015, the European Commission released a

35. See European Parliament, *Resolution of 6 April 2011 on the Future European International Investment Policy* (2010/2203(INI)), P7\_TA(2011)0141, at para. 31, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0141+0+DOC+PDF+V0//EN>.

36. Council of the European Union, *Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, at para. 23 (adopted June 14, 2013, declassified Oct. 9, 2014), <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>; see *EU Draft Mandate Includes New Language On Investment, IP Enforcement*, INSIDE US TRADE (June 14, 2013) (subscription) (stating that the mandate's language on domestic remedies likely refers to "arguments by some critics of ISDS that investors should first exhaust domestic remedies in national courts before turning to international arbitration").

37. *Public Consultation on Modalities for Investment Protection and ISDS in TTIP* at 9 (March 27, 2014), [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152280.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf).

38. *Id.*; see also *id.* at 12 ("As a matter of principle, the EU's approach favours domestic courts.").

39. See *Concept Paper: Investment in TTIP and Beyond* at 11 (May 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF).

40. See *European Parliament resolution of 8 July 2015*, *supra* note 28, at 15-16 (recommending that the European Commission "replace the ISDS system with a new system for resolving disputes between investors and states . . . where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate

proposal for an “Investment Court System” that would replace ISDS in TTIP, “all [other] ongoing and future EU investment negotiations,”<sup>41</sup> and eventually, all “EU agreements, EU Member States’ agreements with third countries and . . . investment treaties concluded between non-EU countries.”<sup>42</sup> Although the Commission’s proposal does not include imposition of the local remedies rule, the rule could be applied under either the current arbitration model or a new international investment court. Germany, a critical voice in EU trade policy, has indicated that it supports both the creation of permanent investment courts and imposition of the local remedies rule.<sup>43</sup>

In the United States, civil society organizations<sup>44</sup> and some members of the U.S. State Department’s Advisory Subcommittee on International Investment Policy<sup>45</sup> have supported adoption of the local remedies rule. Although the Obama administration declined to include an exhaustion requirement in its model investment treaty, the growing controversy over ISDS could induce the U.S. government to accept the local remedies rule in TTIP as a compromise necessary to secure its broader negotiating objectives, including tariff reductions, liberalized trade in services, and protections for intellectual property.<sup>46</sup>

In addition to reducing political opposition to concluding and ratifying the TTIP, adoption of the local remedies rule could help

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mechanism . . .”).

41. Press Release, European Commission, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm).

42. *Id.* The Commission presented its proposal to the United States on November 12, 2015. See European Commission, Press Release, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm).

43. See World Investment Report, *supra* note 1, at 109.

44. See, e.g., Theodore R. Bromund, James M. Roberts, and Riddhi Dasgupta, *Investor-State Dispute Settlement (ISDS) Mechanisms: An Important Feature of High-Quality Trade Agreements*, THE HERITAGE FOUND. (Feb. 20, 2015), <http://www.heritage.org/research/reports/2015/02/investor-state-dispute-settlement-isds-mechanisms-an-important-feature-of-high-quality-trade-agreements> (“ISDS mechanisms can also be structured to supplement domestic legal systems by requiring investors to exhaust their remedies in those systems first. This kind of mechanism is more appropriate for agreements between law-abiding nations because it gives investors a way to appeal to an agreed system of international arbitration for disputes, while simultaneously respecting national legal systems.”).

45. See Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, (Sept. 30, 2009), <http://www.state.gov/e/eeb/rls/othr/2009/130287.htm>. The author served on the subcommittee and was among the members that submitted a statement attached to the Subcommittee’s report that supported the inclusion of the local remedies rule in the model BIT. See *id.*, Annex B, Collective Statement from Sarah Anderson et al., <http://m.state.gov/md131118.htm#b>.

46. See *White House Fact Sheet: Transatlantic Trade and Investment Partnership (T-TIP)* (June 2013) <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/june/wh-ttip>.

maintain support for ISDS by reducing the number of awards that could be perceived as inappropriately intrusive on domestic regulatory authority. Some claims would be settled in the domestic courts. For those cases that did proceed to arbitration after the investor had exhausted local remedies, the additional guidance concerning relevant domestic legal standards could reduce the potential for controversial awards.<sup>47</sup>

#### IV. STANDARDS FOR AN EXHAUSTION PROVISION IN TTIP

In order to produce the benefits discussed above, a local remedies provision in TTIP would need to satisfy certain criteria. Given the tendency of arbitrators to bypass local remedies requirements—for example, by using most favored nation provisions to invoke more favorable dispute settlement procedures—an exhaustion requirement should be made an explicit condition of consent to arbitration.<sup>48</sup> An exhaustion requirement should not be subject to an unrealistically short time limit, such as the eighteen-month period provided for in some IIAs. If a time limit is specified, it should not be shorter than the four-year period that reflects the average duration of investor-state proceedings,<sup>49</sup> and the investor should be barred from instituting the investor-state claim prior to the expiration of the period.<sup>50</sup> Any exceptions to the local remedies rule should be narrowly drafted to cover only those circumstances in which attempts to pursue local remedies would be futile.<sup>51</sup>

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47. See *supra* notes 26-29 and accompanying text.

48. See, e.g., *Maffezini Decision on Objections to Jurisdictions*, *supra* note 16, ¶ 63 (“[I]f one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies . . . this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law.”)

49. See *supra* note 32 and accompanying text.

50. *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 144-48 (July 2, 2013) (holding that local litigation requirement was satisfied even though the specified eighteen-month period did not conclude until after the institution of the investor-state arbitration).

51. See, for example, Article 15 (“Exceptions to the local remedies rule”) of the International Law Commission’s Draft Articles on Diplomatic Protection, which provides, “Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.” Rep. of the Int’l Law Comm’n, 58th Sess., 2006, U.N. Doc. A/61/10.

## V. CONCLUSION

Reforms that do not address the displacement of domestic courts as the primary fora for disputes involving foreign investment, such as the Investment Court System that has been proposed by the European Commission, are unlikely to resolve the debate over the investment provisions in TTIP or the broader legitimacy crisis facing ISDS.<sup>52</sup> Incorporation of the local remedies rule, in contrast, could significantly reduce opposition to ISDS. Rather than functioning essentially as courts of first instance for investment disputes, investment tribunals would provide an additional layer of protection that would be available to foreign investors to address any deficiencies in domestic legal systems. In addition to reducing opposition to the inclusion of ISDS in TTIP and other new agreements, this approach would both result in fewer controversial ISDS awards and promote greater integration with domestic legal regimes,<sup>53</sup> thereby providing the basis for a system of investor protection that could enjoy broader and more sustainable political support.

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52. See Press Release, The Greens—European Free Alliance in the European Parliament, *Cosmetic Investment Court Proposal Fails to Address Core Problems with ISDS* (Sept. 16, 2015), <http://www.greens-efa.eu/eu-trade-policy-14494.html> (“[T]he Commission has used deft sleight of hand with its proposal for an ‘Investment Court System.’ The system being proposed by the Commission has another name and some structural differences but it retains all the hallmarks of the deeply flawed ISDS system . . . .”); Press Release, Friends of the Earth Europe, *Press release, EU ‘Post-ISDS’ Proposal More of Same* (Sept. 16, 2015), <https://www.foeeurope.org/EU-Post-ISDS-proposal-more-of-same-091615> (“Friends of the Earth Europe has criticised the [investment court] proposal, which fails to fundamentally reform the flawed system of investor protection, in particular the granting of exclusive privileges to foreign investors over the rest of society, and ignores the fact that investor rights are not needed in an EU-US agreement.”).

53. See *supra* Part III.A.