MUNIROH RAHIM

IS A REQUIREMENT OF RESORT TO PRIOR REMEDIES JURISDICTIONAL?

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

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Abstract

The doctrine of resort to prior remedies has been a hot debate in some international investment proceedings in arbitration tribunals. Some groups argue that resort to prior remedies in international investment disputes under bilateral investment treaties is akin to exhaustion of local remedies in diplomatic protection doctrine. Therefore failure to exhaust local remedies before bringing the international investment claims to international plane leads to the case declared inadmissible before the international tribunals. The groups also further argue that in the event that the Bilateral Investment Treaty requires that disputes should be brought to local courts where the investment has been made, such requirement is jurisdictional. Therefore, failure to bring the disputes to local courts for remedies leads the tribunal in question lacks of jurisdiction to hear the case.

Accordingly, this paper provides an in depth examination of whether or not a requirement of resort of prior remedies jurisdictional. The paper concludes that a requirement to resort to prior remedies in international investment disputes under international investment treaties is not a jurisdictional requirement because of two reasons. First, jurisdiction means that the tribunal has power and competent to hear the investment disputes. Such power extends to any legal disputes between contracting parties and national of another contracting parties and the availability of consent of Contracting Party and national of another contracting party to bring the disputes to the tribunal in question. Second, the issue of resort to prior remedies in international investment disputes does not relate at all to the jurisdiction of the tribunal to hear the disputes. The issue is related to the claims itself whether or not the claims is matured enough to be brought to the international tribunal.

To add more benefit, this paper also considers impacts of the issue of resort to prior remedies on Indonesian law. Such consideration is important as there is an aspiration among the Indonesian government officials to include provisions on exhaustion of local remedies in the BITs. In reaching a conclusion on the (un)feasibility of the inclusion of exhaustion of local remedies in the BITs, investigation has been made on two issues, namely, an availability of Indonesian court remedies to deal with international investment disputes and an analysis on ASEAN Australia New Zealand Free Trade Agreement on Investment Chapter where Indonesia is a party, and its impact on the Indonesia's aspiration.

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The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 13,290 words.

I Introduction

Resort to prior remedies in international investment disputes under investment treaties has been linked to the doctrine of exhaustion of local remedies in public international law. Various arguments have been presented by various scholars on the characteristics of resort to prior remedies in international investment disputes to answer whether or not a requirement of resort to prior remedies is a jurisdictional requirement.

This paper argues that a requirement to exhaust local remedies on international claims in public international law under customary international law is not jurisdictional on the grounds that the jurisdiction of the tribunal lies within its power and authority to adjudicate international disputes. A requirement to exhaust local remedies in international claims is procedural requirement for the admissibility of the claim to be brought to the international plane under customary international law of diplomatic protection doctrine. The purpose of exhaustion of local remedies is that a local court of the state where an allegedly wrongful act has been committed should be given an opportunity to repair the damages and that the exhaustion of local remedies is to prove that that the host state has failed to render justice to an alien.

The paper further argues that a requirement of resort to prior remedies in international investment disputes under international investment treaties is also not jurisdictional on the grounds that the jurisdiction of the tribunals vested in the authority and competency of the tribunal to render a judgment on international investment disputes.

First, this paper presents the introduction. In the second part, the paper discusses exhaustion of local remedies under the general principles of public international law. Some examples of international claims brought to international arbitration under customary international law are analysed to illustrate the basic notion of the exhaustion of local remedies rule.

In the third part the paper presents discussion about the argumentation of non-jurisdiction of resort to prior remedies in international investment disputes under international investment treaties. The general rule of resort to prior remedies and its relations to the jurisdictional issues in international investment disputes is discussed with reference to provisions, if any, on resort to prior remedies in regional and bilateral treaties and multilateral conventions. To deepen an understanding on resort to prior remedies, the

Urbaser case and the BG Group PLC case are the primary cases for analysis in an attempt seek the relevance between resort to prior remedies and jurisdictional issues of a tribunal. In those cases, resort to prior remedies is framed under the notion of 18 months litigation.

In the last part, the paper discusses resort to prior local remedies in international investment law and its policy implication for Indonesia. Investigation is made on two levels. The first level is the availability of Indonesian court remedies. Consideration has been made on two issues namely, administrative court remedies and constitutional review of legislation. In this level, discussion is focused on how far Indonesian courts can give direct effect to the guarantees contained in investment treaties where Indonesia is a contracting party. The second level is a review of the impact of the ASEAN investment treaties on Indonesia's policy-making to regulate foreign investment in Indonesia.

II Exhaustion of Local remedies under Customary International Law

A Legal Character of Exhaustion of Local Remedies

Local remedies are defined as "legal remedies which are open to the injured person before the judicial or the administrative courts or bodies, whether ordinary or special, of the state alleged to be responsible for causing the injury[1]. The remedies to be exhausted comprise all forms of recourse as of rights including administrative remedies of legal character[2]. Exhaustion of local remedies is a doctrine in customary international law that obliges an alien, whose rights have been violated by a host state, to exhaust local courts available in the host state before requesting its state of origin to espouse his/her case to the international plane; failure to do so leads to the international court/arbitral tribunal having no jurisdiction to hear the case[3].

1 Rational of Rule of Exhaustion of Local Remedies

The rationale of the doctrine of exhaustion of local remedies is to give an opportunity for the territorial state to redress the allegedly wrongful acts within the framework of its own domestic legal system at the national level before its international responsibility can be

[1] International Law Commission *Draft Articles on Diplomatic Protection* 2006, art.14

[2] James Crawford *James Crawford Brownlie's Principles of Public International Law (8th ed, Oxford University Press, Oxford, 2012)* at 713

[3] James Crawford, at 714

enforced[4]. Only wrongful acts invoked under indirect injuries that the rule of exhaustion of local remedies applies.

International claims are invoked on the basis of two classes of injuries, namely, direct injuries and indirect injuries.[5] The first is a wrongful act allegedly committed by a state against an immediate interest of another state. In this context the rule of exhaustion of local remedies under customary international law does not apply on the grounds that states have an equal sovereignty. The Corfu Channel Case[6] illustrated that an international wrongful act committed by a state (Albania) against an immediate interest of another state (UK) may be brought to an international court by the UK without first resorting to the local remedies available in Albania.

The second is indirect injury, defined as a wrongful act committed by a state against an alien of another state. In this context the rule of exhaustion of local remedies under customary international law applies on the grounds that the host state is given an opportunity to repair the damages and failure to redress the damages by the host state may raise an international claim[7]. Among the international claims based on indirect injuries to a state is the Interhandel case[8], which was litigated in the ICJ between Switzerland against the US.

Under customary international law, only states are subject to international law. The consequence of that notion is that only a state may bring an international claim to an international court to seek remedy for wrongful acts committed by another state. There are circumstances where a host state has failed to render justice through its domestic legal system to an alien whose property and rights are being violated by the host state. In this situation, the alien may not directly sue the alleged lost state for its wrongful act in the international plane since the alien lacks legal standing before an international court/arbitration.

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[4] C F Amarasinghe *Local Remedies in International Law (1st Ed, Press Syndicate of the University of Cambridge, Cambridge, 1994)* at 13

[5] O. Illiyumade *Dual Claim and the Exhaustion of Local Remedies Rule in International law*, 10 Van.H. Trans nat'l L 83 at 1

[6] *The Corfu Channel Case (the United Kingdom v Albania) (Merits)* (1949) ICJ Rep 4

[7] O. Illiyumade at 1

[8] *Interhandel Case (Switzerland v United States of America) (Preliminary Objection)* (1959) ICJ Rep 6

2 Exhaustion of Local Remedies and Diplomatic Protection Doctrine

The doctrine of exhaustion of local remedies is closely linked to the judicial sovereignty of the national's state of the alien to render protection to its own nationals. The nationality constitutes the theoretical vindiculum juris entitling the protecting state, in international law to intervene on behalf of its citizens abroad[9]. Under customary international law, a host state is obliged to respect and extend justice to aliens who reside on its soil. Where rights of aliens are violated by the host state, the state whose nationals are violated may seek justice on behalf of its citizens in the International Court of Justice/tribunals under the diplomatic protection doctrine if the requirements for seeking justice in the international plane have been fulfilled[10].

Under the doctrine of diplomatic protection disputes are between a state whose rights of its nationals are violated and the violating host state. Diplomatic protection is a doctrine of international law permitting the state of an injured person (individual or corporate) to "espouse" that person's claim and seek redress for the injury from the injuring state at the international level[11]. Consequently, a state whose nationals have suffered an injury caused by an internationally wrongful act of another state has rights to exercise diplomatic protection[12].

The requirement of the state's espousal under the doctrine of diplomatic protection is the exhaustion of local remedies by the individuals whose rights have been violated in the host states where the alleged wrongs are committed. Failure of the individual to satisfy the rule leads to the claims declared inadmissible as confirmed by the ICJ Dicta in Case Concerning Ahmadou Sadio Diallo[13].

3 Exemption of Exhaustion of Local Remedies

Exhaustion of local remedies means that there must be a final decision of a court which is the highest in the hierarchy of courts to which the injured alien or corporation can resort

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[9] A.A Cancado Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge University Press, New York, 1983) at 11

[10] James Crawford at 492

[11] John H Currie *Public International Law* (2nd Edition, Irwing Law Inc, Canada, 2008) at 360

[12] Ian Brownlie *The Principle of international Law* (7th eds, Oxford University Press, Oxford, 2008) at 492

[13] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) (Merits)* (2007) ICJ Rep 639 para 42

in the legal system of the respondent or host state[14]. Certain exceptions of the applicability of rule of exhaustion of local remedies are recognised under international customary law. The remedies available in the host state should not be pursued if it would be in effective or obviously futile or the court available in the host state is not competent to hear the case[15].

B Exhaustion of Local Remedies in International Investment Disputes

An international investment claim brought by state's espousal under diplomatic protection rules should satisfy the requirement of exhaustion of local remedies and failure of the individual or corporation to do so leads to the case being inadmissible before the international plane[16]. However the requirement of exhaustion of local remedies under customary international law does not constitute jurisdictional requirement for the jurisdiction of an international court or international tribunal lie within the agreement of both parties to bring the dispute to an international court or a tribunal.

The application of the diplomatic protection doctrine and the rule of exhaustion of local remedies can be illustrated in the Electronica Sicula S.p.A (ELSI), a case brought by the United States of America against Italy to the International Court of Justice[17]. In its decision, the International Court of Justice stated that international claims which are based upon private complaint of individuals whose government acts as their representatives in espousing their cause are classified as indirect injuries[18]. The ELSI is an example of international claims submitted to an international court based on indirect injuries (in this case to the USA) to which the rule of exhaustion of local remedies applies.

III Resort to Prior Remedies under International Investment Treaty: Is it a jurisdictional requirement?

A Legal Character of Resort to Prior Remedies

1 Jurisdiction of the Tribunal and Resort to Prior Remedies

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[14] C.F. Amarasinghe at182

[15] F.C Amarasinghe at 207-8

[16] James Crawford at 492

[17] *Case Concerning Electronica Sicula S.p.A (United States of America v Italy) (Judgment)* (1989) (ICJ Rep. 15 para 46

[18] *Case Concerning Electronica Sicula S.p.A,* para 51

Jurisdiction refers to "the court's prima facie ability to entertain a dispute, and this is determined by whether the court/arbitral tribunal regards itself as a competent authority to hear and determine the dispute[19]. Jurisdiction is defined as a power or authority to render judgment or award**.** The jurisdiction of a tribunal to render an award is analysed through elements pursuant to Article 25 of the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the ICSID Convention). It stipulates that jurisdiction of the tribunal shall extend to[20]:

1) any legal dispute.

2) between Contracting Parties and national of another contracting state arising directly out of an investment.

3) there is consent of Contracting Party and national of another contracting state to bring the disputes to international tribunal.

Pursuant to Section 3 Article 41 ICSID Convention, the proceedings of cases under ICSID tribunals comprise two stages; namely proceedings on a preliminary question of jurisdiction and competence of the tribunal and proceedings on the merits of disputes[21]. An objection at the jurisdictional stage deals with the elements stipulated in Article 25 of the ICSID Convention and in the context of the tribunal's competence with respect to at least one or all of its elements (rationae temporis, loci, personae, et materiae)[22]. Resort to prior remedies does not fall within the elements to test whether a tribunal has power and competence to adjudicate a case as the power and the competence of the tribunal lies within the elements pursuant to the above article 25 of the ICSID Convention.

The second stage of tribunal's proceedings is on the merit of the claims. To test whether the claims has merit to be adjudicated under international investment treaties, tribunals shall examine the characteristic of the claims from the perspective of substantives rights protected by the treaty. Such substantive rights conferred to foreign investors include, among others fair and equitable treatment, non-favoured nation treatment, protection

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[19] Mary Keyes *Jurisdiction in international litigatio*n (Federal Press, Sydney, 2005) at 36

[20] International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) 575 UNTS 159 (enter into force 14 October 1966), art 25

[21] ICSID, art 41

[22] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v the Argentine Republic (Decision on Jurisdiction)* ICSID ARB/07/26, 19 December 2012, para 126

from denial of justice, and protection from uncompensated expropriation[23]. In many investment tribunals, issues of exhaustion of local remedies falls within the second stage, merits of the claims. In the event of allegation of treaty breaches, such issues were employed to prove whether or not denial of justice against foreign investors has been committed by the domestic court of the host state where the investment was made in.

2 Diplomatic Protection and Resort to Local Remedies

Exhaustion of local remedies under customary international law is different from resort to prior remedies under international investment treaties. Contracting parties to the ICSID Convention waived their rights to invoke the diplomatic protection doctrine of customary international law should international claims be brought at the international plane[24]. The rule of diplomatic protection in international law is not generally applicable to the regime for the settlement of investor-host state disputes created by an investment treaty[25].

While under customary international law of diplomatic protection doctrine, exhaustion of local remedies by the injured alien in the host state where the wrongful act is committed is required before the claims is admissible in the international plane, resort to prior local remedies by injured foreign investors in the host state where the investment is made is precluded by international investment treaties aimed to create direct rights for foreign investors to bring claims to the international plane without first resorting to domestic courts of the host state.

3 General Rule of Resort to Prior Remedies in Multilateral Investment Treaties

By virtue of Article 26 of the ICSID Convention foreign investors, whose home country and the country where the investment is made are contracting parties to the Convention, are not required to exhaust local remedies before seeking international arbitration[26].
The Article precludes the requirement of exhaustion of local remedies unless the state parties to the Convention or the BITs state explicitly that local remedies is a requirement of consent to instituting arbitration and must be exhausted. The ICSID Convention opens

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[23] Campbell Mc Lachlan QC, Laurence Shoer and Matthew Weiniger *International Investment Arbitration Substantive Principles (Oxford University Press, Oxford, 2007)*, at 11

[24] ICSID Art 26

[25] Zachary Douglas *the International Law of Investment Claims (1st Ed, Cambridge University Press, Cambridge, 2009)* at 10

[26] F.C. Amarasinghe at 252

an opportunity for state parties to stipulate explicitly should the parties intend that the exhaustion of local remedies as a condition of their consent to international arbitration. The ICSID Convention under article 25 addresses the issue of jurisdiction of ICSID and its relations to a legal dispute arising directly out of an investment, between Contracting Parties and a national of another Contracting State. Article 26 signifies that the traditional procedures of exhaustion of local remedies would not apply in the ICSID arbitration, at least as general matter, but that Contracting States would be free to impose such an exhaustion requirement in their instrument of consent[27].

ASEAN, Australia and New Zealand Free Trade Agreement[28] (AAFTA) is among the Free Trade Agreements established on regional basis. The AAFTA contains specific provisions on conferring foreign investors substantive rights namely fair and equitable treatment, full protection and security, compensation for losses owing to armed conflict, civil strife or state of emergency, free flow of transfer of capital and expropriation and compensation. Furthermore, the AAFTA also creates direct rights of foreign investors who are nationals of the contracting parties to sue against the host state of the contracting parties to the AAFTA to international arbitrations. AAFTA Chapter 11 on Investment Article 20 read as follows:

> *If an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations, the disputing investor may, subject to this article, submit to conciliation or arbitration a claim:*

Furthermore, pursuant to Article 21 of the Agreement, a disputing investor may submit a claim against the host state which parties to the Agreement at the choice of the disputing investor to arbitration under either ICSID Convention, the ICSID Additional Facility Rules, or under the UNCITRAL Arbitration Rules[29]. The AAFTA Agreement does not explicitly require exhaustion of local remedies and the disputing parties may propose instituting an international arbitration once a dispute on investment arises without obligation to first resort to local remedies. Exception of the preclusion of resorting domestic court of the host states has been made only for foreign investors who make

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[27] Rudolf Dolzer and C. Schreuer *Principles of International Investment Law(* 2nd edition Oxford University Press, Oxford, 2012), at 389

[28] ASEAN Australia New Zealand Free Trade Agreement (entered into force on 1 January 2010 for (between) the following: Australia, Brunei, Malaysia, Myanmar, New Zealand, Singapore, the Philippines and Vietnam, It entered into force for Thailand on 12 March 2010, Laos and Cambodia on 1 and 4 January 2011 respectively and Indonesia on 10 January 2012)

[29] AAFTA Chapter 11 Section B

investment in the Philippines and Vietnam pursuant to Article 21 para 1.a, which reads as follows:

> *a. Where the Philippines or Viet Nam is the disputing Party to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claims;*

Again Article 21 para 1.a does not explicitly require to exhaust local remedies in the ASEAN member states including the Philippines and Viet Nam. Furthermore, the Article 21 requires that the claims should be brought to the courts or tribunals that have jurisdiction to hear such claim. This kind of requirement bring about the consequences that the Philippines and Viet Nam should provide for local courts that have power and competency to hear the claims brought by foreign investors.

In terms of AAFTA, one of the main purposes of incorporating a chapter on foreign investment cooperation in the AAFTA is to promote cooperation in economic fields through the flow of foreign direct investment between contracting parties. The chapter is also aimed at protecting foreign investment through creating directs rights for foreign investor to institute arbitration proceedings should an investment dispute arises.

Most BITs provide for dispute settlement mechanisms without any preconditions to the consent of state parties to international arbitration. As a consequence as long as the BIT is silent on resort to prior remedies, the provisions of Article 26 of the ICSID Convention applies; that is that resort to prior remedies in international investment disputes under such a bilateral investment treaty is not jurisdictional. Unless otherwise the contracting parties to BIT stated explicitly[30] that exhaustion of local administrative or judicial remedies as a precondition of its consent to arbitration, requirement of exhaustion of local remedies before resorting to international claims would be inapposite as it would be contradictory to the general purposes and objective of the international investment treaties and international convention on investment.

[30] ICSID, art 26

B Rationale behind the Conclusion of the International Investment Treaties

The establishment of BITs in which a standing offer to recourse to international arbitration to foreign investors of the other contracting parties are included in their provision, was driven by rationales such as improving the efficiency of settling international investment disputes through avoiding exhaustion of local remedies. Recourse to a domestic court of the host state as a remedy to the disputes between host state and foreign investor is often not attractive to such foreign investors who are fear a lack of impartiality on the part of the local court of host country[31]. On the other hand, the home states are reluctant to espouse an international claim of its investor investing in a foreign country (host state) due to fear of negative impacts on their bilateral relations. Further to this, disputing foreign investors would prefer to be the claimant themselves, instead of their home government, because they are convinced that they are better equipped to develop argument and marshal evidences with relations to what may be a very complex problem of international investment[32].

Bilateral and regional investment treaties are contractual in nature where parties' autonomy to create treaty and the consent of parties to the treaty are the main features of such treaties. A treaty between states is like a contract between parties whether to enter or not to enter a treaty is based on the principle autonomy. Once a state enters into a treaty, the *pacta sun servanda* principle, in which contracting states are obliged to keep promises stipulated in the treaty, applies. On the issue of consent, treaties provide for the contracting parties' consent to foreign investors to bring a claim in international arbitration. Such consent of the host state to international arbitration is reflected in the conclusion of the treaty whereby consent of the foreign investor is reflected in a letter of request to institute an international arbitration.

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[31] Rudolf Dolzer and C. Schreuer *Principles of International Investment Law(* 2nd edition Oxford University Press, Oxford, 2012) at 235

[32] Jan Poulsson *Arbitration Without Privity* (10 (2) ICISD Rev-Foreign inv L.J. 232 (1995) Reproduced in R Dean Bishop, James Crawford and W Michael Reisman Foreign Investment Dispute-Case, Materials, and Commentary (Kluwer Law International, the Hague, 2005) at 691

C Eighteen Months Litigation Requirement: Is it Jurisdictional Requirement?

1 Eighteen Months Rule Litigation Requirement[33] in BIT between UK and Argentine Does Not Constitute Jurisdictional Requirement

Some bilateral investment treaties require disputing parties to submit disputes to competent tribunal (domestic court) of the contracting parties in whose territory the investment was made before the investor can recourse to international arbitration; is known as the eighteen months litigation requirement. For example; the UK-Argentina Bilateral Investment Treaty is one of those treaties that include eighteen months litigation requirement. Article 8 of the BIT stipulates that[34]:

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) If one of Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) Where the Contracting Parties and the investor of the Contracting Party have so agreed.

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[33] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v the Argentine Republic*, para 60

[34] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentine for the Promotion and Protection of Investment (entered into force on 19 February 1993),* art. 8

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer to the dispute either to :

(a) the International Centre for the Settlement of Investment Disputes.

Different interpretations of the eighteen months litigation have been made with the various arguments due to lack of clarity of the provisions. Various approaches have been made by tribunals/arbitrators and respondent states in interpreting and such a requirement framing it with the issue of jurisdiction, admissibility and arbitrability. Furthermore, approaches of such a requirement are framed by the consequences of disregarding the 18 months litigations requirement.

Argentina argues in various proceedings namely in Hochtief AG-Argentine Tribunal[35], Abaclat Tribunal[36], Gas Natural SGD Tribunal[37] and Urbaser Tribunal[38] and BG Group Plc that the eighteen months litigation requirement is a jurisdictional requirement to be exhausted by the investors before claims may be raised in international tribunals. Argentina in the Urbaser case Tribunal proceedings argued that the prior submission to the local courts of Argentine is a jurisdictional requirement that may not be unilaterally set aside by any foreign investors which is not party to the Treaty. The rule requires that an international arbitration is subject to the prior submission of the dispute to the Argentina courts for a term of 18 months or until a decision is rendered on the merits of the case, whichever comes first[39]. Argentine further argued that 18 months litigation is akin to the rule of exhaustion of local remedies in international law; that the State where the violation occurred should have an opportunity to redress it by its own means[40]. As regards, the BIT, the requirement for prior submission to local courts constitutes an important element of such consent[41]. In the BG Group proceedings, Argentina argued

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35 *Hochtief AG v the Republic of Argentine (Jurisdiction and Admissibility*) ICSID ARB/07/31, October 24, 2011 para 96

36 *Abaclat and Others v the Argentine Republic, (Decision on Jurisdiction and Admissibility)* ICISD ARB/07/5, 4 August 2011, para 577-590

37 *Gas Natural SDG, S.A v the Argentine Republic (Preliminary Question on Jurisdiction)* ICSID ARB/03/10, 17 June 2005

38 *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*

39 *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para 65

40 *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para 66

41 *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para 67

that the failure of BG Group to bring its grievance to Argentina's courts for 18 months renders its claims inadmissible[42].

The Hochtief AG-Argentine Tribunal maintained that Argentina's interpretation of article 10 (3) on 18 month litigation is radically different from a duty to exhaust local remedies. The tribunal further held that there is no obligation imposed on foreign investors under Article 10 (3) to exhaust the remedies[43] before submitting the case to international arbitration. The tribunal further stated that the issue of 18 months litigation is an issue of admissibility of the claim rather than the jurisdiction of the Tribunal[44] for the tribunal's jurisdiction depends upon the existence of an agreement between the two parties to the dispute and Argentina's agreement to accept the jurisdiction of the Tribunal in respect of a category of dispute is contained in the Argentine-Germany BIT[45].

The Abaclat tribunal held that 18 months litigation is a requirement before resorting to an international arbitration; however, it neither examined the 18 months litigation from the aspect of jurisdiction of the Tribunal nor from the position of the futility of pursuing the case in Argentina's domestic courts. The Tribunal put more emphasis on the balance between the interests of the claimant and the respondent according to the general purposes and objectives of the Chile-Argentine BIT. The Tribunal held that the claimant had disregarded the 18 months litigation requirement but decided that the claimant's disregard of the 18 months rule did not preclude the claimants from resorting to ICSID arbitration on the grounds that provisions of the BIT did not mention the consequences of non-compliance of the rule[46].

The Gas Natural SGD Tribunal did not examine in specific terms the issue of 18 months litigation and its relation to the issue of the Tribunal's jurisdiction. The Tribunal held that the BIT did not require resort to national jurisdiction prior to access to international arbitration[47]. The Tribunal held that the 18 months litigation requirement does not come within the concept of prior exhaustion of local remedies as understood in international law as pursuant to Article 26 of the ICSID Convention, the requirement of exhaustion of

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[42] *BG Group Plc v. The Republic of Argentine (Final Award)* UNCITRAL 24 December 2007, para 141

[43] *Hochtief AG v the Republic of Argentine* para 48

[44] *Hochtief AG v the Republic of Argentine* para 96

[45] *Hochtief AG v the Republic of Argentine* para 22

[46] *Abaclat and Others v the Argentine Republic, (Decision on Jurisdiction and Admissibility)* ICISD ARB/07/5, 4 August 2011, para 590

[47] *Gas Natural SDG, S.A v the Argentine Republic* para 30

local administrative or judicial remedies as a condition of consent to arbitration under the Convention is not explicitly expressed in the BIT[48] .

The Urbaser Tribunal held that resort to domestic courts is a precondition that must be met before resorting to international arbitration[49] however in interpreting Article 8 on 18 months litigation requirement, there should be a bilateral obligation between the investor and the host state. The article also requires that host state allows its court to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient term[50]. The objective of not depriving the host state of its interest of having a fair opportunity to address the dispute through its own court, should be balanced by the objective of not depriving the foreign investor who equally has an interest in a fair opportunity to have the dispute examined by a competent domestic court[51].

The Urbaser Tribunal found that none of various possible alternative means of litigation before the domestic courts of Argentina are suitable to meet the requirement of the Article X (2) and (3) of the BIT. This finding was based on the grounds that the time taken for any investor-state disputes before the courts of Argentina would far exceed the 18 months fixed by Article X (3) of the BIT for the purpose of reaching a decision on the substance. Therefore the Tribunal concluded that Claimants were not required to resort to the local courts of Argentina pursuant to provision of Article X (2) and (3) of the BIT. It would be impossible for such court proceedings to be concluded and final decision reached in 18 months, thus it would be unfair to require the investor to resort to local courts[52].

2 Eighteen months litigation does not fall under rule of exhaustion of local remedies under customary international law

Argentina concluded some BITs with other contracting states which provide for 18 months litigation in domestic courts before the foreign investor may resort to

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[48] *Gas Natural SDG, S.A v the Argentine Republic* Para 30

[49] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para130

[50] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para 131

[51] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para 131

[52] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*, para 132

international arbitration. However, in the BG Group Tribunal, Argentina does not specifically states that 18 months litigation constitutes the rule of exhaustion of local remedies. In spite of that Argentina insisted that failing to recourse to the domestic court of Argentine make the BG's claims inadmissible before the Tribunal.

On the other hand, the BG Group relied on the customary international law rule and held that the 18 months litigation requirement of exhaustion of local remedies may be disregarded in cases where the course of justice is unduly slow and unduly expensive in relation to the prospective compensation[53]. From that proposition, it can be construed that BG Group agreed that 18 months litigation is akin to local remedies that must be exhausted but BG Group relied on exemption to escape from jurisdictional requirement of exhaustion of local remedies by invoking the futility of local remedies.

The Tribunal is right when holding that arbitration is the engine of transition from a politicised system of diplomatic protection to one of direct investor-state adjudication[54] and the purpose of BITs is to create direct rights for foreign investors to have recourse to international arbitration. The BG Tribunal is also right when holding that reliance on customary international law of the rule (and its exemption) of exhaustion of local remedies[55] is not relevant because the Argentina-UK BIT is available[56]. However the Tribunal did not give a thorough analysis of the application of the diplomatic protection doctrine in its attempt to refuse the BG's arguments on exemption of exhaustion of local remedies.

Customary international law of diplomatic protection provides for procedural rules of local remedies to be exhausted by the aggrieved party before it can bring its grievances to the international plane. The diplomatic protection doctrine is the only framework available for the national state of foreign investor in the absence of specific treaty provides for disputes settlement mechanism between the states. If the BG group's interpretation of 18 months litigation is akin to local remedies under customary international law and the rule of exhaustion of local remedies to be applied is correct, then such an interpretation will contradict the general principle of international law that the lex specialis takes precedence of lex generalis. More than that the Vienna Convention of the Law of treaties Article 31 stipulates that a treaty shall be interpreted in good faith

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[53] *BG Group Plc v. The Republic of Argentine*, para 142

[54] *BG Group Plc v. The Republic of Argentine*, para 147

[55] *BG Group Plc v. The Republic of Argentine*, para 143

[56] *BG Group Plc v. The Republic of Argentine*, para 146

in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the lights of its object and purpose. Such provision sheds lights on how an interpretation should be made. In deciding disputes on treaty interpretation, The International Court of Justice sets that international conventions/treaties take precedence over customary international law in governing the interpretation of a treaty[57]. The UK - Argentina BIT provides for specific provisions on disputes settlement mechanisms in investment relations[58] and, therefore disputes out of investment between foreign investor of the contracting parties against contracting parties where the investment been made, should be governed by the BIT lex specialis and not by customary international law of exhaustion of local remedies.

The BG tribunal is also correct when refusing the BG Group's argument on the exceptionality of exhausting local remedies under customary international law[59] in the disputes because there is an available bilateral investment treaty which become lex specialis of applicable law should disputes out of investment between foreign investors of the Contracting Party against the other Contracting Party arise. Furthermore, if BG group relied on customary international law to solve the dispute, then BG has not jus standi to sue Argentina in an international tribunal as under customary international law, only states have jus standi to sue other states in the international plane. Should the BG group have grievances against another state, under customary international law of diplomatic protection, only the UK, the national state of the BG group, has jus standi to bring the case before international arbitration, after the BG group exhausted local remedies in Argentina's domestic court.

3 Eighteen months litigation does not relate to issues akin to admissibility in customary international law

The BG Group Tribunal treated 18 months litigation as a matter of admissibility[60] and not a matter of the tribunal's jurisdiction. Meanwhile Argentina maintained that BG claims are not admissible because of the BG group's failure to bring its grievance to

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[57] *Statute of the International Court of Justice*, art 38

[58] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentine for the Promotion and Protection of Investment (entered into force on 19 February 1993),* art 8

[59] *BG Group Plc v. The Republic of Argentine,* para 146

[60] *BG Group Plc v. The Republic of Argentine,* para 47-53

Argentina courts for 18 months litigation[61]. The Tribunal decided that the BG Group case is admissible on the ground that a serious problem would loom if the admissibility of the Claimants' claims were denied[62].

The Tribunal decided the admissibility of the case without first defining the definition and the concept of admissibility of the case itself. It is true that there is no uniform conduct of ad hoc and the ICSID tribunals in dealing with the issue of admissibility in international investment arbitration even though the ICSID Convention (to which the UK and Argentina are parties0 and the BIT do not contain a concept akin to admissibility of claims. The CMS Tribunal confirmed that the Convention does not deal with admissibility matters as confirmed by the CMS Tribunal[63]. The Enron Tribunal in its decision on jurisdiction maintains that the distinction between admissibility and jurisdiction does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competent of the tribunal[64].

In the International Court of Justice's jurisprudence, there is clear distinction between jurisdiction and admissibility; objection to jurisdiction is the equivalent to pleading that the tribunal/the court is incompetent to give a ruling at all whether that ruling related to the admissibility of the claims or its merit, whereas, admissibility of a claim is equivalent to pleading that the tribunal should rule the claim to be inadmissible on grounds other than its ultimate merits[65]. In the ICJ Proceedings, a case may be declared inadmissible but it does not necessarily mean that the court does not have jurisdiction. The court has jurisdiction, but the case cannot be heard by the court until the matter is rendered admissible according to the merits of the case.[66]

When the conclusion of admissibility of the case is drawn, the BG Tribunal does not discuss or give an analysis of the admissibility of the case from theoretical or practical perspectives. If the Tribunal borrowed the concept of admissibility from the ICJ's jurisprudence in concluding that the case is admissible in jurisdictional stage of

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[61] *BG Group Plc v. The Republic of Argentine*, para 141

[62] *BG Group Plc v. The Republic of Argentine*, para 156

[63] *CMS Gas Transmission v the Republic of Argentina (Objection to Jurisdiction)* ICSID ARB/01/8, 17 July 2003, para 41

[64] *Enron Corporation and Ponderosa Assets, L.P v the Argentine Republic (Decision on Jurisdiction)* ICISD ARB/01/03, 14 January 2004

[65] Peter Muchlinski, Federico Ortino and Christoph Schreuer *International Investment Law* (Oxford University Press, Oxford, 2008) at 919

[66] Peter Muchlinski, Federico Ortino and Christoph Schreuer, at 928

proceedings it is problematic because neither such concept is found in the ICSID Convention nor in the BIT. In this case, it is inapposite for the Tribunal to propose reasoning on the admissibility of the case from the elements outside of the case; the futility of the Argentinian domestic law and policy.

The Urbaser Tribunal proposed a convincing analysis on the issue of jurisdiction and admissibility and its relation to the 18 months rule litigation. The Urbaser Tribunal held that if the lack of admissibility is asserted as an objection at the jurisdictional stage, it must be dealt within a jurisdictional framework or in the context of the Tribunal's competence with respect to at least one or all of its elements (rationae tempori, loci, personae, et materiae)[67].

4 Eighteen months litigation constitutes procedural precondition to be met before instituting international arbitration

The BIT has specific purposes and objectives, among which to encourage economic cooperation and to promote investment. In particular, the purpose of the establishment the BIT is to give foreign investors recourse to international arbitration should disputes out of investment arises. Such rights are provided by the BIT to enable the disputing foreign investor to avoid a long and exhausting proceedings in the domestic court of the host state.

In interpreting the provisions on 18 months litigation stipulated in the UK-Argentine BIT, reference should be made to the Vienna Convention on the Law of Treaties, Article 31[68] which stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

There are various interpretations on 18 months litigation requirement in most BITs between Argentina with its counterparts. Argentina proposed a flawed argument that the BG Tribunal is lack of jurisdiction because Argentina does not give consent to instituting

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[67] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic* para 126

[68] Vienna Convention on the Law of Treaties Vienna Convention of the Law of Treaties 1155 UNTS 331 (entered into force on 27 January 1980), art 31

arbitration on the ground that the BG group disregard the 18 months litigation in Argentine domestic Court.

Consent to arbitration is one of the very important elements in the bilateral investment treaties beside rights and obligation of parties to the treaty. The host contracting state party must have consented to arbitration of investment disputes with a claimant having the nationality of another contracting state party pursuant to the provisions of the investment treaty and, where relevant, the ICSID convention[69]. Consent to arbitration of a state is a very important element of the tribunal adjudicative power. Consent of the host state is expressed through concluding the BIT with the other contracting parties, where recourse to arbitration is stipulates in its provision of disputes settlement mechanism. Consent of foreign investors to arbitration is regulated as mutually agreed upon by the contracting parties to the BIT, and usually is expressed in writing, through a letter requesting to institute international arbitration.

Foreign investor's consent to arbitration is jurisdictionally required as the foreign investor is not party to the treaty where under the non privitiy doctrine, the foreign investor as a third party does not have rights to raise cause of action to submit claim unless otherwise the contracting parties agree to grant right to foreign investor which is generally stipulated in the BIT provisions. Consent of disputing parties to institute arbitration is one of element that affect the jurisdiction of the court as the ICISD Convention defines that the extent of jurisdiction of an international tribunal lies on the consent of Contracting Party and the national of another contracting state to bring the disputes to international tribunal[70].

The Urbaser Tribunal has a convincing argument that 18 months litigation is a precondition to be met before instituting international arbitration[71]. Framing 18 months litigation as a procedural precondition before instituting international arbitration brings different meanings and consequences from framing it with preconditions to the consent of state parties to instituting international arbitration. Framing it with procedural precondition is that 18 months litigation is one of the steps to be met by either party before instituting international arbitration and that failure to meet such a precondition does not affect the jurisdiction of the Tribunal at all. Meanwhile framing 18 months

[69] Zachary Douglas, at 151

[70] ICSID Convention, art 25

[71] *Urbaser S.A and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v the Argentine Republic*,

litigation with consent of state parties means that 18 months litigation is a requirement of such consent therefore, disregarding the requirement may cause the tribunal lack of jurisdiction.

Argentina's interpretation that 18 months litigation is a jurisdictional requirement goes too far for the Vienna Convention of the Law of Treaties article 31 stipulates that interpretation of a treaty should be in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objectives and purposes[72].

The purpose of the UK-Argentine BIT is to provide three tiers disputes resolution mechanism for foreign investors against the host state of the contracting parties. The Tree tiers- negotiation, local court litigation, and international arbitration- aim at providing disputes resolution for the foreign investor against the host state in an inexpensive, speedy and efficient manner. On the other hand, the three tier dispute resolutions also give an opportunity for host state to offer remedies should the investor's rights have been breached. Under the principle of Vienna Convention Article 31, interpretation of 18 months litigation should be framed within two aspects - first, giving a fair and speedy manner of dispute resolution for BG Group, and second, giving opportunity for the Argentina Court to redress the disputes and offer remedies according to its domestic law. In this regard, 18 months litigation must not be interpreted as a bar to recourse to international arbitration, but as a choice that the disputing parties can make use of in resolving their investment disputes.

If Argentina's interpretation that 18 month litigation constitutes consent to arbitration and lack of Argentina's consent leads to lack of the Tribunal's jurisdiction is correct, then such an interpretation is contradictory to the plain meaning of the provision itself. More than that, it contradicts the main purposes of the conclusion of the UK-Argentina BIT. Such interpretation is confirmed by the District Court of Columbia in its proceedings on review of the BG Tribunal award brought by the Argentina Republic. The District Court of Columbia's reasons on refusing the Argentine's request on the ground that the arbitrability of the case is in the hands of arbitrators are correct because Argentina was not compelled to arbitrate the dispute without its consent[73]. The implication of such a court's holding is that the 18 months litigation does not constitute a precondition to consent of Argentine to arbitration.

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[72] Vienna Convention on the Law of Treaties Vienna Convention of the Law of Treaties, art 31

[73] Republic of Argentina v BG Group 715 F Supp 2nd 108 at 17

The US Court of Appeal has a well reasoning about arbitration objectives in the appellate proceedings on the decision of the District Court of Columbia. The US's Court of Appeal is right when it maintains that the basic objective of arbitration is to ensure that commercial arbitration agreements are enforced according to their terms[74]. However, the Court is wrong when in interpreting the provisions on 18 months litigation, the Court frames it with the arbitrability issue. The Court of Appeal is also wrong to hold that the question of gateway of arbitration should be decided according to the intent of the parties to the agreements. And where the parties did not agree to submit the arbitrability question to arbitration, then the district court should decide the question independently as in case of Howsam v Dean Witter [75].

Arbitrability implies that the dispute is 'arbitrable' or capable of being settled by arbitration[76]. In this case, it is inapposite to frame the case within the arbitrability as Argentina has consented to international arbitration as a standing offer through signing the BIT with the UK, whereas, consent to arbitration is expressed by BG Group through requesting to institute international arbitration.

If -the assertion of the Court of Appeal is right, then the BIT text should state explicitly - that the 18 months requirements must be fulfilled as a prerequisite of consent of contracting parties to international arbitration. Because the BIT text does not state clearly then to interpret such provision of 18 months is jurisdictionally required is exceeding the parties intended[77]. In this case, it can be construed that the 18 months litigation in domestic courts is only a matter of procedure to be followed by disputing parties and not a jurisdictional requirement before instituting international arbitration. The Supreme Court further held that the requirement to litigate in domestic court and wait until 18 months is only procedural condition precedent to arbitration[78].

D Impact of the Supreme Court's Interpretation on 18 months litigation on international investment arbitration

1 Legal Basis for Domestic's Court Review under the New York Convention

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[74] Republic of Argentina v BG Group Plc F 2 (DC Cir) at 9

[75] Republic of Argentina v BG Group Plc F 2 (DC Cir) at 10

[76] Peter Muchlinski, Federico Ortino and Christoph Schreuer, at 927

[77] BG Group Plc v Republic of Argentina 572 US at 1 (c)

[78] BG Group Plc v Republic of Argentina 572 US at 1 (c)

Under the New York Convention[79], either party to the dispute may request a refusal on recognition and enforcement of an arbitral to the court at the seat of arbitration. Article V New York Convention stipulates refusal to an award may be requested on the ground that:

1 (b) the parties to the agreement referred to in article II were, under the law……, failing any indication thereon, under the law of the country where the award was made; or

2 (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Argentina brought a petition to the United States District Court for the District of Columbia to vacate the award that is in favor of BG group against Argentina[80] made by the BG Tribunal on the grounds that the tribunal exceeded its authority and lacked jurisdiction[81] by allowing the BG Group recourse to arbitration before submitting the case to Argentina's domestic court and that was contrary to the public policy of the United States[82].

The District Court is correct on two counts in deciding that it has jurisdiction to review an award made by the tribunal based on the New York Convention under two grounds: first, if there is indication that the agreement (to recourse arbitration) is failing any indication, thereon, under the law of the country where the award was made[83]. Second, if there is the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country[84]. Furthermore, the Court is giving well analysis on distinction of two sets of rules on reasons for vacating the award under Federal Arbitration Act and on refusing or confirming the award under New York Convention. The Federal Arbitration Act (FAA)[85] recognises the element of exceeding powers to vacate an award[86] whereas the New York Convention does not.

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[79] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38(entered into force on 7 June 1959)

[80] Republic of Argentina v BG Group 715 F Supp 2nd 108 at 1

[81] Republic of Argentina v BG Group 715 F Supp 2nd 108 at 9

[82] Republic of Argentina v BG Group 715 F Supp 2nd 108 at 11

[83] The New York Convention, art v 1. a

[84] The New York convention art v 2 b

[85] The Federal Arbitration Act

[86] Federal Arbitration Act

2 *Impact of the US Supreme Court's decision on setting standard of arbitration review*

The US Supreme Court's ruling has big impacts on the current and future proceedings involved in interpreting the 18 months litigation requirements since this issue has become one of the main focus in the international investment arbitration since last decade. The ruling confirms some previous Tribunals' interpretation that 18 months litigation is procedural requirement and that it does not affect the jurisdiction of the Tribunal. Furthermore, the ruling also sets the standard for other foreign courts in reviewing an arbitral award. Likewise, the Supreme Court's ruling also confirms the nature of the BIT akin to a private contract. Such confirmation of the contractual nature of the BIT is important for future tribunals attempting to interpret the intent of contracting parties on the consent to international arbitration. This has big impact on how the courts decide the arbitrability or non arbitrability of the case. Such a gateway of arbitrability is of utmost importance in deciding whether the tribunal exceeds its power in deciding the case.

As the New York Convention paves the way for parties to seek annulment on the grounds that the award is against public policy of the seat of the tribunal ground, some losing parties try to find an escape by invoking provisions to seek annulment or court review in the domestic court of relevant states. The District Court's refusal against the respondent's arguments that the award is contrary to the public policy of the seat of the tribunal would discourage the losing party to easily find a way to annul an award which is in their opinion favouring the other party in domestic courts of states on the ground of public policy issues.

E *Resort to Prior Remedies in International Investment Disputes and policy Implication for Indonesia*

1 *Availability of Indonesia's Court Remedies*

In the Indonesian legal system, the judiciary consists of two types of court. The first type is the Supreme Court and all courts under its jurisdiction namely; general courts, military courts, religious courts and administrative courts. Second type is Constitutional Court[87]. The General courts have many branches among others are commercial court and tax court. The commercial court has jurisdiction to hear disputes between private individuals

[87] Indonesian legal system, at 12 http://www.aseanlawassociation.org/papers/Constitution.pdf

or entities whereas the tax court has jurisdiction to hear disputes between state and individuals or entities on taxation disputes.

The Administrative Court is different from the General Courts with the Administrative Court having the following characteristics[88]:

a. Creating balance of power between the applicant (private individuals/corporation) vis a vis the respondent (state) where the respondent is a state officials or state agency. It is assumed that the claimant's position is weaker compared to that of the respondent
b. Cause of action or the object of the case is a decision made by relevant state officials/state institution
c. The court's decision is enforced on the principle 'erga omnes; that is, the decision is enforceable against not only the parties to the claim but also against related third parties.

Is the Administrative Court a competent and effective court in Indonesia to hear a foreign-investor disputes? At the outset, every person including the foreigner has constitutionally guaranteed rights of access to justice pursuant to Article 28 D of the Indonesian Constitution 1945. Pursuant to Article 53 para 1 and 2, Law No. 9 year 2004[89], any natural person or legal private entity whose rights have been allegedly violated by the state agency may seek annulment of the policy or decision issued by a state official or state agency with or without compensation to the Administrative Court under two grounds. First such policy or decision is contradictory to the relevant applicable laws. Such applicable laws are the Indonesian Constitution, relevant applicable laws, government regulations, and residential decree. Second, such policy or decision is contradictory to the general principles of good governments pursuant to Article 3 Law no. 28 Year 1999 on Good Governance. Such law is also applicable to a dispute between foreign investors against government agencies in particular the coordinating board of Investment Agency on license revocation.

The disputing foreign investors may pray to the Administrative Court to reinstall the permit, to annul the decision, and to seek the damages pursuant to Article 53 of Law no. 9 year 2004 on the Administrative Court. On periods, disputes on government's policy or decision have been filed by foreign investors in administrative courts, which some of the investors have been granted an award (revalidation of the permit) against the government

[88] Indonesian Legal System, at 80 http://www.aseanlawassociation.org/papers/Constitution.pdf

[89] Law on the Administrative Court 2004 (Republic of Indonesia)

body. One of such case is MSK Plantation Pte. Ltd versus Chairman of Investment Coordinating Board case No. 34 K/TUN/2012. Pursuant to Article 53 damages may be granted by the court to the foreign investors where the loss that the foreign investor suffers may be materially calculated. Pursuant to Government Decree no. 43 year 1991[90] Regarding Damages, the amount of damages that the court may award to the claimants under the Decree must not exceed Rp. 5,000,000 (equivalent to USD 350 per Sept 2015).

Thus, although under the applicable laws, there is a court available at the domestic level that has jurisdiction to adjudicate foreign investor-government officials/agency, this court lacks effectiveness to provide redress to foreign investors. Under the Government Decree no. 43 damages are not calculated according to -a sum equal to the loss- including loss of profit, suffered by the foreign investor. Damages are calculated under the discretion of the Court and the amount of damages that can be awarded must not exceed the equivalent of US $ 350.

2 Indonesian Courts and its Effects to the Guarantees Contained in the Investment Treaties

Does the Administrative Court have jurisdiction to hear foreign investor-state disputes under treaty breach made by the state? Bilateral investment treaties (BIT) provide rights to foreign investors; these rights include fair and equitable treatment, protection from denial of justice and protection from expropriation with proper compensation. Such rights do not fall within the jurisdiction of the Administrative Court as pursuant to paragraph 4 of Law no. 5 year 1986[91] and Law no. 9 year 2004 on the Establishment of Administrative Court, the competence of the Administrative Court is to adjudicate a dispute between private individuals/corporations against state administration arising in the field of state administration as a result of the issuance of the decree of the state administration. In terms of causae materiae, such allegation of treaty breach is not within the jurisdiction of the Administrative Court for the competency of the Court is merely to hear cases arising in the field of state administration as a result of the issuance of the decree of the state administration. Alleged violation of substantive treaty rights by the states is not akin to state administration arising in the field of state administration.

[90] Peraturan Pemerintah Tentang Ganti Rugi dan Tata Cara Pelaksanaannya pada Peradilan Tata Usaha Negara 1991, reg 43

[91] Law on the Administrative Court No. 5 1986 (Republic of Indonesia)

In this case the Administrative Court is not the appropriate Court to hear foreign investor-state disputes on treaty claims for two reasons; namely, an unavailability of effective damages that may be awarded to the foreign investor, and the lack of jurisdictional incompetency of the Court to hear treaty rights breaches.

Can the Constitutional Court review a law enacted by the government that is allegedly contradictory to a law on ratification of bilateral investment treaty where foreign investor's rights are guaranteed under the BIT treaty? The Constitutional Court was established pursuant to Article 24 (2) and 24 C of the Constitution of the Republic of Indonesia and Law No. 24 Year 20003 on the Constitutional Court. The characteristics of the Constitutional Court are as follows:

b. A court of first and final instance
c. The decision of the court is final and binding
d. Decisions of the constitutional validity of laws
e. Deciding disputes between state institutions
f. Resolving disputes related to the results of the general election
g. On petition of the Parliament, the Court reserves the power and authority to determine allegations of treason, corruption, bribery and other serious criminal offences against the President and Vice President.

Pursuant to article 51 Law no. 24 on the Constitutional Court, claimants are conferred constitutional rights under the Indonesian Constitution when they satisfy the following one of the characteristics; namely, Indonesian citizen, legal entity, or state institution/agency. Pursuant to Article 52, the claims should satisfy the following requirements:

- Enactment of a law does not satisfy provisions of the 1945 Indonesian constitution; or/ and
- The provisions contained in the law are contradictory to the 1945 Indonesian Constitution.

Indonesia adopted a dual system, where international treaties are not automatically applicable at the domestic level; hence all international treaties must be ratified in order to be implemented in domestic level. Such ratification is implemented through the promulgation of the treaty into a law[92]. Under the Indonesian legal system, a foreign investor has "jus standi" to bring a case before the Constitutional Court as the foreign

[92] Undang Undang Perjanjian Internasional Pasal mengenai Pengesahan Perjanjian Internasional 2000 (Republic of Indonesia), art 1-2

investor satisfies the requirements to be a claimant pursuant to article 51 of the Law on the Constitutional Court.

As it has been mentioned before, an international treaty has effects at the domestic level after being promulgated into a law through ratification by the Indonesian Parliament and the Government. While there are many debates on whether or not the Constitutional Court has jurisdiction to review law on the ratification of international treaties, a decision of the Constitutional Court on the request to judicially review the law of Ratification of the ASEAN Charter against the 1945 Indonesian constitution confirms that the Constitutional Court does have jurisdiction to adjudicate the case[93] and that the ratified international treaties (including bilateral treaties) are objects of judicial review of the Constitutional court under Indonesian legal system. Therefore, it can be construed that a law on ratification of Bilateral Investment Treaties is one of the objects of judicial review of the Constitutional Court.

A claim submitted before the Constitutional Court should satisfy one or both the following requirements; enactment of a law does not satisfy provisions of the 1945 Indonesian constitution, the provisions contained in the law are contradictory to the 1945 Indonesian Constitution. It is very hard to draw a logical conclusion that enactment of a law which allegedly violates treaty rights under BIT leads to violation of the Constitution or leads to contradiction of the Constitution.

Furthermore it should be borne in mind that the Constitutional Court‘s jurisdiction is to judicially review a law that allegedly does not satisfy provision of the Constitution or is contradictory to the Constitution. The Court does not have jurisdiction to judicially review an alleged contradiction between one law against the other enacted laws.

The Constitutional Court has a big impact in the Indonesian judicial system because the Court’s decision can annul a law that is contradictory to the Constitution. However, due to the limited jurisdiction of the Administrative Court, and due to the Court’s competency and power is being limited to review a law against the 1945 Constitution, it can be construed that the Indonesian courts have little direct effects on the guarantees contained in an investment treaty.

[93] Aliansi untuk Keadilan Global v Pemerintah Indonesia [2013] Decision of the Constitutional Court of the Republic of Indonesia on a request to judicially review law No. 38 Year 2008 on the ratification of Charter of the Association of Southeast Asia Nations against the 1945 Indonesian Constitution, case No. 33/PUU-IX/2011 , February 2013

Arbitration has existed in Indonesia since the time of the Dutch colonial government[94]. The most recent attempt to codify all the disparate arbitration laws and regulation into one law was Law No. 30[95] on Arbitration and Alternative Disputes Resolution which became the primary source of law for the arbitration system in Indonesia[96]. One of the purposes of codifying regulatory framework into one definitive arbitration law is to provide legal certainty in the field of dispute settlement mechanisms[97].

Indonesia is a contracting party to the New York Convention and to the ICSID Convention. Indonesia enacted the Investment Law 2009 which provides for resorting to international arbitration. Pursuant to Article 32 (4) of the Law the disputing parties may settle the dispute through international arbitration upon agreement by the parties.

There are 64 Bilateral Investment Treaties[98] in place between Indonesia and its counterparts in which direct recourse to international arbitration has been stipulated in their provisions. The BIT between the UK and the Republic of Indonesia is one of its kinds. Article 7 of the BIT stipulates as follows[99]:

> *(1) The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such nation or company to submit for conciliation or arbitration, to the Center established by the Convention of the Settlement of Investment Disputes between States and Nationals of Other States….*

In summary those bilateral investment treaties do not stipulate jurisdictional requirements to resort to prior remedies in Indonesia's domestic court before the foreign investor bring their treaty claims to international arbitration.

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[94] Indonesian legal system, at 125 http://www.aseanlawassociation.org/papers/Constitution.pdf

[95] Arbitration and Alternative Dispute Resolution No. 30 1999 (the Republic of Indonesia

[96] Indonesian Legal System at 127 http://www.aseanlawassociation.org/papers/Constitution.pdf

[97] Indonesian Legal System p 128 http://www.aseanlawassociation.org/papers/Constitution.pdf

[98] Abdul Kadir Jaelani *Kedaulatan dalam Perjanjian Investasi Internasional, Koran Sindo, Selasa* 26 Mei 2015

[99] Agreement between the Government of the United Kingdom of Great Britain and North Ireland and the government of the Republic of Indonesia for the Promotion and Protection of Investment (entered into force 24 March 1977)

There are aspirations at the domestic level to launch a new policy toward international investment, including through renegotiating those existing bilateral treaties and including elements of requirement of exhaustion of local administrative or judicial remedies as a condition of consent to arbitration. The aim of this is to give more room to the Government to implement its own development goals[100]. Such a new policy proposal is feasible as long as Indonesia prepares all domestic administrative and judicial remedies including ensuring that the domestic courts are competent and effective in dealing with international investment disputes.

3 Impact of ASEAN investment Treaties on Foreign Investment Protection in Indonesia

There are five investment chapters under various regional agreements among others is ASEAN Cooperation framework of ASEAN Australia New Zealand Free Trade Agreement (AAFTA) that confers rights for foreign investors to have direct recourse to international arbitration. Under the terms of those regional investment treaties, where Indonesia is a contracting party, disputing parties are not required to resort to prior remedies before the disputes be submitted to international arbitration.

AAFTA provides for disputes settlement mechanism for investor-state disputes within the ASEAN framework. Pursuant to AAFTA Chapter 11 on Investment a disputing investor may submit claims such as national treatment, treatment of investment, compensation for losses, transfer and expropriation and compensation directly to international arbitration. Article 20 gives wide freedom for foreign investors to choose a forum such as conciliation or arbitration they consider to be the best fit for disputes settlement.

Article 22 (1) (c) of the AFTA Chapter 11 stipulates that:

> *The notice of arbitration being accompanied by the disputing investor's written waiver of its right to initiate or continue any proceedings before the courts or administrative tribunals of either Party, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute a breach referred to in Article 20 (Claim by an Investor of a Party).*

Such provisions brings about the consequences that should the disputing foreign investor have chosen arbitration to settle investment disputes, then resort to domestic courts of the relevant states is precluded.

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[100] https://kadijailani.worldpress.com/tag/perjanjian-investasi Indonesia's perspective on Investment Agreement review, South Center, Published in Investment Policy Brief, no. 1, July 2015

ASEAN Cooperation has various Protocols on Disputes Settlement Mechanisms among others is the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanism adopted by the ASEAN Member States in Ha Noi on 8 April 2010. Pursuant to article 19, the Protocol shall enter into force on the day following the date of deposit of the tenth instrument of ratification with the Secretary-General of ASEAN. The 2010 Protocol has not entered into force[101]. While the ASEAN Charter undertakes a general commitment to the establishment and maintenance of institutional disputes settlement mechanisms, the 2010 ASEAN Protocol on Dispute Settlement puts in place such an institutionalized system and provides for specified dispute resolution methods[102].

However, the 2010 ASEAN Protocol does not provide a legal basis for foreign investor-state disputes for number of reasons. First, the 2010 ASEAN Protocol has not yet entered into force. Second, unlike AAFTA that provides for investor-state arbitration, the 2010 ASEAN Protocol on Disputes Settlement Mechanisms does not. Pursuant to article 1 of the 2010 Protocol, the Complaining Party means any member State to which the request for consultation or arbitration is made. Last, the 2010 ASEAN Protocol applies to disputes concerning the interpretation and application for the Charter. The Protocol applies to other ASEAN instruments which expressly state that the Protocol applies or other ASEAN instruments unless specific means of dispute settlement are already provided for[103]. In this case, foreign investor-state disputes does not fall within the scope of the 2010 Protocol because AAFTA Agreement Chapter on Investment has provides for by its own rights a foreign investor-state disputes settlement mechanism.

Another important agreement in ASEAN on dispute settlement mechanism is the 2004 ASEAN protocol on Enhanced Dispute Settlement Mechanism signed in Vientiane, Laos on 29 November 2004. The Protocol is the primary mode of dispute settlement envisioned for ASEAN Economic agreements both before and after 2004, where those instruments have not specifically provided special or additional rules and procedures[104]. Article 5 of the 2004 Protocol provides for disputes resolution through Panels to hear state to state disputes. Among the agreements in the field of investment protection

[101] http://cil.nus.edu.sg/2010/2010-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms/

[102] Gino J. Naldi “the ASEAN Protocol on Dispute Settlement Mechanism: An Appraisal” (2014) J. Int'l Disp. Settlement at 122

[103] Gino J. Naldi at 122

[104] 2004 ASEAN Protocol on Enhanced Disputes Settlement Mechanism http://cil.nus.edu.sg/2004/2004-asean-protocol-on-enhanced-dispute-settlement-mechanism-signed-on-29-november-2004-in-vientiane-laos-by-the-economic-ministers/

covered by the Protocol is the Agreement among the Governments of Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand for the Promotion and Protection for Investment (hereinafter the ASEAN Agreement on Protection of Investment) which entered into force on 15 December 1987. State party to the Agreement may bring investment disputes against other state party to the Panels under the framework of the ASEAN Protocol.

Due to the nature of the state-to-state disputes settlement mechanism offered by the 2004 ASEAN Protocol foreign investor may not bring treaty claims against the host state of ASEAN Contracting parties to international arbitration or to the Panels. Legally, there is a room for a national's state of foreign investor who is party to the Agreement to bring investment disputes as long as the national's state of the investor bring the disputes to the Panels on the interpretation on investment agreements under Article 5 of the ASEAN Protocol on the interpretation of ASEAN Agreement of Protection of Investment. Such mechanism is akin to state espousal in term of rasionae personae where a national state of foreign investor brings the grievances on the interpretation of a certain agreement covered by the ASEAN Protocol.

Since the conclusion of the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanisms, no state-to state disputes have been brought before the Arbitration under article 5 of the Protocol. Likewise, the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms has not entered into force after it was signed. Hence precedent-setting on the dispute settlement mechanism under those ASEAN Protocols have not been established.

It can be construed that the operation of the Panels under the framework of the 2004 ASEAN Protocol likely would not be akin to international arbitration but probably would be akin to the mechanism and the work of WTO Disputes Settlement Mechanism. Likewise,

From those findings, in can be concluded that the 2004 ASEAN Protocol on Enhanced Disputes Settlement and the 2010 Protocol to the ASEAN Charter on Disputes Settlement mechanisms do not have direct effect to the protection of treaty rights conferred to foreign investors by bilateral and multilateral investment treaties under the legal framework of ASEAN.

On the other hand, the ASEAN Investment Agreement contained in AAFTA Chapter 11 on Investment, gives an exclusive resort to arbitration should the foreign investors have chosen a particular arbitration forums for dispute settlement. Under the AAFTA Chapter 11 on Investment direct rights for international arbitration recourse has been guaranteed and resort to arbitration is stipulated exclusively, and that it has an adverse huge impact on Indonesia's aspiration to renegotiate its bilateral investment treaties. An attempt to amend the AAFTA and include provisions on requirement of resort to prior remedies before instituting international arbitration is almost impossible because the amendment of the AAFTA should involve the ten member states of ASEAN.

A policy to renegotiate bilateral investment treaties with other contracting parties and proposes inclusion of jurisdictional requirements to resort to prior remedies before submitting investment disputes to international arbitration, looks easier owing the fact that Indonesia may terminate the treaty once it expires. Indonesia may propose an amendment of the existing bilateral treaties during the negotiation on the extension of the validity of the bilateral investment treaties. However, the policy to renegotiate bilaterally with individual country would b irrelevant if the direct recourse of foreign investor to international arbitration is still guaranteed by the AAFTA Chapter 11 on Investment.

IV Conclusion

The doctrine of local remedies in international investment disputes under customary international law has similar meaning to the doctrine of prior remedies in international investment disputes under international investment treaties; however, the application of both doctrines is different. Under customary international law, the doctrine of local remedies must be exhausted until the highest court before the national' state of the alien may espouse the claims to the international plane. Disregarding the exhaustion of local remedies rule may lead the international claims declared inadmissible by the tribunal as the exhaustion of local remedies has two purposes. The first purpose is to give an opportunity for the violating host state to offer redress to the alien, and the second is to prove that the violating state failed to render justice to the alien. As such the hos state's failure to offer redress to the injured aliens raises an international responsibility of the violating host state. However the Tribunal's and Court's declaration that the case is inadmissible does not affect the jurisdiction of the Tribunals at all because the jurisdiction of the tribunal lies within their power and competency to adjudicate disputes. Such power is bestowed through the consent of disputing parties to bring the case before the tribunal/the court. Thus, it can be concluded that disregarding the rule of exhaustion of

local remedies by the injured aliens does not affect the jurisdiction of the tribunal or the court to adjudicate the disputes.

Under international investment treaties, resort to prior remedies in international investment disputes is precluded as the treaties are aimed at creating direct rights for foreign investors to bring claims to the international plane without first resorting to domestic court of the host state. Under the ICSID Convention, however a state may explicitly state that resort to prior remedies is a requirement of consent of state parties to international arbitration. Should the treaties are silent on the requirement of consent to international arbitration, the interpretation of the treaty should be based on the ordinary meaning; that is the treaty does not require prior remedies to be exhausted.

There are some bilateral investment treaties (BITs) such as those between the UK and the Argentina Republic that include a requirement of 18 months litigation in the domestic court of the host state. Various interpretations have been made on the requirement of the 18 months litigation. Some groups, including the Argentina Republic, argues that the 18 months litigation in the domestic court constitute requirements of consent of contracting parties to international arbitration and that disregarding such requirement constitutes the host state's lack of consent to the international arbitration. The Argentina's argument is flow on the grounds that such an interpretation is contradictory to the general purposes and objectives of the BIT itself, which is to create direct rights for foreign investors to recourse to international arbitration.

The 18 months litigation does not constitute jurisdictional requirement as the jurisdiction of the tribunal, under the ICSID Convention article 25 lies within the three aspects; namely legal disputes; between contracting parties and national of another contracting state arising directly out of an investment; and the availability of consent of the contracting party and nationals of another contracting state to bring the dispute to international tribunal. Consent of the foreign investor is expressed by the request to institute international arbitration whereas consent of the contracting parties to international arbitration is expressed through concluding the BIT.

The 18 months litigation does not relate to the issue to admissibility in customary international law, neither the ICSID Convention nor the BIT recognise the concept of admissibility in international investment disputes. Pursuant to Article 41 of ICSID Convention, the Tribunal has two stages of proceedings, being the preliminary question and the merits of the disputes.

The US Supreme Court's ruling on the issue of 18 months litigation had big impact on the current and future proceedings involved in interpreting the requirement of prior remedies. The Court's ruling is that resort to prior remedies is a procedural requirement therefore it does not affect the jurisdiction of the Tribunal. Furthermore, this ruling also set the standard for other foreign courts in reviewing an arbitral award. Likewise, the Supreme Court's ruling confirmed the contractual nature of the BIT which is akin to a private contract. This kind of ruling also give big impact on how the domestic courts analyse the issue of arbitrability or non arbitrability of the case. Such a gateway of arbitrability is utmost important in the preliminary stage when a court decide whether the tribunal exceed its power in deciding the case.

As the ICSID Convention paves the way for parties to seek an annulment of the tribunal's award on the grounds that the award is against the public policy of the seat of the tribunal. The losing party may try to find an escape by invoking such provisions to seek annulment through court review in domestic court of relevant states. In this case, the US District Court's refusal on Argentina's arguments that the award is contrary to the public policy of the seat of the tribunal, would discourage the losing party to exploit the room for an annulment in domestic courts of states on the grounds of public policy issues. Furthermore,

Under the Indonesian legal system, the Administrative Court is the court that has jurisdiction to hear a case between foreign investors against state officials/agencies. However the power and competency of the Administrative Court is only limited to adjudicate disputes between private individuals/corporations arising in the field of state administration as a result of the issuance of the decree of the state administration. Under such limited jurisdiction, a cause of action against Indonesia under the breach of treaty rights could not be brought to the Indonesian Administrative Court. Furthermore, under the Indonesian Government Decree no. 43 on Damages, damages is not calculated according to a sum of equal to the loss including loss of profit, suffered by the foreign investor, instead damages are calculated under the discretion of the Court and the amount of damages that can be awarded must not exceed the equivalent of US $ 350. In this case, The Administrative Court lack effectiveness in providing redress to foreign investors.

A decision of the Constitutional Court's on the request to judicially review the law of Ratification of the ASEAN Charter against the 1945 Indonesian Constitution confirms that the Court has jurisdiction to review a law on the ratification of international treaties. This decision implies that law on the ratification of bilateral investment treaties is one

of the objects of judicial review of the Constitutional Court. A claim submitted before the Constitutional Court should satisfy the following requirements; enactment of a law does not satisfy provisions of the 1945 Indonesian constitution; or/ and the provisions contained in the law are contradictory to the 1945 Indonesian Constitution. It is very hard to logically conclude that enactment of a law that allegedly violates treaty rights under BITs leads to violation of the Constitution or enactment of that law contradict to the Constitution.

Furthermore it should be borne in mind that the Constitutional Court‘s jurisdiction is to judicially review a law that allegedly does not satisfy provision of the Constitution or is contradictory to the Contradictions. The Court does not have jurisdiction to judicially review an alleged contradiction between the enacted laws. The Constitutional Court has a big impact in the Indonesian judicial system because the Court’s decision can annul a law that is contradictory to the Constitution. However, due to the limited jurisdiction of the Administrative Court, and due to the Court’s competency and power being limited to review a law against the 1945 Constitution, it can be construed that the Indonesian courts have little direct effects on the guarantees contained in an investment treaty.

There are aspirations at the domestic level to launch a new policy toward international investment including through renegotiating those existing bilateral treaties and including elements of requirement of exhaustion of local administrative or judicial remedies as a condition of consent to arbitration. the aim of this is to give more room to the Government to implement its own development goals. Such a new policy proposal is feasible as long as Indonesia prepares all domestic administrative and judicial remedies including ensuring that the domestic courts are competent and effective in dealing with international investment disputes.

Indonesia is a party to the AAFT Agreement which provides for provisions for creating direct rights of foreign investors to sue against host state of the contracting parties to the AAFTA in International arbitration. Under the term of those bilateral, regional and multilateral investment treaties, where Indonesia is a contracting party, disputing parties are not required to resort to prior remedies before the disputes be submitted to international arbitration. Although AAFTA provides for state-investor disputes settlement mechanisms, the ASEAN Protocol on Disputes Settlement Mechanisms does not. Article 5 of the Protocol provides for disputes resolution through Panels to hear member states’ disputes. Due to the nature of state-to-state disputes settlement mechanism offered by the

ASEAN Protocol, the foreign investors may not bring treaty claims against the host state to international arbitration or to the Panels.

Legally under the ASEAN Protocol provisions, there is a room for a national's state of foreign investors to bring the investment disputes. Such disputes may be brought by the state against another state party to the Panels under the framework of disputes on the interpretation on investment agreements and not under the framework of the disputes of treaty claims.

Since the establishment of the ASEAN Protocol in 2010, no state-to state disputes on the interpretation of ASEAN Charter or ASEAN arrangements have been reported hence precedent-setting has not been established. However, in can be construed that the operation of the Panel will not be akin to international arbitration but probably is akin to the mechanism and the work of WTO Disputes Settlement mechanisms. From those findings, in can be concluded that the ASEAN Protocol on Disputes Settlement Mechanism does not have direct effect to the protection of treaty rights conferred to foreign investors by the bilateral and multilateral investment treaties.

The ASEAN Investment Agreement contains in AAFTA Chapter 11 on Investment, where direct rights for international arbitration recourse has been guaranteed, give an adverse huge impact on Indonesia's aspiration to renegotiate its bilateral investment treaties. An attempt to amend the AAFTA and include provisions on jurisdictional requirements to resort to prior remedies before submitting investment disputes to international arbitration, is almost impossible because the amendment of the AAFTA should involve the ten member states of ASEAN.

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