

The Utility of Futility: Local Remedies Rules in International Investment Law

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The local remedies rule is a customary rule of international law that requires foreign petitioners to exhaust domestic remedies before seeking international dispute resolution. Futility is an equitable exception that excuses noncompliance on the grounds that adherence to local remedies rules would be “futile.” As an exception, futility is presumably applicable to a smaller share of disputes than enforcement of local remedies rules. In international investment law, this presumption is debatable, with investment tribunals frequently excusing noncompliance. This Note recovers futility’s first principles in order to argue that public and private international law have gone astray, and, that going forward, investment tribunals should favor a more stringent “obvious futility” standard. Empirically, “obvious futility” better aligns with the historical and logical foundations of the futility exception. Pragmatically, “obvious futility” responds to systemic critiques of international investment law by vindicating the ability of states to define their obligations to foreign investors. It underscores that futility is an exception, and state sovereignty remains the rule.

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I. INTRODUCTION

The local remedies rule is a customary rule of international law that requires foreign petitioners to exhaust domestic remedies before seeking diplomatic protection from their home state or pursuing other mechanisms of international dispute resolution.¹ Futility is an equitable exception to the local remedies rule.² A successful futility claim excuses noncompliance on the basis that exhausting domestic remedies would be “futile.” As an exception, futility is presumably applicable to a smaller share of disputes than the local remedies rule. In international investment law,³ this is a questionable presumption. Despite clear text in international investment agreements (IIAs) mandating resort to domestic dispute resolution as a precondition to raising an international claim, investment tribunals have frequently excused noncompliance under the futility exception.⁴ Above all,

1. *See* Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 15, 42 ¶ 50 (July 1989) (recognizing the rule mandating the exhaustion of local remedies as “an important principle of customary international law.”); *Interhandel Case* (Switz. v. U.S.), Preliminary Objections, I.C.J. Rep. 6, 27 (Mar. 1959) (describing the local remedies rule as “a well-established rule of customary international law.”).

2. The case law and academic literature addressing local remedies refer interchangeably to the “local remedies rule,” *see, e.g.*, CHRISTOPHER DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 347 (2008); the “exhaustion requirement,” *see, e.g.*, JAMES R. CRAWFORD & THOMAS D. GRANT, *Local Remedies, Exhaustion of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 24 (Jan. 2007); and the “exhaustion of local remedies rule,” *see, e.g.*, Int’l Law Comm’n, Draft articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 63 (2001). This terminological fluidity is generally not problematic but can cause some confusion when applied to international investment agreements (IIAs), in which the relevant clauses typically do not mandate “exhaustion” but rather a specific period of consultation or domestic litigation. This Note will refer primarily to the “local remedies rule” when discussing the concept in the context of international investment law, and to “exhaustion” when discussing diplomatic protection.

3. This Note analyzes the futility exception primarily with reference to its application in international investment disputes. Because the Note’s discussion of futility draws upon historical and contextual factors, however, I will also resort to broader public and private international legal principles. Given that scope, it bears noting at the outset that futility is not unique to investment law, and that the contours of the exception can and do vary across legal regimes. Futility claims are common, for example, in international commercial arbitrations. *See, e.g.*, Final Award, ICC Case No. 6149, XX Y.B. Comm. Arb. 41, 47 ¶ 20 (1995) (“The fact that defendant did not respond and refused to appoint another arbitrator was not susceptible of preventing claimant from having performed all steps necessary within the first stage of the arbitration proceedings.”). Several domestic jurisdictions have also recognized a futility exception. *See, e.g.*, *Scalisi v. Fund Asset Mgmt., L.P.*, 380 F.3d 133, 138 (2d Cir. 2004) (“The specifics of what constitutes futility vary from state to state.”); *Elizabeth Chong Pty Ltd v. Brown*, [2011] FMCA 565 (Australian Fed. Mag. Ct.) (refusing to order a stay of arbitration pending mediation because “the parties have had prolonged and extensive negotiations over a period of years.”).

4. As Christoph Schreuer concludes, “the exhaustion of local remedies is generally not a requirement of modern investment arbitration.” *The Co-Existence of Local and International Law Remedies*, BRITISH INSTITUTE INT’L AND COMP. L., Third Investment Treaty Forum Conference, in 4 TDM 1, 11 (2005). Indeed, some IIAs explicitly preclude exhaustion. *See, e.g.*, Austria-U.A.E. BIT, art. 10(5) (2001) (“If the investor chooses to file for arbitration, the host Contracting Party agrees not to request the exhaustion of local settlement procedures.”). Before addressing the futility exception, it is therefore worth considering whether the local remedies requirements on which it is premised remain relevant. Some authors have suggested they do not; *see, e.g.*, Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties*, 44 NETH. INT’L L. REV. 233 (1997). The twenty-eight international

however, investment tribunals' handling of futility claims has been erratic.⁵ It is difficult to discern a consistent logic underlying their variously strict, lenient, and intermediate applications of local remedies rules.

This Note contends that such unpredictability is not a *fait accompli*. Notwithstanding investment law's fragmented institutional architecture,⁶ debated adherence to precedent,⁷ and increasingly diverse participants, a cogent standard for applying the futility exception is available. The Note's ambitions are two-fold: to identify that standard and to indicate why investment tribunals have often ignored it. Following this introduction, Part II determines the appropriate standard for futility in three Sections. Section II.A begins by reviewing the development of four interrelated concepts in international law: reprisals, diplomatic protection, local remedies, and futility. This historical account indicates how the justifications for applying the local remedies rule and futility exception have changed over time.

investment disputes considered in this Note argue to the contrary. Although IIAs do not typically mandate that claimants exhaust local remedies, they do often require resort to some form, or some extent, of local remedies. As with many tenets in investment law, suits against Argentina provide the most robust empirical support for the claim. Yet Argentina is not alone. Consider the pre-1993 BITs signed by Uruguay. Each of the following agreements mandates that petitioners resort to domestic courts for eighteen months prior to instituting international arbitration: Ger.-Uru. BIT, art. 11(2) (1987); Neth.-Uru. BIT, art. 9(2) (1988); Switz.-Uru. BIT, art. 10(2) (1988); Hung.-Uru. BIT, art. 10(3) (1989); It.-Uru. BIT, art. 9(2) (1990); Rom.-Uru. BIT, art. 10(2) (1990); Pol.-Uru. BIT, art. X(2) (1991); U.K.-Uru. BIT, art. 8(2) (1991); Belg.-Lux. Econ. Union-Uru. BIT, art. 11(3) (1991); Spain-Uru. BIT, art. XI(3) (1992). Each of the treaties remains in force. Even without looking outside Latin America, the preceding is adequate to indicate that local remedies rules are, and for the foreseeable future will remain, a point of contention in international investment disputes.

5. Several analysts have noted tribunals' inconsistent application of the futility exception, albeit seemingly by way of apology. *See, e.g.*, Miriam K. Harwood & Simon N. Batifort, *Jurisdiction and Procedure in Investment Arbitration: New Developments*, 5 THE INTERNATIONAL ARBITRATION REVIEW 1, 3 (James H. Carter, ed., Law Business Research Ltd. 5th ed., 2014) (granting that tribunals have "expressed different views"); *see also* CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION, *supra* note 2, at 351 (acknowledging that "various tribunals have taken divergent views"); *see also* ALEXANDRA DIEHL, THE CORE STANDARD OF INTERNATIONAL INVESTMENT PROTECTION 83 (2012) (conceding that the "exact contours of [the local remedies rule and its futility exception] are not entirely clear"). Arguably the leading commentator on the local remedies rule, Chitharanjan Felix Amerasinghe, accepts that the local remedies rule, and thus the futility exception, "may technically be called a vacuous concept." C.F. Amerasinghe, *The Local Remedies Rule in Appropriate Perspective*, 36 HEIDELBERG J. INT'L L. 727, 736 (1976). As John Dugard summarized in his Third Report for the International Law Commission's (ILC) Draft Articles on Diplomatic Protection: "While it is agreed that local remedies need not be exhausted when they are futile or ineffective, there is no agreement as to how this exception is to be formulated." John Dugard (Special Rapporteur), Int'l Law Comm'n, *Third Rep. on Diplomatic Protection*, ¶ 26, U.N. Doc. A/CN.4/523 and Add.1, at 57, ¶ 26 (2002). Along with the absence of contrition, what distinguishes this Note from the preceding citations is what follows from observing such inconsistency. Previous scholarship has noted futility's uneven application, but not inquired into its origins or consequences. This Note is the first to analyze, in depth, investment tribunals' erratic application of futility.

6. *See* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 4 N.Y.U. Pub. L. and Legal Theory Working Papers, Paper 146 (2009), https://lst.nellco.org/nyy_plltwp/146/.

7. *See generally* Andrés Rigo Sureda, *Precedent in Investment Treaty Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 830 (Christina Binder et al. eds., 2009).

Sections II.B and II.C narrow this broad perspective by analyzing the development of international legal regimes that have sought to codify the local remedies rule. In Section II.B, I consider state commentary during the League of Nations Codification Conference in 1930 and the drafting of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) in 1960. In Section II.C, I turn to the International Law Commission's (ILC) 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts and 2006 Draft Articles on Diplomatic Protection.

Part II thus sets out the empirical background against which the practices of contemporary international investment tribunals may be assessed. Part III takes up this normative task. Section III.A argues that Article 16 of the ILC's 2006 Draft Articles on Diplomatic Protection promotes a standard of futility—"no reasonable possibility"—that mistakes the logical and historical underpinnings of the concept.⁸ The historical and contemporary analysis in Part II instead indicates that investment tribunals should require claimants alleging futility to satisfy a more stringent "obvious futility" standard before excusing non-compliance with local remedies rules. Section III.B indicates that the ILC is not alone in its error. Drawing upon a set of twenty-eight investment arbitrations, I first provide general quantitative evidence that investment tribunals' construal of futility claims has been erratic. Granting the limits of statistical responses to the question at hand, Section III.B goes on to assess several indicative jurisdictional decisions and awards.

As an empirical contribution, this Note articulates the historical and logical foundations of the futility exception, and indicates how and why contemporary investment tribunals have departed from these principles. Normatively, the Note contends that investment tribunals should harmonize their erratic jurisprudence around a stringent "obvious futility" standard more in keeping with these foundations than the less demanding alternatives many have favored.

The costs of doing so are clear—adopting an "obvious" standard from among the various potential criteria⁹ entails restraining the discretion of

8. Although the Draft Articles' articulation of the futility standard is not binding on any given investment tribunal, advocates and tribunals have already begun to treat it as persuasive evidence. *See, e.g.,* *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, at ¶ 610 ("In the light of the International Law Commission's well-reasoned and well-balanced restatement of the threshold applicable to the futility exception, the Tribunal does not consider it necessary to rely on alternative standards proposed by the Parties."). More generally, insofar as international investment law is a species of international law, and the ILC's mission is to encourage "the progressive development of international law and its codification," U.N. Charter art. 13(1)(a), scholars of international investment law cannot and should not ignore its conclusions.

9. This Note concentrates on the continuum of standards for granting a futility exception that tribunals have analyzed or utilized in the past. It bears acknowledging, however, that investment

investment tribunals to fashion equitable remedies for state behavior that may be obstructive, cynical, and offensive to the judicial conscience. I argue that these costs are worth bearing. Along with restraining undue discretion, “obvious futility” responds to the increasingly fervent criticism of international investment law by vindicating the ability of states to define their rights and obligations vis-à-vis foreign investors. It underscores that futility is an exception. State sovereignty remains the rule.

II. THE FOUNDATIONS OF FUTILITY

A. The Historical Development of Futility

The term “futility,” or analogous language indicating the impossibility of obtaining justice through domestic proceedings, does not typically appear in IIAs. Instead, petitioners invoking the futility exception make (often implicit) reference to either Article 31(1),¹⁰ Article 31(3)(c),¹¹ or Article 32(b)¹² of the Vienna Convention on the Law of Treaties. Futility is thus to be taken into account (a) as part of a “good faith” interpretation and in light of the “object and purpose” of the applicable IIA; (b) as a “relevant rule of international law applicable between the parties”; or (c) as a “supplementary means” for interpreting the IIA, if an interpretation of the text in accordance with Article 31 “[l]eads to a result which is manifestly absurd or unreasonable.”

Historical analysis of the futility exception aids in understanding the logical underpinnings of such claims as well as the concept itself. Under each of the interpretive exercises described in the Vienna Convention, tribunals have little choice but to consider this logic. Thus, while determining the “object and purpose,” the “relevant rule[s] of international law,” or what counts as “unreasonable” under a particular IIA may not explicitly require historical scrutiny, such analysis will be a component of a robust judicial inquiry. This Section traces, albeit in necessarily abridged fashion, the historical development of futility claims by analyzing four interconnected

tribunals are, at least formally, at liberty to formulate their own standard, and expand the continuum toward greater leniency or stringency. In other words, should my argument for “obviousness” prove unpersuasive, an imaginative jurist may very well aim to do better.

10. “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.” Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980).

11. “There shall be taken into account, together with the context: . . . (c) Any relevant rules of international law applicable in the relations between the parties.” *Id.* at art. 31, ¶ 3(c).

12. “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: . . . (b) Leads to a result which is manifestly absurd or unreasonable.” *Id.* at art. 32(b).

concepts in international law: reprisals, diplomatic protection, the local remedies rule, and, finally, futility.

i. Reprisals

Virtually every primitive legal system includes rules regulating reprisals for injuries sustained in a foreign (hereinafter “host”) community.¹³ Conceptually, these rules combine two notions of solidarity¹⁴: home solidarity, insofar as the home community marshals resources to support its members’ self-help efforts; and host solidarity, insofar as communal guilt diffuses a private wrong across the members of the host community. Reprisal laws initially sought to limit home and host solidarity, regulating the practice in order to ensure that the retribution was appropriate and a predominantly private affair.

As early as the ninth century, reprisal law sought to ensure appropriateness by requiring evidence that a denial of justice had occurred before authorizing a proportionate reprisal.¹⁵ The ambition of these laws was to facilitate justice for the individual member of the home community without sacrificing broader relations between the home and host communities. Thus, even if a claimant could demonstrate that a denial of justice had occurred abroad, home community authorities would only authorize the injured party to undertake a reprisal against the assets of the injurer that could be found within the home community.¹⁶ The authorities eschewed home and host state solidarity in favor of preserving the privacy of the dispute.

As adjudicative mechanisms formalized, so, too, did the prerequisites for obtaining a right of reprisal. As A.A. Cançado Trindade explains, authorities in the home community would not accept denial of justice claims

13. A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 REVUE BELGE DE DROIT INTERNATIONAL 499, 501 (1983); see also Matthias Ruffert, *Reprisals*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT’L LAW ¶¶ 1-6 (Sept. 2015); Hans W. Spiegel, *Origin and Development of Denial of Justice*, 32 AM. J. INT’L L. 63, 64 (1938) (identifying laws addressing reprisals in “all primitive legal systems, and also in those of the Teutonic tribes who brought them to the west and south of Europe at the time of the migration of nations.”).

14. “Solidarity” is here understood in a non-technical sense and stripped of any associations with trade unionism or class-consciousness. The Oxford English Dictionary’s first entry for the term is appropriate: “The fact or quality, on the part of communities, etc., of being perfectly united or at one in some respect, esp. in interests, sympathies, or aspirations.” The Dictionary cites an 1841 tract by H. Doherty defining the term as “collective responsibility.” *Solidarity*, OXFORD ENGLISH DICTIONARY ONLINE (Jan. 2018), www.oed.com.

15. See, e.g., Spiegel, *supra* note 13, at 64-65 (citing an 836 treaty between Sicard of Benevento and the Neapolitans, and an 840 treaty between Emperor Lotar I and Doge Petrus Tradenicus of Venice).

16. D.A. Gardiner, *The History of Belligerent Rights on the High Seas in the Fourteenth Century*, 48 L. Q. REV. 521, 538 (1932) (“[T]he claimant first sought justice in the appropriate Court of his adversaries’ town, and if he failed to obtain it, applied to the authorities in his own; when these were satisfied that his complaint was justified, they arrested the goods of any citizen of the offending town who was in, or subsequently came within their jurisdiction, until sufficient had been seized to repair the damage done to the claimant.”).

unless the claimant had already sought, and failed to receive, adequate relief from the host community. This placed authorities in the home community in the position of assessing the justice offered in foreign communities; nonetheless, preserving the privacy of the dispute remained reprisal law's overarching aspiration. The fact that the host community had not provided adequate justice had little bearing on the extent of the right of reprisal. A successful claimant remained restricted to seizing the offender's goods located within the home community, likely leaving the injurer's community—and most importantly its leadership—relatively unmolested.

It bears noting that as early as the fourteenth century, some sovereigns had begun to develop adjudicative structures with striking parallels to contemporary investment tribunals. In an early fourteenth century agreement between Holland and England, for example, Count William of Holland and King Edward II of England agreed to each appoint two judges to a tribunal responsible for assessing foreigners' claims. Safe conduct was guaranteed to parties entering the host country in order to appear before the tribunal.¹⁷

As reprisal law continued to develop, the consolidation of sovereignty in the nation state introduced novel tensions and procedures. Most important here, with the introduction of diplomatic protection, home state *authorization* of private retribution was gradually replaced by *assumption* of the injured party's claim. Reprisal law's once resolute avoidance of home and host state solidarity became correspondingly difficult to maintain.

ii. Diplomatic Protection

The fifteenth century case of John de Waghen and the Leydenese¹⁸ illustrates the first step in a two-part transition from the law of reprisals toward the modern practice of diplomatic protection.¹⁹ The dispute concerned de Waghen's claim against a merchant from Leyden for an unpaid debt of 852 nobles and 22 denari. Pursuant to the law of reprisals, de Waghen had first brought his claim to his home state authority, Richard II,

17. See Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT'L L. 694, 709 (1933).

18. See generally *id.* at 707; 1 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA: 1205-1648, at 126 (R.G. Marsden ed., 1915).

19. By way of clarifying any ambiguity as to this Note's understanding of the expression "diplomatic protection": "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law." *Mavrommatis Jerusalem Concessions Case* (Greece v. Britain), Jurisdiction, (1924) P.C.I.J. (Ser. A) No. 2, at 12 (August 30).

ultimately obtaining a “*litera de marca*”²⁰ against the Leydenese from Henry IV. After forty-seven years attempting to recoup the debt, de Waghen again petitioned the King. Henry V responded by instructing his admirals to seize all Leydenese ships, the merchants on board, and the goods and merchandise until the debt was satisfied.²¹ The first step from the law of reprisals toward the contemporary practice of diplomatic protection entailed marshalling the resources of the home state to rectify citizens’ injuries abroad. Rather than acting strictly as an arbiter—granting or refusing the citizen the right to undertake private reprisal after failing to receive justice abroad—the sovereign might now summon community resources in order to intervene on citizens’ behalf. Note, however, that public intervention remained unavailable until after the citizen had attempted and failed to satisfy the claim abroad, and then via private efforts. In de Waghen’s case, Henry V found that forty-seven years of effort was enough.

The second step toward the contemporary practice of diplomatic protection dispensed with the requirement for citizens to first seek and fail to gain satisfaction for their authorized, private claim. Instead, once authorities were satisfied that a denial of justice had occurred, the community as a whole would exercise the right of reprisal.²² The development of a state monopoly on reprisal took place alongside the centralization and formalization of administrative structures in the seventeenth and eighteenth centuries. By the mid-eighteenth century, Emerich de Vattel was already expounding the rules of reprisal (now under the moniker of diplomatic protection) in mandatory and state-centric terms:

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full

20. The United States Constitution allocates an analogous power to Congress in a rarely cited provision. Along with the power to declare war, Article 1, Section 8, Clause 11 grants Congress the power “[t]o . . . grant letters of marque and reprisal.” As John Yoo notes, “Outside of the law reviews and scholarly debates over the allocation of war powers between Congress and the President, the Marque and Reprisal Clause has played little if any role in modern law.” John Yoo, *Marque and Reprisal*, HERITAGE GUIDE TO THE CONSTITUTION (2012), <http://www.heritage.org/constitution/#/articles/1/essays/50/marque-and-reprisal>. Indeed, Congress has not used this authority since the War of 1812.

21. In full, Henry V’s Order “command[s] you, and each of you, that from time to time you cause to be seized and arrested all and singular the ships of the aforesaid town of Leyden that now are in any ports or elsewhere within our realm of England, or elsewhere within our dominions or power, or may hereafter come within the same, together with the merchants on board them, and their masters and mariners, as well as all the goods, merchandise, and things belonging to the merchants, masters and mariners, that you find in such ships or elsewhere, to the value aforesaid, in addition to the damages, costs and expenses reasonably incurred by him, John, in this behalf, by way of marque and reprisal, and that you cause the same to be delivered to him without delay.” 1 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA, *supra* note 18, at 126-27.

22. CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 27 (2d ed. 2004).

satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.²³

Mirroring this now compulsory home state solidarity was the increasing invocation of host state solidarity. By the nineteenth century, “aveng[ing] the deed” often entailed intervention into the host state’s territory if “full satisfaction” could not be had from assets in the home state, thereby likely distributing the consequences of an injurer’s wrong across the broader host state community.

Thus, in two steps—first, authorizing public intervention on citizens’ behalf, and second, making public intervention the exclusive remedy for citizens harmed abroad—authorities transformed the law of reprisals from a grant of a private right of retribution against goods already subject to the home state’s jurisdiction into the “gunboat diplomacy” that inspired much of modern international investment law. Yet even gunboat diplomacy was subject to preconditions. Even what was often the thinnest of veils for naked, power politics assumed that citizens had already brought their claim before host state authorities and failed to receive justice.

iii. The Local Remedies Rule

International investment tribunals typically frame the application of local remedies rules as a balancing exercise in which the tribunal must weigh the interest of the foreign claimant in expeditious justice against that of the host state in exercising its sovereign rights.²⁴ However, the preceding discussion suggests that local remedies rules first developed to protect the interests of an entirely different actor: the home state. Injured parties’ reprisal rights were initially limited to the assets of an injurer within the home state. The host state was only implicated insofar as home state authorities found its adjudication of the dispute inadequate—thus, only by way of an indirect (quasi) censure. Amerasinghe takes the point further:

No account was taken of the delinquency perpetrated by sovereign or state in whose territory the original wrong was committed . . . [I]t was redress of the original wrong committed by one private party against another that was considered necessary, not of the total injury committed by the responsible sovereign or state in failing to do justice.²⁵

The host state entered the calculus more prominently with the formalization of the state system in the seventeenth century. Along with the

23. EMMERICH DE VATTTEL, 3 THE LAW OF NATIONS 136 (Charles G. Fenwick, trans., 1916).

24. For discussion of the inadequacy of defining host states’ sovereign’s interest in such generic terms, and an attempt to develop a more precise alternative, see *infra* subsection II.A.iii.

25. AMERASINGHE, *supra* note 22, at 25.

hardening of state boundaries yielding a clearer demarcation between home and host,²⁶ the routinization of states' adjudicative processes brought with it a corresponding formalization of home states' analyses of whether a claimant had pursued and/or exhausted local remedies. Put differently, as "justice" began to imply the satisfaction of a set of pre-determined procedures, home state authorities became more likely to consider whether these procedures were met during proceedings abroad. The shift in attention toward host states is clear in a 1670 agreement between Great Britain and Spain. Article 4 provides:

No letters of reprisal shall be given, or any other proceedings of that nature had, except justice shall be denied or unreasonably delayed; in which case it shall be lawful for that King, whose subject has suffered the injury, to proceed in any manner according to the law of nations till reparation shall be given to the injured party.²⁷

"[U]nreasonably delayed" presupposes a baseline temporal expectation; "justice . . . denied" assumes a related reference point of basic fairness. Most important for present purposes, Article 4 also gestures toward the beginnings of a shift in the logic of the local remedies rule. Where once home state centric, the host state's interests now appear at least relevant to the home state authority's determinations. Thus, Article 4 begins with a default rule that upholds host state interests—"No letters of reprisal shall be given"—and the remainder of the Article details conditions authorizing an exception to the rule and permissible forms of redress.

Amerasinghe concludes that "respect for the sovereignty of the host or respondent state is at the heart of the implementation of the [local remedies] rule."²⁸ The preceding analysis suggests that this "heart" was almost wholly absent prior to the consolidation of administrative authority in the post-Westphalian period. Indeed, even in the centuries afterward, treaties such as

26. *See, e.g.*, Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, Oct. 24, 1648, art. LXVII (Peace of Westphalia) ("That as well as general as particular Diets, the free Towns, and other States of the Empire, shall have decisive Votes; they shall, without molestation, keep their Regales, Customs, annual Revenues, Libertys, Privileges to confiscate, to raise Taxes, and other Rights, lawfully obtain'd from the Emperor and Empire, or enjoy'd long before these Commotions, *with a full Jurisdiction within the inclosure of their Walls, and their Territories*: making void at the same time, annulling and for the future prohibiting all Things, which by Reprisals, Arrests, stopping of Passages, and other prejudicial Acts, either during the War, under what pretext soever they have been done and attempted hitherto by private Authority, or may hereafter without any preceding formality of Right be enterpris'd. As for the rest, all laudable Customs of the sacred Roman Empire, the fundamental Constitutions and Laws, shall for the future be strictly observ'd, all the Confusions which time of War have, or could introduce, being remov'd and laid aside.") (emphasis added). Credit is due to Victoria Sahani for this insight.

27. 2 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA: 1649-1767, at 284 (R.G. Marsden ed., 1916).

28. AMERASINGHE, *supra* note 22, at 426.

that between Great Britain and Spain at best indicate a novel balancing of home and host state interests.

The explanation for this newfound interest in the sovereignty of the host state lies, at least in part, in the changing target of the reprisal. Whereas once strictly targeted toward the individual wrongdoer, reprisals began to affect the entire host state. As noted at the outset of this Section, the law of reprisals entails dual notions of solidarity: Home state solidarity became consequential when the state began to marshal the community's resources on behalf of injured citizens. Host state solidarity, in the form of collective guilt, appears much later in the development of the law of reprisals—the logic of the local remedies rule only begins to transition toward upholding host state sovereignty when the gunboats arrive. Put differently, the legal regime became solicitous of the interests of host states when it was not merely the goods of a daft Leydenese merchant at stake but rather the port of Rotterdam.

Bringing this logic up to the present requires turning to the international instruments that have succeeded the gunboats. Just as the rise of gunboat diplomacy helps explain the transition toward host state sovereignty, so its decline in favor of bilateral investment treaties (BITs), free-trade agreements (FTAs), and other instruments of contemporary investment law aids in understanding investment tribunals' belief that local remedies rules require balancing host state sovereignty against investors' interest in expeditious adjudication. Whereas diplomatic protection—especially in its more aggressive applications during the eighteenth and nineteenth centuries—often subordinated the interests of investors to broader state affairs, IIAs returned the interests of claimants to the fore. Most notably, these agreements returned the right of action to the individual alleging injury. In this sense, contemporary IIAs are analogous to the law governing reprisals prior to the development of diplomatic protection. The difference is that home state authorization to pursue claims against a foreign wrongdoer is now, to borrow a phrase, a “standing offer,”²⁹ and the claim is against the host state itself.

iv. Futility

Identifying the role of futility in this history requires taking a step back. The preceding discussion of the local remedies rule concluded analyzing the late twentieth century, noting that investment agreements have in many ways become substitutes for diplomatic protection. We also noted that accompanying this substitution was a shift in the logic of local remedies rules: from screening claimants in order to protect the interests of the home

29. See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

state, toward vindicating the sovereign interest of the host state against the gunboats and, more recently, litigious foreign investors.

The first arbiters of futility claims were the authorities of an investor's home community. They assessed whether the claimant—notwithstanding his failure to exhaust local remedies—had nonetheless suffered a denial of justice.³⁰ Cabining the home community's policy interests for the moment,³¹ this decision turned in large part on whether equity justified excusing compliance with local remedies rules because there was no remedy to be had.³² Futility therefore is, and has always been, an exception, a justification for derogating from an otherwise applicable norm of compliance with local remedies rules. For the United States in the nineteenth century, futility claims would be upheld only in “exceptional circumstances,” such as when local remedies were “non-existent.”³³ As Secretary of State Hamilton Fish famously put it in 1873, “a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust.”³⁴ The rule, however, “unequivocally” remained that diplomatic protection was unavailable prior to exhaustion of domestic remedies.³⁵

While futility's “exceptional” status and the balancing of interests necessary to assess futility claims have been there from the beginning, the actors and thus the weights on each side of the scale have not been static. As we have seen, injured parties in the Middle Ages exercised their right of reprisal against assets of the wrongdoer located in the home community. Given the limited implications for home state resources and host state sovereignty, authorities in the home state enjoyed significant discretion in their assessment of futility claims. Futility claims submitted to Secretary Fish carried altogether different implications and therefore entailed a distinct assessment. On one side of the scale were the monetary and reputational costs to the United States of marshalling its resources against a foreign sovereign on behalf of an (at least nominally) private interest. On the other side were the alleged injury suffered by a citizen abroad and the United

30. For a thorough review of the relationship between the international delict of denial of justice and local remedies rules, see JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 100-30 (2009).

31. I cabin these considerations in order to distinguish the features of futility most important in the context of international investment law. The preceding discussion of diplomatic protection amply demonstrates that, in practice, policy interests have never been cabined.

32. Precisely when, or to what standard, a tribunal should find that there was “no remedy to be had” is the central interest of this Note. In other words, although “no remedy” is a standard for assessing futility claims in and of itself, “no” is too blunt a metric for determining the availability of justice before local authorities. Part II contends that among the more nuanced alternatives to “no,” “obvious futility” is the best approach.

33. A.A. Cançado Trindade, *supra* note 13, at 519; see also 6 A DIGEST OF INTERNATIONAL LAW § 987 (John Bassett Moore ed., 1906) (“Local remedies must, as a rule, be exhausted”).

34. Letter from Hamilton Fish, Sec. of St., to Col. William J. Halpin (Mar. 13, 1873), in A DIGEST OF INTERNATIONAL LAW, *supra* note 33, at § 988 (John Bassett Moore, ed. 1906).

35. A.A. Cançado Trindade, *supra* note 13, at 519.

States' interest in promoting the rule of law in those states receiving significant amounts of foreign investment. Investment tribunals addressing futility claims today confront yet another iteration of actors and interests. The host state and the investor are the principal actors, though home state interests are also relevant.³⁶ The weight the tribunal should afford each interest is the principal concern of this Note.

Not only have the parties and magnitude of interests on either side of futility claims changed, new arbiters also hold the scales. During the nineteenth and twentieth centuries, arbitrators and judges gradually took the place of home state authorities. While a full discussion of the international case law addressing futility during this period is beyond the scope of this analysis, a brief review of key decisions indicates that the new arbiters of futility claims generally continued the restrictive "exceptional circumstances" stance favored by their political predecessors.

In the *Finnish Ships Case*,³⁷ a group of shipowners from Finland challenged the British Government's decision to requisition thirteen of their ships during World War I. After losing before Britain's Admiralty Transport Arbitration Board, the shipowners successfully petitioned the Finnish Government for diplomatic protection. Finland brought the issue before the Council of the League of Nations under Article 11 of the Covenant.³⁸

The Council appointed Judge Algot Bagge of the Supreme Court of Sweden to arbitrate the dispute, which now centered upon Britain's claim that the shipowners had not exhausted local remedies. Finland argued that the British Arbitration Board had made a dispositive finding of fact against the ship owners and that further appeal was therefore futile.³⁹

Determining the standard of review for Finland's futility claim, Judge Bagge noted that the parties disagreed over "whether the local remedy shall be considered as not effective only where it is obviously futile . . . or whether, as the Finnish Government suggest, it is sufficient that [an appeal] only

36. Although much of international investment law remains premised on a model in which one party is primarily an exporter of capital and the other an importer, it is not clear that this model comports with many contemporary investment agreements. NAFTA, CETA, and the proposed TTIP are indicative. Foreshadowing the normative argument in Part II, incorporating home states' interests into the balance should lead to a stricter interpretation of futility claims, because the party that is currently the home state is likely to be a host state in future disputes. Anticipating its interests as a respondent, the home state may prefer that the tribunal strictly enforce the local remedies rules in the relevant agreement.

37. Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war, 3 U.N. Rep. Int'l Arb. Awards 1479 (Sales No. 1949 V.2) (1934). See generally, Alexander P. Fachiri, *The Local Remedies Rule in the Light of the Finnish Ships Arbitration*, 17 BRIT. Y.B. INT'L L. 19 (1936) (hereinafter *Finnish Ships*).

38. The second clause of Article 11 guaranteed "the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." League of Nations Covenant art. 11.

39. Edwin M. Borchard, *The Local Remedy Rule*, 28 AM. J. INT'L L. 28, 729, 729-31 (1934); see also CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION, *supra* note 2, at 348-50.

appear to be futile.”⁴⁰ Bagge favored the “obviously futile” standard,⁴¹ concluding that “a certain strictness in construing this rule appears justified.”⁴² To support his interpretation, Bagge cited Edwin Borchard’s review of the *Prize Cases*⁴³ after the American Civil War.⁴⁴ Bagge noted that although the United States Supreme Court ultimately excused otherwise mandatory appeals, “th[e] rule [of local remedies] was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.”⁴⁵

The 1957 *Case of Certain Norwegian Loans* presents a more ambiguous interpretation of the appropriate standard for assessing a futility claim.⁴⁶ One of the questions before the International Court of Justice (ICJ) was whether local remedies rules required the French bondholders to first pursue their claim in the Norwegian courts. Judge Lauterpacht’s separate opinion devotes substantial attention to the question. Responding to France’s claim that resorting to the Norwegian judicial system would have been futile, Lauterpacht first noted that while he could “appreciate the contention of the French Government that there are no effective remedies to be exhausted . . . I must hold that, *however contingent and theoretical* these remedies may be, an attempt ought to have been made to exhaust them.”⁴⁷

One paragraph later, the standard shifts, with Lauterpacht acknowledging “the legal position on the subject cannot be regarded as so abundantly clear as to rule out, *as a matter of reasonable possibility*, any effective remedy before Norwegian courts,”⁴⁸ and then returning on the following page to a more stringent articulation of the standard: “[I]n matters of currency and international loans the decisions of courts of various countries—including those of Norway—have not been characterized by such a pronounced degree of uniformity and certainty as to permit a

40. *Finnish Ships*, 3 U.N. Rep. Int’l Arb. Awards 1479, *supra* note 37, at 1504.

41. In an article written more than two decades later, Bagge appears to depart from the “obvious futility” standard favored in *Finnish Ships*. In a key passage, Bagge acknowledges, “It must sometimes be extremely difficult, if not impossible, for the international tribunal which has to determine whether on merits of the claim a recourse on the national plane *would in all probability* have been futile” Algot Bagge, *Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, 34 BRIT. Y.B. INT’L L. 162, 167 (1958) (emphasis added). As suggested by Judge Lauterpacht’s decision in *Certain Norwegian Loans*, discussed *infra* at 417-18, discerning a precise standard of futility within even a single judicial opinion may be a fraught task. When that search entails traversing two decades, as well as the distinction between a judicial decision and a scholarly publication, we have all the more reason to be cautious in drawing firm conclusions on Judge Bagge’s “real” view regarding the appropriate standard for futility claims.

42. *Finnish Ships*, 3 U.N. Rep. Int’l Arb. Awards 1479, *supra* note 37, at 1504.

43. 67 U.S. 635 (1863).

44. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 823-24 (1915).

45. *Finnish Ships*, 3 U.N. Rep. Int’l Arb. Awards 1479, *supra* note 37, at 1504.

46. *Certain Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. Rep. 9 (Jul. 6).

47. *Id.* at 39 (Jul. 6) (separate opinion by Lauterpacht, J.) (emphasis added).

48. *Id.* (emphasis added).

forecast, *with full assurance*, of the result of an action in Norwegian courts.”⁴⁹ Judge Lauterpacht’s hopscotch concludes with the claim that although the “possibilities [of Norwegian Courts finding in favor of the French bondholders] may be remote . . . [t]hey are not *so absolutely remote as to deserve to be ruled out altogether*.”⁵⁰

It is difficult to pin Lauterpacht’s understanding of the futility exception to a single standard. Must the futility of the claim be more than “contingent and theoretical,” or may it merely be “a matter of reasonable possibility”? Must the claimant have “full assurance” of failure, or the seemingly more stringent requirement that success be “so absolutely remote as to deserve to be ruled out altogether”? Comparatively clear, however, is that France’s futility claim confronted a high bar. Lauterpacht did not adopt Bagge’s succinct “obvious futility” approach, but his various articulations are not far from it.⁵¹

B. The Codification of Futility – Origins

The following Section narrows the historical review to focus on treaty practice during the twentieth century. In particular, it considers state commentary during the League of Nations Codification Conference in 1930 and during the drafting of the ICSID Convention in 1960. I therefore do not purport to provide anything approaching a full survey of multilateral treaties addressing local remedies rules. The ensuing analysis instead aims to further elaborate the logic and history of the futility exception by turning to more contemporary state practice. Within the Note as a whole, my ambition remains to set out the empirical basis for Part III’s normative position in favor of strict construal of futility claims.

i. The League of Nations Codification Conference

The League of Nations Codification Conference was part of a broader intergovernmental initiative led by the Committee of Experts for the Progressive Codification of International Law. The Committee comprised

49. *Id.* at 40 (emphasis added).

50. *Id.* at 41 (emphasis added).

51. Given the general tenor of Judge Lauterpacht’s articulations of the futility exception, Judge Gros’ reference to *Norwegian Loans* in the *Barcelona Traction* case is, while incomplete, by no means inaccurate or objectionable. Judge Gros cites Lauterpacht suggesting that “however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them,” for the proposition that “[w]hether it be Spanish law or international law that is considered to have been violated, it is necessary to request the local courts to look into the matter and allow them the opportunity of correcting any mistake.” Case Concerning the Barcelona Traction, Light and Power Company, Ltd., (Belg. v. Spain), 1970 I.C.J. Rep. 284 (Feb. 5) (separate opinion by Gros, J.) (citations omitted). Most citations are selective. Thus, while a judge seeking a more permissive standard of review may have instead referred to phrases such as “a matter of reasonable possibility,” Judge Gros’ selection is also a fair representation of Judge Lauterpacht’s views.

representatives of the “the main forms of civilization and the principal legal systems of the world.”⁵² The Conference sought to promote the codification and development of international law by identifying the common legal principles that underlie substantial domestic diversity.⁵³

The Assembly of the League of Nations called for the Conference to focus on the law of nationality, territorial waters, and the responsibility of states for damage done to the person or property of foreigners. Meeting at The Hague in March and April of 1930, the Conference only agreed on a final document addressing nationality.⁵⁴ With regard to state responsibility, the Conference did not agree to a single recommendation.⁵⁵

The Conference therefore appears a poor source for identifying state practice. For my purposes, however, the inability of the delegates to settle upon any recommendations indicates nothing more than the procedural fact that the group did not reach unanimous accord on a precise set of terms. As Judge Lauterpacht’s separate opinion in *Norwegian Loans* suggests, the delegates were hardly unique in this respect. As such, I will not make the historical case for a stringent application of the futility exception simply by pointing to scholars, tribunals, or treaties that have “used the magic words.” While magic words such as “obvious” are helpful, my argument rests on a more general review of the logic and tenor of judicial and state practice. Approached in this manner, the Codification Conference strengthens the case for a strict reading of futility claims in investment disputes by indicating the state-centric logic of the inquiry.

The delegates who considered state responsibility for damages to non-citizens addressed a series of prepared questions. Point XII asked, “Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?”⁵⁶ Of the twenty-two national representatives that responded to the question, nearly all replied in the affirmative. Notwithstanding this consensus as to the conclusion, there was considerable variation in the content of their statements.

Privileging concision, Australia’s full submission was “Generally, yes.”⁵⁷ New Zealand deferred to Great Britain: “The New Zealand Government

52. First Session of the Committee of Experts for the Progressive Codification of International Law. 20 AM. J. INT’L L. 12, 12 (1926).

53. *Id.* at 12-13; International Law Commission, Origin and Background: League of Nations Codification Conference, CODIFICATION DIVISION, OFF. LEGAL AFF. (2016), <http://legal.un.org/ilc/league.shtml>.

54. See *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 11 LEAGUE OF NATIONS O.J. 847 (1930).

55. International Law Commission, Origin and Background, *supra* note 53.

56. 2 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW 136 (Shabtai Rosenne ed., 1930).

57. *Id.* at 136.

desire[s] to associate themselves with the views expressed by His Majesty's Government in Great Britain."⁵⁸ Germany also agreed with the assertion in Point XII "generally speaking," but noted "[s]pecial circumstances [that] may . . . justify exceptions to this rule."⁵⁹ In particular, Germany referred to circumstances in which it "would be impossible to insist that the State concerned should await the final judgment," such as if its citizen faced the threat of further damage or the offence was likely to be repeated.⁶⁰ Germany's proposed exceptions to Point XII's articulation of the local remedies rule thus related not to the feasibility of resolution—the principal concern of futility claims—but rather the likelihood of additional harm.

The Danish representative offered further exceptions, including if "the national authorities . . . allow the matter to drag on unconscionably" or if there is "obvious neglect of the foreigner's right because he is a foreigner or a national of some foreign state."⁶¹ Finland's response began, "The reply to this question will be in the affirmative," but hedged with a broad exception: local remedies must be exhausted only when "the remedies open to the person concerned are effective and meet the requirements of justice."⁶² The United Kingdom's response was similarly concerned with effectiveness, and added several further qualifications: "[W]hen an *effective* mode of redress is *open* to individuals in the courts of a *civilised country* by which they can obtain *adequate* satisfaction for any invasion of their rights, recourse must be had to the mode of redress so provided before there is any scope for diplomatic action."⁶³ Although this and the preceding responses are attentive to the interests of claimants, Great Britain goes on to articulate the underlying rationale for its position in state-centric terms: exhausting local remedies is generally mandatory because it is "the only principle which is correct in theory and which operates with justice and impartiality *between the more powerful and the weaker nations*."⁶⁴ Thus, while the contemporary reader swiftly assumes that Finland's stipulation that local remedies be "open to the person" stemmed from concern for the claimant's right to justice, Great Britain's explanation suggests that state interests—in particular the equitable administration of (recently reshaped) international order—may have been front of mind.

58. *Id.* at 138.

59. *Id.* at 136.

60. *Id.*

61. *Id.*

62. *Id.* at 137.

63. *Id.* (emphases added). The British response quotes a memorandum from the British Embassy in Washington, D.C. *See* Memorandum from The British Ambassador (Spring Rice) to the Secretary of State, File No. 763.72112/2461, *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, Supplement, The World War 379 (Apr. 24, 1916).

64. 2 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW 139 (Shabtai Rosenne ed., 1930) (emphasis added).

The Czechoslovakian government called for strict enforcement of the local remedies rule. Using language analogous to that of Judge Bagge in the *Finnish Ships* arbitration, the Czech response maintained that the “person concerned must *obviously employ* all the remedies afforded him by municipal law in defence of his interests.”⁶⁵ Finally, the United States’ response was lengthy, and, much like Judge Lauterpacht’s separate opinion in *Norwegian Loans*, imprecise in its formulation of the appropriate standard. As with Great Britain, however, the United States prioritized state interests over those of the individual claimant.

The United States first suggested that it would excuse the a failure to exhaust local remedies only if those remedies “have been found *inapplicable* or *inadequate*, or if *no legal remedies are afforded*.”⁶⁶ “Inapplicable” suggests an objective review of whether local remedies address the harm; “inadequate” alludes to a more subjective determination of the quantum of redress achievable or achieved; and “no legal remedies are afforded” sets a much higher standard approaching impossibility. This imprecision is exacerbated when the United States subsequently cites a nineteenth century arbitral decision holding that “[t]he obligation of a stranger to exhaust the remedies which nations have for obtaining justice . . . ought to be understood *in a rational manner*.”⁶⁷ The United States’ response concluded by quoting a letter from Secretary of State Thomas F. Bayard suggesting the futility exception applies when local remedies are “insufficient.”⁶⁸

Despite the variability of the comments of the delegates to the Convention, two conclusions appear justified. First, their responses do not coalesce around a single standard for assessing futility claims. The briefest responses—setting aside simple affirmations like that of Australia—excuse compliance with local remedies rules in the event of delay. Responses

65. 2 LEAGUE OF NATIONS CONFERENCE, *supra* note 56, at 139. (emphasis added).

66. *Id.* at 23 (emphasis added). The United States quotes the Department of State’s *Claims Circular* of May 15, 1919, revised Oct. 1, 1924 ¶ 8. The Circular is cited in full in Nat’l Assoc. for the Protection of American Rights in Mex., 1 *Bulletin* 25-31 (Apr. 28, 1926).

67. 2 LEAGUE OF NATIONS CONFERENCE, *supra* note 56, at 23 (emphasis added); see The Montano Case, Montano (Peru) v. U.S. in 2 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1630, 1637 (John Bassett Moore, ed., 1898). For students of U.S. law, compare this standard to that of “no remedy at all” often applied by courts assessing a motion for or against a transfer on account of *forum non conveniens*. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (“Of course, if the remedy provided by the alternative forum is *so clearly inadequate or unsatisfactory that it is no remedy at all*, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.”) (emphasis added).

68. 2 LEAGUE OF NATIONS CONFERENCE, *supra* note 56, at 23; see 6 A DIGEST OF INTERNATIONAL LAW, *supra* note 33, at § 990, 691. The Third Restatement of Foreign Law is not a paragon of clarity either. It provides that the United States will consider claims by nationals injured abroad only after the exhaustion of local remedies, “unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 (AM. L. INST. 1987). “Sham” and “inadequate” are presumably distinct triggers for the futility exception. What either means is difficult to say.

engaging in lengthier analyses of the question use a series of adjectives that imply distinct levels of strictness. There is thus little evidence supporting a particular set of magic words. Second, the delegates considered the local remedies rule in state-centric terms. Given that they represented state interests, this is hardly shocking; nonetheless, it confirms the conclusion in Section II.A regarding the shifting but still sovereign-centric logic of the local remedies rule during the twentieth century. Applied to this Note's normative claims, this offers historical support for analogously state-centric interpretations of local remedies rules, and their exceptions, in contemporary investment agreements.

ii. The ICSID Convention

The Executive Directors of the International Bank for Reconstruction and Development (the World Bank) drafted the ICSID Convention between 1961 and 1965. The Convention's implementing institution, the International Center for Settlement of Investment Disputes (ICSID), describes the Convention as designed "to be widely acceptable to both capital exporting and developing States."⁶⁹ It thus bears noting at the outset that notwithstanding the Convention's neutral preamble—in which the contracting states recognize "the need for international cooperation for economic development, and the role of private international investment therein"⁷⁰—the Convention is the product of an institutional and conceptual framework in which investments flow in one direction. Private international investment comes from "capital exporting" states and goes to "developing states." The application of the ICSID Convention to contemporary IIAs in which the parties do not fit this model helps explain several tensions in contemporary international investment law, including the appropriate interpretation of local remedies rules.

The Legal Committee on Settlement of Investment Disputes met twenty-two times during the winter of 1964 in order to review the Draft ICSID Convention prepared by the World Bank's Executive Directors.⁷¹ The Committee included representatives from sixty-one governments, who proceeded article-by-article before formally publishing the Revised Draft on December 11, 1964. The Executive Directors approved the Revised Draft in March of 1965 and opened it to the member states of the World Bank for signature.

69. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 1 HISTORY OF THE ICSID CONVENTION, at ii (1970).

70. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 U.S.T. 1270, pmbl. (Apr. 2006).

71. Where possible, my citations reference the authoritative sources published by ICSID. Those seeking a more digestible history of the drafting of the ICSID Convention will find a great deal in ANTONIO R. PARRA, THE HISTORY OF ICSID (2012).

The Preliminary Draft's articulation of what would become Article 26 of the ICSID Convention provides, "Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings in lieu of any other remedy."⁷² The First Draft's text—reviewed by the Legal Committee—replicated the Preliminary Draft's language except for one replacement: rather than "in lieu of" any other remedy, the First Draft grants consent "to the exclusion of" any other remedy.⁷³

The final text of Article 26 largely retains this language,⁷⁴ but it also adds a new sentence. Article 26 of the ICSID Convention provides, "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."⁷⁵

Article 26 presents a puzzle. The final text's first sentence reverses the presumption—clear in the delegates' commentary at the League of Nations Codification Conference, and in other multilateral agreements addressing investor-state disputes⁷⁶—that exhaustion of local remedies is mandatory. "[T]o the exclusion of any other remedy" captures all domestic proceedings. The first sentence also includes an exception—"unless otherwise stated"—allowing treaty parties to overcome the presumption by mandating recourse to local remedies. The puzzle arises when this approach is combined with

72. See COM/AF/WH/EU/AS/1 (October 15, 1963), *Preliminary Draft*, in 2.1 HISTORY OF THE ICSID CONVENTION 219 (1968); see also SID/LC/SR/13 (December 30, 1964), Summary Proceedings of the Legal Committee Meeting, December 4, Afternoon, in 2.2 HISTORY OF THE ICSID CONVENTION 792 (1968).

73. See 1 HISTORY OF THE ICSID CONVENTION, *supra* note 69, at 134.

74. The text modifies some aspects of the First Draft, but the changes do not appear substantive. The changes are indicated in italics: "Consent *of the parties* to arbitration *under this Convention* shall, unless otherwise stated, be deemed consent *to such arbitration* to the exclusion of any other remedy."

75. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 17 U.S.T. 1270, art. 26 (Apr. 2006).

76. See, e.g., President and Fellows of Harvard College, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM. J. INT'L L. 545, 548 (1961) (stating in Article 1 that "an alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made."); Organisation for Economic Co-operation and Development, Draft Convention on the Protection of Foreign Property of 1967, Art. 7(b) (providing that "a national of a party claiming that he has been injured by measures in breach of this Convention may, *without prejudice to any right or obligation he may have to resort to another tribunal*, national or international, institute proceedings against any other party responsible for such measures before the Arbitral Tribunal referred to in paragraph (a) . . .") (emphasis added); Asian-African Legal Consultative Committee, Model Bilateral Agreements on Promotion and Protection of Investments, 23 INT'L LEGAL MATERIALS 237, 250 (1984) (mandating in Article 9: "The local remedies shall be exhausted before any other step or proceeding is contemplated."). See generally The Rule of the Exhaustion of Local Remedies, adopted by the Institute of International Law at its Granada Session, in 46 *Annuaire de l'Institut de droit international* 364 (1956). A translation of the agreement is available in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 142 (1969); F. V. García Amador, *State Responsibility*, Int'l Law Commission, State Responsibility, U.N. Doc. A/CN.4/96, at 204, ¶¶ 162-73 (Jan. 20, 1956).

the second sentence. It makes the second sentence appear superfluous. For the members of the Legal Committee commenting on the text of the First Draft, however, it was anything but.

Those Committee delegates representing developed states were largely silent during the debate over including the second sentence in Article 26. In one notable exception, the Swedish delegate suggested, “It was very difficult to know when local remedies were exhausted, and this could lead to a waste of time that would undermine the whole of the arbitration procedure.”⁷⁷ His observation does not appear to have garnered significant support. Instead, delegates from developing states bombarded the Chairman of the Legal Committee with comments emphasizing the importance of compliance with local remedies rules as a pre-condition to arbitration.

The Indian delegate, for example, stressed that “[d]isputes between states and foreign investors in those states should . . . be decided either by consultations and negotiations between the parties or in the national courts . . . [I]t should not be a purpose of the Bank to create and facilitate recourse to the Center.”⁷⁸ A delegate representing several Latin American states underscored his “serious objection on the matter of jurisdiction.” “Normally,” he noted, “disputes between a government and a foreign investor were dealt with first in the national courts,”⁷⁹ and the presumption in the first sentence of Article 26 appeared to contradict that norm. After affirming his support for the general goal of establishing a center for the settlement of investment disputes, the Chinese delegate added “one salient point”: “[I]n the opinion of his government,” the Committee minutes note, “the parties to the dispute should not abandon the principle that all local remedies must be exhausted before resort to the Center for settlement.”⁸⁰

Responding to these comments, the Chairman clarified that under the text of the First Draft:

If a State wished to make its consent to international arbitration subject to the prior exhaustion of local remedies, it was free to do so, and there was no intention whatever of changing the rule of international law generally accepted, *viz.*, that in the absence of a contrary agreement international claims could not be brought until local remedies had been exhausted.⁸¹

77. SID/LC/SR/13, *supra* note 72, at 794.

78. SID 62-1, ¶ 27 (Dec. 28, 1962), *in* 2.1 HISTORY OF THE ICSID CONVENTION 57 (1968).

79. SID 62-2, ¶ 6 (Jan. 7, 1963), *in* 2.1 HISTORY OF THE ICSID CONVENTION 61 (1968).

80. SID 63-8, ¶ 12 (June 5, 1963), *in* 2.1 HISTORY OF THE ICSID CONVENTION 88 (1968).

81. Z10 (Jul. 20, 1964), Consultative Meeting of Legal Experts Fourth Session, Bangkok, Thailand (Apr. 30, 1964) *in* 2.1 HISTORY OF THE ICSID CONVENTION 524 (1968).

Nonetheless, “[t]he language of that section would be reviewed . . . in order to remove any suggestion that exhaustion of local remedies would not be a normal requirement.”⁸²

Although quiet throughout the debate, developed states found their voices during the final vote on Article 26. Notwithstanding the one-sided conversation affirming the importance of exhaustion, the final text passed with nineteen votes in favor and seventeen against.⁸³ One interpretation of the drafting history of Article 26 points to this narrow final vote in order to contend that the exhaustion principle, so critical to developing states’ delegates, hardly garnered unanimous support. Applied to futility claims, this interpretation implies that tribunals construing the ICSID Convention should construe the exception liberally. A better interpretation recognizes that however close the final vote, the debate concerned a sentence that is strictly emphatic—a “belt and suspenders” measure designed to mollify actors not content with the default disposition; no exhaustion “unless otherwise stated”—of Article 26’s first sentence. The fact that the debate even occurred points toward a state-centric orientation; its outcome favors a host state orientation. And both of these conclusions align with the analysis in Section II.A, indicating that local remedies rules and the futility exception in international investment law are sovereign-centric in their logic.

C. The Codification of Futility – Contemporary Initiatives

i. The International Law Commission

The General Assembly of the United Nations is not a legislative body. Instead, the drafters of the Charter of the United Nations favored granting the General Assembly persuasive authority gained through study and enacted through recommendations.⁸⁴ Article 13 of the Charter provides, “The General Assembly shall initiate studies and make recommendations for the purpose of (a) . . . encouraging the progressive development of international law and its codification.”⁸⁵

In December 1946, the General Assembly established the Committee on the Progressive Development of International Law and its Codification, directing it to develop recommendations pursuant to Article 13(1)(a). One year later, the Committee advised the General Assembly to establish an

82. *Id.* at 525.

83. SID/LC/SR/13, 3 (Dec. 30, 1964) *in* 2.2 HISTORY OF THE ICSID CONVENTION 794 (1968).

84. International Law Commission, Origin and Background: Drafting and implementation of Article 13, paragraph 1, of the Charter of the United Nations, CODIFICATION DIVISION, OFF. LEGAL AFF. (2016), <http://legal.un.org/ilc/drafting.shtml>.

85. U.N. Charter art. 13, ¶ 1.

International Law Commission (ILC) and the Assembly agreed.⁸⁶ The ILC fulfills its mission primarily by formulating Draft Articles on topics of international law that it then submits to the General Assembly for approval. Even if approved, these Articles are not international legislation. Rather, they provide a focal point around which the ILC believes international law already has coalesced, or should coalesce in the future.⁸⁷ Despite this aspirational element, the ILC's Articles—whether or not they gain formal approval from the General Assembly—are widely recognized as authoritative statements on the particular field of law they address.⁸⁸ This Section considers two products of the ILC: the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Conduct and the 2006 Draft Articles on Diplomatic Protection.⁸⁹

86. U.N. GAOR, Summary Records of the Sixth Committee, 2d Sess., 59th mtg. at 173, 174 (Nov. 20, 1947) (“The Committee agreed that effect could best be given to the provisions of Article 13, subparagraph 1a, of the Charter by the establishment of a commission, composed of persons of recognized competence in international law.”).

87. Students of U.S. law may find comparison to the American Law Institute's Restatements fruitful. As the Institute describes these texts, they “aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court.” AMERICAN LAW INSTITUTE, <https://www.ali.org/about-ali/how-institute-works/> (last visited Nov. 2, 2018). The ILC's Articles similarly look to the empirical question of how the law “presently stands” as well as the normative question of how the law “might appropriately be stated.”

88. *See, e.g.*, North Sea Continental Shelf Cases (Ger. v. Den. & Neth), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 44-56 (Feb. 20, 1969); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 68, at § 103 n.1 (“The views of the International Law Commission have sometimes been considered especially authoritative.”).

89. The ICSID Convention came into force in 1966. The ILC approved the Draft Articles on Diplomatic Protection forty years later. What occurred in between is clearly relevant to this Note's empirical review, and the normative argument that follows from it. Although I have found no prominent international legal institutions wrestling directly with the contours of the futility exception during this period, two broader trends in international law do bear noting. The first is the development of human rights treaties investing individuals, in carefully circumscribed circumstances, with a degree of international legal personality. The implications of this development for international investment law in general, and the futility exception in particular, are however difficult to trace with any precision. On the one hand, one might anticipate that the greater deference afforded to the individual's right to safety and security in international law, and the greater the willingness of the international community to intrude upon a sovereign's internal processes for purposes of accountability, the less one should expect strict enforcement of local remedies rules. On the other hand, many of these international human rights treaties include local remedies requirements, denying access to international review to complainants that have not first exhausted domestic procedures. *See, e.g.*, International Covenant on Civil and Political Rights, art. 41(c), Dec. 16, 1966, 999 U.N.T.S. 171, (“The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.”); *see also* Cesare P.R. Romano, *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW (Nerina Boschiero et al. eds., 2013). A second development during this period potentially affecting the construal of futility claims is the proliferation of IIAs, most containing some variant of a local remedies requirement. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2015, 121, fig. iv.1 (documenting the “era of proliferation,” with the number of IIAs jumping from 404 to 3067 from 1989 to 2007). An increased volume of disputes addressing compliance with local remedies requirements, of course, need not point

Article 44(b) of the Draft Articles on the Responsibility of States for Internationally Wrongful Conduct stipulates, “The responsibility of a State may not be invoked if . . . (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.”⁹⁰ In the accompanying commentary, the ILC discusses how to construe its reference to “available and effective” remedies. Echoing the Restatement (Third) on Foreign Law,⁹¹ the commentary notes:

The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal.⁹²

Instead of detailing what “clear from the outset” implies, however, the Draft Articles disclaim any attempt to address questions of jurisdiction or admissibility. “The present articles,” the commentary emphasizes, “are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals.” The ILC instead leaves such questions to “the applicable rules of international law.”⁹³

This is problematic insofar as it is the ILC’s mission to offer guidance on “the applicable rules of international law.” That said, it is also unrealistic to expect the ILC to cover the whole field in a single statement, and the 2001 Draft Articles were not the ILC’s final statement on exhaustion. As the ILC concluded its work on the Draft Articles on the Responsibility of States, a separate group within the Commission was already preparing to address precisely these “questions of the jurisdiction of international courts and tribunals.” That project concluded in 2006 with the ILC’s approval of the Draft Articles on Diplomatic Protection.⁹⁴

The Draft Articles on Diplomatic Protection are the most recent and authoritative statement on the content of local remedies rules and the futility exception in international law.⁹⁵ Article 15, “Exceptions to the local

toward a stricter or more lenient approach to the doctrine, though it likely did increase jurists’ sense of a need for a more harmonized jurisprudence.

90. Int’l Law Comm’n Draft articles, *supra* note 2, at 29.

91. See *supra* note 68 and accompanying text.

92. Int’l Law Comm’n Draft articles, *supra* note 2 at 121.

93. *Id.* at 120-21.

94. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 15-21 (2006).

95. Note that the General Assembly has not ratified the Draft Articles. See G.A. Res. 62/67, at 2 (Dec. 6, 2007) (deciding to “further examine . . . the question of a convention on diplomatic protection”); G.A. Res. 65/27, at 1 (Dec. 6, 2010) (“Recalling its resolution 62/67 of 6 December

remedies rule,” identifies five circumstances in which compliance with the local remedies rule may be excused:

- (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;
- (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) The injured person is manifestly precluded from pursuing local remedies; or
- (e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.⁹⁶

Although several of these provisions arguably relate to futility, the Draft Articles sought to summarize the international standard for futility in subclause (a) alone. Interpreters have construed the text accordingly, and subclause (a) will therefore be the focus of my analysis.

In his Third Report on Diplomatic Protection, submitted to the ILC in 2002, Rapporteur John Dugard identified three standards of futility that “enjoy some support among the authorities.”⁹⁷ International tribunals had excused compliance when local remedies “are obviously futile (option 1),” “offer no reasonable prospect of success (option 2),” or “provide no reasonable possibility of an effective remedy (option 3).”⁹⁸ Dugard then arranged the three standards into a hierarchy of strictness, with “obvious futility” more stringent than “no reasonable prospect of success” and “no reasonable possibility of an effective remedy” in an intermediate position.

Dugard argued that the ILC should adopt the intermediate option—“no reasonable possibility of an effective remedy”—as a middle way between

2007” and “[d]ecid[ing] to . . . further examine the question of a convention on diplomatic protection, or any other appropriate action.”). Regardless, the Draft Articles have already been cited by international tribunals (*see, e.g.*, Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, Judgment, 2007 I.C.J. Rep. 582, ¶ 39 (May 24)); scholars (*see, e.g.*, CHITTHARANJAN FELIX AMERASINGHE, DIPLOMATIC PROTECTION 62 (2008)); and most important for present purposes, investment tribunals (*see, e.g.*, Yukos Universal Limited (Isle of Man) v. The Russian Fed’n, Final Award, PCA Case Repository No. 2005-04/AA 227, at 452 ¶ 1425 (July 14, 2014)).

But see Ambiente Ufficio S.p.A. and others v. The Argentine Republic, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility 20, ¶ 56 (May 2, 2013) (Bernárdez, dissenting) (“[T]he said draft articles are still subject to consideration within Legal Committee of the General Assembly of the United Nations and have not yet been endorsed by the generality of States as reflecting the customary international law governing ‘diplomatic protection’. Notwithstanding these facts, the Majority Decision proceeds to apply that so-called threshold without even asking whether it was actually part and parcel of a rule of positive international law applicable in the relations between the Contracting Parties to the BIT.”) (emphasis omitted).

96. U.N. Doc. A/61/10, *supra* note 94, at 20.

97. U.N. Doc. A/CN.4/523, *supra* note 5, at 56 ¶ 20 (2002).

98. *Id.* at art. 14(a).

the undue stringency of “obvious futility” and the excessive leniency of “no reasonable prospect of success.” He begins his argument for the intermediate option by noting its provenance. In *Norwegian Loans*, Judge Lauterpacht’s separate opinion acknowledges that “[t]he legal position on the subject [of when to excuse noncompliance with local remedies rules] cannot be regarded as so abundantly clear as to rule out, *as a matter of reasonable possibility, an effective remedy* before Norwegian courts.”⁹⁹ Dugard’s Third Report then turns to “[p]erhaps the best exposition of the test,” citing Sir Gerald Fitzmaurice.¹⁰⁰ It is an interesting citation insofar as Fitzmaurice does not so much argue for “no reasonable possibility” as define what the standard implies. Fitzmaurice argues that a “no reasonable possibility” test is:

acceptable provided it is borne in mind that what there must be a reasonable possibility of is the existence of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant obtaining that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.¹⁰¹

Dugard’s argument concludes citing the “admirabl[e]” formulation by David R. Mummery,¹⁰² who contends that the “flexibility of [a “no reasonable possibility”] approach is consonant with the social function of the rule . . . to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it.”¹⁰³ The case for “no reasonable possibility” thus rests on its provenance, its flexibility, and the desire to avoid the undue harshness (“obviously futile”) or leniency (“no reasonable prospect”) of alternative standards.

Recall that the final text of Article 15(a) of the Draft Articles provides that local remedies need not be exhausted where “[t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.” The ILC thus accepted Dugard’s proposal, but only after bifurcating its two major prongs—“reasonable possibility” and “effectiveness”—into separate clauses. Even this modified approach did not receive unanimous approval. In his Seventh Report, submitted in 2006, Dugard notes that the United States had “call[ed] upon the Commission to reconsider its decision” supporting the “no

99. *Id.* ¶ 35 (quoting *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. Rep. 34, 39 (Jul. 6) (separate opinion by Lauterpacht, J.) (emphasis added)).

100. *Id.* at 59, ¶ 35.

101. *Id.* (quoting Gerald Fitzmaurice, *Hersch Lauterpacht-The Scholar as Judge-Part I*, 37 BRIT. Y. B. INT’L L. 1, 61 (1962) (emphasis omitted)).

102. *Id.* at 60, ¶ 37.

103. *Id.* (quoting David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT’L L. 389, 400 (1964)).

reasonable possibility” standard.¹⁰⁴ The United States argued that customary international law and policy considerations supported language that instead emphasized that “in all but the most extreme circumstances a State has the opportunity to rectify within its own legal system violations of international law.”¹⁰⁵ It submitted the following alternative formulation for the ILC’s consideration: “Local remedies do not need to be exhausted where the local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress.”¹⁰⁶ Although the proposed alternative text incorporates “reasonableness” and “effectiveness” into the analysis, it aligns closest with Dugard’s first option of “obvious futility.” The ILC rejected the proposal.

III. THE APPLICATIONS OF FUTILITY

The following Part contends that the ILC was mistaken. International investment tribunals should follow a discretion-constraining, “obvious futility” standard. Drawing on the analysis in Part II, Part III makes the normative case for “obviousness” in two sections. Section III.A assesses Dugard’s positive argument for “no reasonable possibility” and negative argument against “obvious futility.” Section III.B begins by drawing on a set of twenty-eight investment arbitrations in order to provide quantitative support for the conclusion that investment tribunals have interpreted futility claims in an erratic fashion. It then analyzes a smaller set of disputes in greater depth in order to indicate the shortcomings of more lenient standards relative to a stringent, “obvious” futility approach.

A. Assessing the Draft Articles on Diplomatic Protection

i. The Case for “No Reasonable Possibility”

Dugard’s positive case for the intermediate standard begins by citing Judge Lauterpacht’s admission in *Norwegian Loans* that he was not capable of ruling out, “as a matter of reasonable possibility,” the chance of an “effective remedy” for the French claimants in Norwegian courts.¹⁰⁷ We have already noted the difficulty of deriving any clear or consistent standard for assessing futility claims from Lauterpacht’s separate opinion. At one

104. John Dugard, Special Rapporteur, *Seventh Report on Diplomatic Protection*, ¶ 77, U.N. Doc. A/CN.4/567 (Mar. 7, 2006).

105. *Id.* (quoting Int’l Law Comm’n, Comments and Observations Received from Governments, U.N. Doc. A/CN.4/561 and Add. 1–2 at 57 ¶ 4 (2006)).

106. *Id.* at 56, ¶ 2.

107. *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. Rep. 34, 39 (Jul. 6) (separate opinion by Lauterpacht, J.).

point, Lauterpacht suggests that the prospect of failure in the Norwegian courts must be more than “contingent and theoretical”; at another, failure must merely be a “matter of reasonable possibility.”¹⁰⁸ Lauterpacht argues that a claimant must have “full assurance” that he will not succeed, but also that success must be “so absolutely remote as to deserve to be ruled out altogether.”¹⁰⁹ The general tenor of the opinion suggests that Lauterpacht favored a stringent standard. Beyond that, it is difficult to identify any clear principle, much less a precise set of terms. At the very least, therefore, Dugard’s preferred formulation rests on a debatable foundation.

Dugard’s citation to Sir Gerald Fitzmaurice casts further doubt on the positive case for the intermediate approach. Fitzmaurice writes that a “no reasonable possibility” test “is acceptable” provided that it is “the existence of a possibly effective remedy” and not the “reasonable possibility of the claimant obtaining that remedy” upon which the tribunal focuses its analysis.¹¹⁰ Setting aside Fitzmaurice’s lack of enthusiasm (“acceptable” hardly implies “best”), the more substantive issue highlighted by Fitzmaurice’s claim is the difficulty of making the clear distinction between means and ends that Dugard believes is implicit in the intermediate standard. Fitzmaurice recommends, and Dugard maintains, that “no reasonable possibility” merely requires that the remedy be available, not that the claimant will receive it. Yet the intermediate standard Dugard advocates also includes “effectiveness,” which necessarily introduces a claimant’s ends into the calculation. There is nothing “effective” about receiving a hearing unless the remedy the claimant seeks is simply heard. So long as “effectiveness” is included in the analysis, Fitzmaurice appears to draw a distinction without a meaningful difference.¹¹¹

The remaining basis for Dugard’s positive case is David Mummery’s article, “The content of the duty to exhaust local judicial remedies.”¹¹² Dugard offers a lengthy quote from the article, labelling it the “correct approach.”¹¹³ What makes it “correct,” and appears to be the crux of Dugard’s position, is the inclusion of “reasonableness” in the analysis. As Mummery puts it, this “flexibility of approach is consonant with the social function of the rule.”¹¹⁴ In Part II, I indicated that this “social function”

108. *Id.*

109. *Id.* at 41.

110. Fitzmaurice, *supra* note 101, at 61 (1962) (emphasis omitted).

111. Admittedly, “obvious futility” also includes an element of effectiveness. Any futility standard is outcome-oriented insofar as a given remedy can only be “futile” with reference to some end. The question is how prominent we wish that element to be. In Dugard’s intermediate standard, “effectiveness” is one of three operative terms (reasonable, possibility, effective). In “obvious futility,” it is implicit in one. The difference is clearly one of degree, and the claim here is that such degrees matter.

112. Mummery, *supra* note 103.

113. U.N. Doc. A/CN.4/523, *supra* note 5, at 60, ¶ 37.

114. Mummery, *supra* note 103, at 400.

captures only a small part of the historical and logical underpinnings of the futility exception. The remainder points not toward reasonableness but rather upholding state interests. In this Part, I make the normative case that the “balancing of factors” that Mummery also prizes affords arbitrators undue discretion. The case-specific costs of such balancing include futility’s erratic jurisprudence. The systemic implications include undermining states’ capacity to define their obligations to foreign investors.

ii. The Case Against “Obvious Futility”

Dugard’s case against “obvious futility” in his Third Report relies on three claims. First, Dugard contends that when Judge Bagge used “obvious” in *Finnish Ships*, he did not intend to imply that the futility of the remedy must be immediately apparent. To support this claim, Dugard cites John Little Simpson and Hazel Fox’s 1959 Treatise, *International Arbitration*, in which the authors note that Judge Bagge only reached his decision after lengthy argument concerning the shipowners’ right of appeal in England.¹¹⁵ From this evidence, Simpson and Fox conclude that “[o]bvious” is therefore not to be understood in the sense of immediately apparent. To judge from the *Finnish Ships* case, the test is whether the insufficiency of the grounds of appeal has been conclusively, or at least convincingly, demonstrated.¹¹⁶

This critique misses the mark primarily because it is not clear toward whom Dugard is aiming. Dugard maintains, “The objection to the ‘obvious futility’ test [is] that the ineffectiveness of the local remedy must be *ex facie* ‘immediately apparent.’”¹¹⁷ The phrase “immediately apparent,” however, comes from Simpson and Fox, who write that “obvious is therefore *not to be understood* in the sense of immediately apparent.”¹¹⁸ In other words, Dugard’s source for the claim that “obvious” necessarily implies “immediately apparent” is an argument that such an interpretation should *not* be adopted. He thus appears to be jousting against a straw man.

Dugard’s second objection to an “obvious futility” standard relies upon the ICJ’s 1989 *ELSI* case.¹¹⁹ Dugard interprets this case as rejecting “obvious futility” because the ICJ was “ready to assume the ineffectiveness of local remedies.”¹²⁰ In particular, he cites the ICJ’s statement that “[w]ith such a deal of litigation [lasting from 1968 to 1975 before various Italian courts] about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that

115. U.N. Doc. A/CN.4/523, *supra* note 5, at 59, ¶ 36 (quoting JOHN LITTLE SIMPSON & HAZEL FOX, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 114 (1959)).

116. SIMPSON & FOX, *supra* note 115, at 114.

117. U.N. Doc. A/CN.4/523, *supra* note 5, at 60, ¶ 37.

118. SIMPSON & FOX, *supra* note 115, at 114 (emphasis added).

119. *Elettronica Sicula S.p.A.*, 1989 I.C.J. Rep. 15, *supra* note 1.

120. U.N. Doc. A/CN.4/523, *supra* note 5, at 58, ¶ 30.

had not been tried; or at least, not exhausted.”¹²¹ Dugard is correct that the ICJ was “ready to assume” ineffectiveness because of the extensive prior litigation in Italian courts. The ICJ therefore imposed the burden of proving that a local remedy was in fact available on the Italian respondents. Yet it is not clear what bearing this decision on the burden of proof has for distinguishing between the three potential standards of futility. Extensive prior litigation could demonstrate that there was “no reasonable prospect of success,” “no reasonable possibility of an effective remedy,” or that pursuing further domestic remedies would be “obviously futile.” The case is silent on the point Dugard seeks to prove.

Finally, Dugard contends that the “obvious futility” standard has been “strongly criticized by some writers.”¹²² He refers again to the work of David R. Mummery as well as that of C.F. Amerasinghe. Dugard specifically cites Amerasinghe’s 1976 article, “The Local Remedies Rule in an Appropriate Perspective,” in which Amerasinghe offers a “pragmatic” critique of the “obvious futility” standard.¹²³ Amerasinghe argues that “litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonable rather than highly probable that they are not likely to succeed.”¹²⁴ Taken to its logical conclusion, the argument implies that judges should defer to claimants’ decisions to forego domestic remedies, because claimants are in the best position to assess their chances of success. As an initial objection, note that accepting this argument would entail setting aside *any* local remedies rules. “Obvious futility” is unsuitable, but so, too, is the “no reasonable possibility” standard. Second, the citation is inconsistent with much of Amerasinghe’s work. Indeed, it is flatly contradicted in Amerasinghe’s subsequent treatise,¹²⁵ *Local Remedies in International Law*.¹²⁶ The United States’ submission to the ILC calling for an “obvious futility” standard argued that this approach more accurately reflected customary international

121. *Elettronica Sicula S.p.A.*, 1989 I.C.J. Rep. 15, *supra* note 1, at 46, ¶ 59.

122. U.N. Doc. A/CN.4/523, *supra* note 5, at 58, ¶ 30.

123. *Id.* (quoting C.F. Amerasinghe, *The Local Remedies Rule in Appropriate Perspective*, *supra* note 5, at 752).

124. C.F. Amerasinghe, *The Local Remedies Rule in Appropriate Perspective*, *supra* note 5, at 752.

125. One explanation for Dugard’s citation may be that Amerasinghe did not elaborate this position as thoroughly in the first edition of his treatise, published in 1990. I find the explanation unconvincing for two reasons. First, it is unlikely that Amerasinghe’s position on the appropriate futility standard shifted so drastically between the two editions. One might point to the 1976 article and ask why, if Amerasinghe’s views changed once, they might not do so again. Yet in Dugard’s citation Amerasinghe is not really wrestling with the appropriate standard of review. As noted, the passage effectively calls for *no* standard of review. Second, Dugard cites four works by Amerasinghe in his Third Report to the ILC. He does not include the treatise *Local Remedies in International Law*. Indeed, he does not refer to any work published after 1977.

126. CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW*, *supra* note 22, at 200-15.

law.¹²⁷ To support this proposition, the United States cited none other than C.F. Amerasinghe, who concludes that “the test is obvious futility or manifest ineffectiveness, not the absence of a reasonable prospect of success or the improbability of success, which are both less strict tests.”¹²⁸

To be clear, Amerasinghe’s views are also more nuanced than the United States’ excerpt alone would suggest. For example, Amerasinghe acknowledges that futility claims may entail “walking a tightrope” between the interests of a claimant and a host state.¹²⁹ The tightrope metaphor, however, does not imply that the balance of interests is level:

[B]ecause of the history of the rule and of the manner in which it has evolved . . . respect for the sovereignty of the host or respondent state . . . cannot be ignored. Consequently, it is only where the interest of the alien claimant or other interest clearly dominate and require recognition that a limitation [on compliance with local remedies rules] will be accepted.¹³⁰

We need not devote similar attention to Dugard’s third option: “no reasonable prospect of success.” As Dugard recognizes, this approach is more lenient than “no reasonable possibility” and derives primarily from the jurisprudence of the European Court of Human Rights.¹³¹ In human rights disputes, there appears to be ample justification for placing a thumb on the scale to favor relaxing local remedies requirements. That said, the third approach does offer a useful reminder that the appropriate standard for assessing futility claims may vary for different fields of law. This Section argued that the ILC’s Draft Articles selected the wrong standard for general international law. It does not answer whether “obvious futility” should also be preferred in the specific context of investment disputes. The following subsection thus considers whether there are particular features of international investment law that call for adopting a more or less stringent standard of futility than the “obvious” approach I have advocated for thus far.¹³²

127. U.N. Doc. A/CN.4/567, *supra* note 104, at 20, ¶ 77.

128. CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW, *supra* note 22, at 206.

129. *Id.* at 201.

130. *Id.*

131. U.N. Doc. A/CN.4/523, *supra* note 5, at 58-59, ¶ 32. *See, e.g.,* X, Y and Z v. U.K., 18 Eur. Comm’n H.R. Dec. & Rep. 76 (1979); *Retimag S.A. v. Germany* (No. 712/60) 1961 Y.B. Eur. Conv. on H.R. 400 (ECHR).

132. Having considered both the case against “no reasonable possibility” and “no reasonable prospect of success,” and the case for an “obvious” standard, some readers may find that their preferred option is “none of the above.” Put differently, might the best approach be either (a) a new formulation, burdened with none of the precedential or conceptual baggage, or (b) to recognize that such fine-grained linguistic distinctions are really just thin cloaks for pre-determined judicial views? The first option calls for starting anew, the second for dispensing with the exercise entirely. This Note, not surprisingly, accepts neither. Without retreading ground already covered above, starting anew is

iii. Futility and International Investment Law

There is little reason to believe that all investment treaties prioritize state interests over those of foreign investors. The argument here is not so categorical. Instead, I contend that, absent indications to the contrary (that are cognizable under Articles 31 and 32 of the Vienna Convention), investment tribunals should construe IIAs to require the same standard appropriate in general customary international law. The discussion above concluded that this standard should be “obvious futility.”

Analysts favoring a stringent standard such as obviousness often justify the position by referring to the host state’s “sphere of sovereignty.”¹³³ The reference is reasonable but often overbroad, especially if offered without further explanation.¹³⁴ There are at least five rationales for requiring a showing of “obvious futility” that we may distinguish within the general notion of state sovereignty.

First, requiring claimants to resort to local remedies upholds state sovereignty by giving the host state an opportunity to avoid the publicity of international adjudication. Though tribunals may impose confidentiality requirements, international dispute resolution may be more likely to attract

likely to increase unpredictability and undermine the harmonization that is among this Note’s principal ambitions. There may be a novel, superior standard, but its marginal jurisprudential benefits are likely to be outweighed by the costs of articulating and implementing it. I reject the realist critique that such discussions are inconsequential on empirical grounds. The disputes that occupy the remainder of this Note provide sufficient response: while I grant that there is no way of knowing definitively whether this is all hot air, I also note that hundreds of millions of dollars appear to turn on the direction that air is blowing.

133. *See, e.g.*, BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD*, *supra* note 44, at 817 (“[T]he right of sovereignty and independence warrants the local State in demanding for its courts freedom from interference.”); CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW*, *supra* note 22, at 62 (“Basically, the rule is a recognition of the sovereignty of the state”); *id.* at 200 (emphasizing that “Respect for the sovereignty of the respondent or host state constitutes the foundation of the rule that local remedies must be exhausted”); *id.* at 425 (“[T]he *raison d’être* of the rule is the recognition given by members of the international community to the interest of the host state, flowing from its sovereignty”); Borchard, *The Local Remedy Rule*, *supra* note 39 at 731-32 (noting that “The rule [of local remedies] is designed to avoid premature international claims, for premature diplomatic intervention is an affront to the independence of the local sovereign, who in first instance must have the opportunity to examine in his own courts disputed questions of law and fact”); Giulia D’Agnone, *Recourse to the Futility Exception within the ICSID System: Reflections on Recent Developments of the Local Remedies Rule*, 12 *LAW & PRAC. INT’L CTS. & TRIBUNALS* 343, 363 (2013) (warning that “if States have the impression that their sovereignty, as expressed in the treaty rules, is bypassed by tribunals going beyond the competences and limits attributed to them by States, there is a concrete risk that States could come to mistrust the Centre”).

134. I use “often” in order to indicate that expansive justifications such as “sovereignty” do have their place. In this Note, that place is the Conclusion, where I argue that reducing the discretion of investment tribunals may ameliorate systemic challenges to the legitimacy of international investment law as a whole. For the purposes of this Section, however, indicating why “obvious futility” is as appropriate for international investment law as for general customary international law requires considering more granular concepts.

(negative)¹³⁵ international attention.¹³⁶ Second, by enforcing local remedies rules, investment tribunals may vindicate sovereigns' interest in efficient dispute resolution. Construing "efficiency" strictly in terms of monetary costs, states may prefer to utilize pre-existing adjudicatory structures rather than pay for an arbitral proceeding in a distant city.¹³⁷

A third rationale for a strict approach to futility discernable in the general concept of sovereignty is assimilation of the foreign investor. As Mummery describes the concept: "[H]e who brings his physical presence or property within the territorial confines of a foreign state should be regarded as having assimilated himself into the state."¹³⁸ Assimilation of the foreign investor will never be total so long as investment agreements provide remedies unavailable to the citizens of the host state. Yet the perfect need not be the enemy of the good. International investment agreements couple the distinct appellate privileges enjoyed by foreign investors with an obligation to first resort to local remedies. A fourth logic considers state

135. *But see* Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (July 8, 2016), in which international dispute resolution elevated Uruguay's position to a cause célèbre among international anti-tobacco advocates. *See, e.g.*, Press Release, Statement of Michael R. Bloomberg, CAMPAIGN FOR TOBACCO FREE KIDS (July 8, 2016), http://www.tobaccofreekids.org/press_releases/post/2016_07_08_uruguay ("This is a major victory for the people of Uruguay – and it shows countries everywhere that they can stand up to tobacco companies and win."); Claudio Paolillo, *Part III: Uruguay vs. Philip Morris*, CTR. FOR PUB. INTEGRITY (Nov. 15, 2010), <https://www.publicintegrity.org/2010/11/15/4036/part-iii-uruguay-vs-philip-morris>; *Philip Morris v. Uruguay*, UNFAIRTOBACCO.ORG (July 11, 2014), <https://www.unfairtobacco.org/en/philip-morris-vs-uruguay/>; Germán Velásquez, *Uruguay's Victory over Philip Morris: a Win for Tobacco Control and Public Health*, INTER PRESS SERVICE (Aug. 22, 2016), <http://www.ipsnews.net/2016/08/uruguays-victory-over-philip-morris-a-win-for-tobacco-control-and-public-health/>.

136. One renowned adjudicator placed particular emphasis on seeking interpersonal or local remedies before bringing the dispute before a third party. While the analogy to international investment disputes is not perfect, consider Jesus of Nazareth's guidance in the following passage from the Book of Matthew: "[I]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church: but if he neglects to hear the church, let him be unto thee as an heathen man and a publican." *Matthew* 18:15-17 (King James). Granting that there are multiple rationales for Jesus's recommendation—most well beyond the theological credentials of this author—one rationale is the value of interpersonal confidentiality. Applied to investment law, "[T]ell him his fault between thee and him alone," recommends giving the host state the opportunity to avoid the censure of the "two or three witnesses," (perhaps the domestic courts), and next, "the church" (perhaps investment tribunals).

137. Claimants may respond that mandating resort to local remedies is likely to be cost inefficient insofar as the dispute is destined for international adjudication regardless of the domestic outcome. Whether requiring resort to local remedies would reduce legal and other costs is ultimately an empirical question. The answer is likely to vary from case-to-case and jurisdiction-to-jurisdiction—not to mention the unpredictable fiscal consequences of changing the expectations of future claimants. Thus, while I do not argue that economic efficiency is the primary rationale for mandating compliance with local remedies rules, investment tribunals should not assume that such rules are superfluous or inefficient.

138. Mummery, *supra* note 103, at 391.

sovereignty from the perspective of the investment tribunal. It suggests that international investment tribunals, much like domestic appellate courts, benefit from prior proceedings. Here, the sovereign interest is in a fair and accurate resolution of the dispute—an interest advanced by articulating and testing arguments in domestic proceedings prior to investment arbitration.¹³⁹

The fifth concept implicit in upholding a state’s “sphere of sovereignty” links local remedies rules to the customary rule of international law recognizing a right to be heard.¹⁴⁰ Claimants may counter that this right will be vindicated so long as the host state participates in any international proceedings. However, this response overlooks that the host state contains multiple “voices,” each of which enjoys the right to be heard. In other words, in investment disputes the “other side” referred to in the principle of *audi alteram partem* includes not just the respondent state but also its judicial system. The latter is, typically, the constitutionally-designated judge of the government’s behavior, and its “voice” will only be heard if the investment tribunal enforces local remedies rules.¹⁴¹

By way of review, the “sovereign interest” of host states that is often given (at least rhetorical) pride of place by advocates for a strict application of local remedies rules encapsulates at least five separate arguments for applying a strict standard such as “obvious futility.” Not all of these arguments apply exclusively to investment law. Yet they are adequate to demonstrate that “obvious futility” is as appropriate for international investment law as for the general international law considered in the ILC’s Draft Articles. The macro-analysis that follows demonstrates that investment tribunals have not applied any standard consistently. The succeeding micro-analysis focuses on a smaller set of disputes in order to highlight the consequences of this erratic jurisprudence.

139. Some analysts have sought to justify strict enforcement of local remedies rules on the basis that doing so will help train domestic adjudicators, thereby supporting the rule of law. See, e.g., Matthew C. Porterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?*, 41 YALE J. INT’L L. ONLINE, 1, 5 (2015) (arguing that “funneling disputes with foreign investors through the domestic courts would promote the rule of law by helping to clarify relevant domestic legal standards.”). However accurate, the argument is not compelling. Among the rationales for demanding compliance with local remedies rules, finding victims for host state judiciaries’ target practice should be low on the list.

140. Mummery, *supra* note 103, at 394.

141. For further on *audi alteram partem*, see John M. Kelly, *Audi Alteram Partem*, 9 NAT. L.F. 103 (1964).

B. *The Erratic Jurisprudence of Futility and its Consequences*

i. *Macro-analysis*

The jurisprudence of investment tribunals construing futility claims is best described as erratic. At this point, however, that claim is pure assertion. This subsection provides quantitative support by analyzing twenty-eight investor-state disputes.

First, a word on methodology. I selected these disputes seeking diversity in geography, counterparties, and the circumstances of the dispute.¹⁴² I also selected disputes based on the depth with which the tribunal engaged with the futility claim in order to advance the accuracy of the categorization process that followed. In categorizing the disputes, I reviewed each text¹⁴³ and placed it within one of three categories: strict, intermediate, and lenient. I derived these categories from Dugard's three articulations of possible futility standards. Although scholars such as Pierre-Marie Dupuy have suggested alternative typologies,¹⁴⁴ Dugard's framework is best suited to my purposes because it concentrates on the relative strictness of tribunals' construal of futility claims.

I reviewed each case for key phrases—"obvious," "reasonable possibility," and "reasonable prospects," for example—that Dugard rightly associates with strict, intermediate, and lenient approaches to futility. However, the classification turned less on these "magic words" than on my reading of the circumstances of the dispute and the opinion's overall tenor. My aim is to identify general trends in the jurisprudence, and this admittedly unreproducible approach is adequate for that purpose.

Figure 1 provides the headcount. Of the twenty-eight disputes, the plurality of tribunals adopted an "intermediate" level of strictness analogous to that advocated by Dugard in the Third Report. The second largest category is "lenient," with eight tribunals merely requiring the claimant to

142. Regardless of my success, this set by no means exhausts the futility jurisprudence of investment tribunals. The figures that follow are an indicative sample, and should be interpreted as such.

143. The vagueness of "text" is necessary in order to include awards, decisions on jurisdiction, and the titles for other varieties of adjudicative determinations within the sample.

144. Dupuy's approach also stipulates three categories. Rather than focusing on the stringency of the tribunal's enforcement of local remedies rules, Dupuy instead draws attention to tribunals' rationale for reaching a given level of strictness. The first category includes tribunals that "did not hesitate . . . to make their own evaluation of the futility of the preconditions required by the applicable BIT on the pure basis of policy considerations." In the second category are tribunals that justify their conclusion by referring to "public international law and in particular in the codification works of the International Law Commission." Tribunals in Dupuy's third category determine the appropriate standard for futility claims based on an interpretation of the text of the applicable BIT in connection with the principle of contemporaneity." Loosely, Dupuy thus divides futility jurisprudence in international investment law into purposive, internationalist, and text-oriented approaches. See Pierre-Marie Dupuy, *Preconditions to Arbitration and Consent of States to ICSID Jurisdiction*, in *BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID* 219 (Meg N. Kinnear et al. eds., 2015).

satisfy a standard akin to “no reasonable prospect of success.” Six tribunals applied a strict “obvious futility” standard.

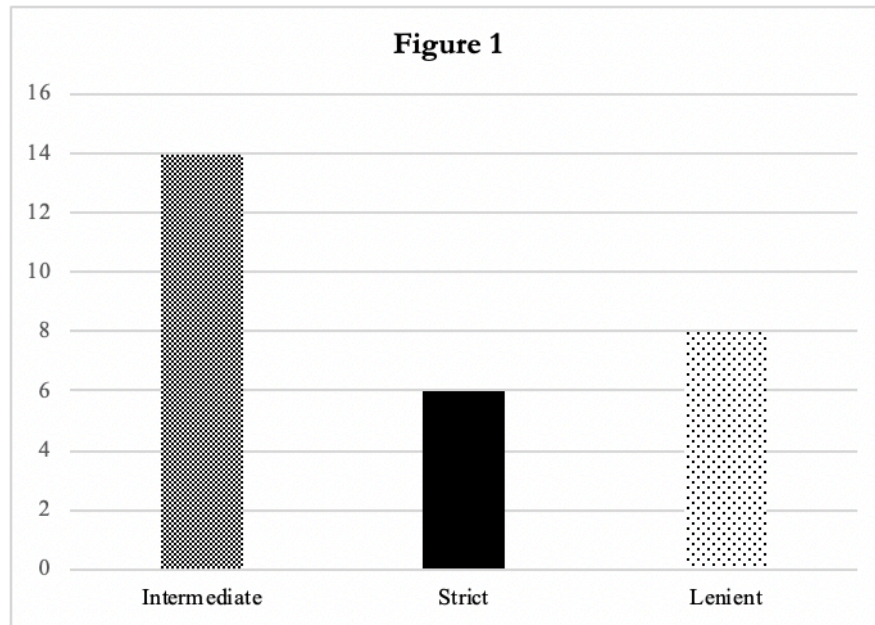


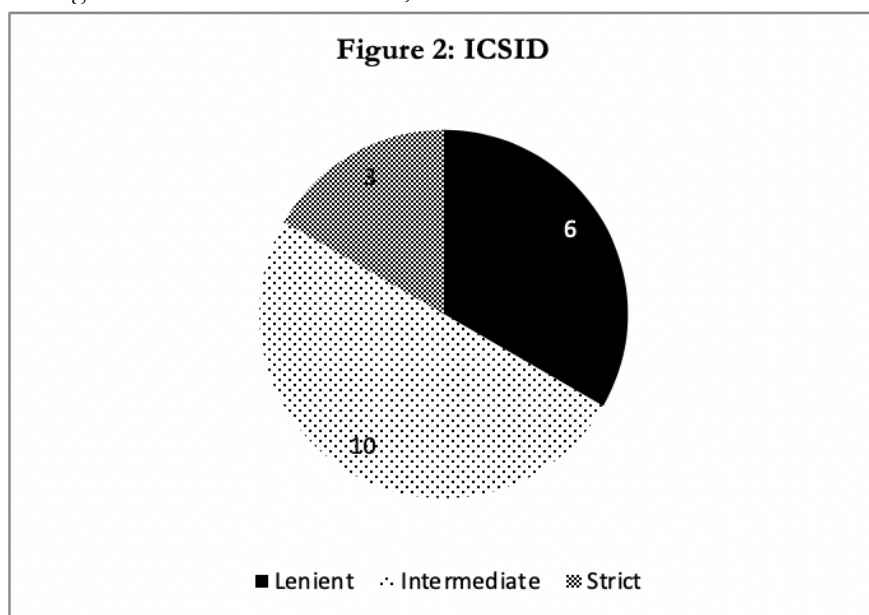
Table 1 presents the longitudinal distribution. The majority of the disputes considered were decided between 2011 and 2016. None concluded prior to 2001. I did not identify any general trend toward or away from a particular standard of review over this period. Between 2006 and 2010, for example, 50% of the disputes fell in the intermediate category. Between 2011 and 2016, the figure was 56%.

Table 1

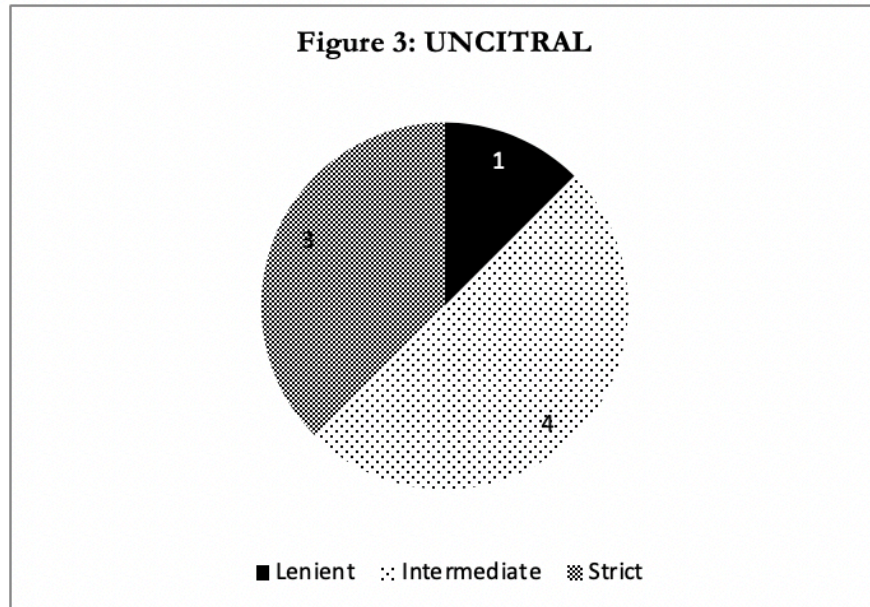
Year Range	Total Decisions in Range	Interpretation of Futility		
		<i>Low</i>	<i>Medium</i>	<i>High</i>
2001-2005	6	4	2	0
2006-2010	6	1	3	2
2011-2016	16	5	9	4

The progression over time thus points toward consistent inconsistency. At no point in this period did the tribunals in my sample coalesce around a particular approach to the futility exception.

Finally, Figures 2 and 3 detail the distribution among disputes applying the same arbitral rules. Nineteen of the disputes were held under the ICSID Rules and eight under UNCITRAL.¹⁴⁵ Figures 2 and 3 suggest that there may be a relationship between the applicable rules and investment tribunals' construal of the futility exception, but it bears emphasizing that any inferences should be taken as a starting point for further research. Of particular interest is the large number of ICSID disputes that favored a lenient application of futility. This comports with the opening clause of Article 26 of the ICSID Convention, which establishes a default position *against* the mandatory exhaustion of local remedies. Article 26 conflicts with the strict approach advocated by representatives of developing states during the negotiation of the Convention, as discussed above.



145. The one case excluded from this count applied the rules of the Stockholm Chamber of Commerce. *See* Mohammad Ammar Al-Bahloul v. Taj, SCC Case No. V (064/2008) (2010).



The challenges of quantifying such material caution against drawing any sweeping conclusions. Nonetheless, the data is adequate to justify the key assertion: investment tribunals are, and for more than a decade have been, erratic in their application of the futility exception.

ii. Micro-analysis

The following subsection and the ensuing Conclusion consider a portion of these disputes in greater depth in order to indicate how an “obvious futility” standard may remedy not only this erratic jurisprudence but also some of the broader challenges to the legitimacy of international investment law. The discussion of the “lenient” and “obvious” categories will be brief, serving primarily to illustrate what previous sections have argued are inappropriate and appropriate interpretations, respectively, of futility claims. The intermediate category favored by the ILC and the plurality of investment tribunals presents a more significant challenge and therefore receives more sustained attention. I focus on the *Loewen*,¹⁴⁶ *Abaclat*,¹⁴⁷ and *Ambiente Ufficio*¹⁴⁸ arbitrations, and argue that while the difference an “obvious” standard would make is often subtle, such distinctions matter for the parties to the dispute; for the systemic coherence

146. *Loewen Group, Inc. and Raymond L. Loewen v. U.S.*, ICSID Case No. ARB/98/3, Award (June 26, 2003).

147. *Abaclat and Others v. Arg.*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

148. *Ambiente Ufficio S.p.A. and others v. Arg.*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013).

of international investment law; and, as I suggest in the conclusion, for the legitimacy of the investment dispute regime.

1. Lenient applications

The Tribunal's discussion of futility in *Plama Consortium Limited v. Republic of Bulgaria*¹⁴⁹ offers a brief and blunt example of the attitude that often underlies lenient applications. Analyzing the Claimant's argument that Bulgaria had consented to ICSID arbitration by virtue of the most-favored nation (MFN) clause in the Cyprus-Bulgaria BIT, the Tribunal reviewed several decisions addressing similar claims. Turning to the case of *Emilio Agustín Maffezini v. Kingdom of Spain*,¹⁵⁰ the *Plama* Tribunal was unconvinced by the *Maffezini* Tribunal's several rationales for accepting the MFN argument. The *Plama* Tribunal acknowledged, however, that the decision in *Maffezini* was "perhaps understandable" given the circumstances of the case.¹⁵¹ After all, if the *Maffezini* Tribunal had rejected the MFN argument, the Claimant would have been subject to what the *Plama* Tribunal described as a "curious requirement that during the first eighteen months the dispute be tried in the local courts."¹⁵² Given this peculiar obligation, "The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view."¹⁵³ The *Plama* Tribunal thus distinguished its decision on the MFN claim on the basis that local remedies rules are irrational, at least "from a practical point of view." Conceived as such, the scope of the futility exception can only be correspondingly expansive.

In *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*,¹⁵⁴ the Tribunal considered Moldova's contention that the Tribunal lacked jurisdiction because the Claimant had not complied with Article VI(3) of the U.S.-Moldova BIT, requiring that "six months have elapsed from the date on which the dispute arose" before claimants may submit a dispute to arbitration.¹⁵⁵ After noting that the Claimant had first objected to Moldova's removal of a critical customs exemption more than a year before invoking the arbitration clause, and that Moldova's response to this objection was simply to pressure the Claimant to comply, the

149. *Plama Consortium Limited v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

150. *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000).

151. *Plama*, ICSID Case No. ARB/03/24. Decision on Jurisdiction, ¶ 224.

152. *Id.* (emphasis added).

153. *Id.*

154. *Link-Trading Joint Stock Co. v. Dep't for Customs Control of Mold.*, UNCITRAL, Award on Jurisdiction (Feb. 16, 2001) (hereinafter *Link-Trading*).

155. Moldova Bilateral Investment Treaty art. 6(3), Mold.-U.S. BIT, Apr. 21, 1993, S. Treaty Doc. No. 103-14 (1993).

Tribunal concluded that enforcing the six-month requirement would ignore the purpose of the clause.¹⁵⁶ Thus, despite the fact that only twenty days separated the Claimant's submission of its complaint to the Moldovan Government and its service of notice of arbitration, the Tribunal waived compliance with the local remedies rule.

The facts of the dispute indicate that the Tribunal's choice to adopt a lenient posture toward the futility claim was not dispositive—the Claimant would have satisfied even an “obvious” standard. Nonetheless, the Tribunal's explanation of its interpretive posture is noteworthy. Describing the purpose of mandating a six-month period, the Tribunal notes its “belie[f] that where, as here, there is an evident refusal of Claimant's position by Respondent, such a waiting period should be interpreted *restrictively*.”¹⁵⁷ The Tribunal continues, “The only consequence of adopting a *liberal* interpretation of the six-month waiting period, as Respondent proposes, would . . . have been to aggravate the possible claim of damages.”¹⁵⁸ The passage is striking because the Tribunal reverses the plain meaning of Article VI(3). A *liberal* interpretation of a clause mandating a six-month waiting period *excuses* adherence to the clear terms. What the Tribunal deems a “restrictive” interpretation amounts to nothing more than mandating compliance. Unless the Tribunal's choice of words was a mistake, this reversal suggests a disposition much like that of the *Plama* Tribunal. Namely, a disposition in which the Tribunal deems itself authorized to find clear treaty terms nonsensical.¹⁵⁹

The Tribunal's reasoning in *Ronald S. Lauder v. The Czech Republic*¹⁶⁰ features another reversal. As in *Link-Trading*, Article VI(3)(a) of the Czech-U.S. BIT mandates a six-month interval between notifying the dispute to state authorities and submitting it to binding arbitration. As in *Link-Trading*, the Claimant ignored this requirement, in this instance waiting just seventeen days.

The Tribunal in *Lauder* reversed the burden of proof. It first noted that the Czech authorities “did not react at all” to a letter from the Claimant requesting an opportunity to negotiate a solution to the dispute.¹⁶¹ “Furthermore,” the Tribunal continued, “the Respondent did not propose to engage in negotiations with the Claimant” even after the Claimant had appended to his Notice of Arbitration the comment that it was “open to any

156. *Link-Trading*, UNCITRAL, Award on Jurisdiction, *supra* note 154, at 5-6.

157. *Id.* at 6 (emphasis added).

158. *Id.* (emphasis added).

159. It bears noting that neither the *Plama* nor the *Link-Trading* Tribunal invoke Article 32 of the Vienna Convention on the Law of Treaties, authorizing the use of “supplementary means of interpretation” where an interpretation under Article 31 “[l]eads to a result which is manifestly absurd or unreasonable.” Vienna Convention on the Law of Treaties art. 32, *supra* note 10.

160. *Ronald S. Lauder v. Czech*, UNCITRAL, Final Award (Sept. 3, 2001).

161. *Id.* at 39, ¶ 188.

good faith efforts by the Czech Republic to remedy this situation.”¹⁶² The Tribunal concluded that “[h]ad the Respondent been willing to engage in negotiations with the Claimant, in the spirit of Article VI(3)(a) of the Treaty, it would have had plenty of opportunities to do so during the six months *after* the 19 August 1999 Notice of Arbitration.”¹⁶³ To summarize, the Tribunal excused the Claimant’s noncompliance with Article VI(3)(a) on the basis of the Claimant’s rhetorical commitment—being “open to any good faith efforts by the Czech Republic”—to uphold “the spirit” of a provision whose clear terms it had already ignored.

2. Strict applications

In *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*,¹⁶⁴ the Tribunal considered the Claimant’s argument that its noncompliance with local remedies rules in the Turkey-Turkmenistan BIT should be excused on the basis that it: “(a) was unable to find a single Turkmen lawyer who was willing to testify against Respondent; and (b) communicated with other investors with claims against Respondent and understands that its experience is universal.”¹⁶⁵ The *Kiliç* Tribunal found the claims unconvincing: “[I]his is not compelling ‘evidence’ of futility,” the Tribunal concluded, “if indeed it can be said to constitute evidence at all.”¹⁶⁶ A claimant’s failure to comply with mandatory recourse to Turkmenistan’s courts would only be excused after a “clear case” had been made on the basis of “‘best’ evidence.”¹⁶⁷ As opposed to the approach in *Lauder*, the Tribunal placed the burden of proof on the Claimant; and unlike in *Link-Trading*, the Tribunal found that a “liberal” interpretation of the BIT’s mandatory terms would imply relaxing their application. The *Kiliç* Tribunal summarized, “[I]he onus is not on Respondent to prove the availability and efficacy of its court systems to manage investor related disputes. Rather, the onus is on Claimant to show, on sufficient evidence, that such recourse is unavailable or would be futile in respect of the matters at issue in this case.”¹⁶⁸

The *Kiliç* Tribunal also considered the Claimant’s attempt to link its futility claim to disputes involving diplomatic protection. The Claimant pointed to several sources indicating that tribunals had excused

162. *Id.* at 39, ¶ 189.

163. *Id.* (emphasis added).

164. *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Republic of Turkm.*, ICSID Case No. ARB/10/1, Award (July 2, 2013) (hereinafter *Kiliç*).

165. *Id.* at 88, ¶ 8.1.2.

166. *Id.* ¶ 8.1.3.

167. *Id.* ¶ 8.1.4.

168. *Id.* at 90-91, ¶ 8.1.15.

noncompliance with clauses mandating the exhaustion of local remedies.¹⁶⁹ The *Kiliç* Tribunal found this argument similarly inadequate. The Tribunal maintained that these sources' discussion of the exhaustion requirement in fact called for a *more* skeptical interpretation of the Claimant's futility argument.¹⁷⁰ The local remedies provisions in the Turkey-Turkmenistan BIT did not mandate exhaustion, were therefore less onerous than the provisions discussed in the sources cited by the Claimant, and thus these sources only undermined the Claimant's cause.

The Tribunal's decision in *Yukos v. Russia*¹⁷¹ has received attention for a variety of reasons—none thus far relating to futility. Yet buried among the more than 600 pages of the Final Award is a stringent application of the futility exception that demonstrates an “obvious” approach. Russia argued that the Tribunal did not have the authority to render an award, *inter alia*, on the basis that the Tribunal had not received the counsel of the Russian, Cypriot, and UK ministries of finance concerning the legality of Russia's tax measures. Failing to obtain this formal advice prior to rendering an award, Russia argued, would violate the terms of Article 21(5)(b)(i) of the Energy Charter Treaty.¹⁷²

Claimants responded, first, that the disputed expropriation was the result of a combination of measures, of which the disputed tax was only a part; and second, “that any referral made to the Russian Ministry of Finance, or the tax authorities of the United Kingdom and Cyprus for that matter, would be an exercise in futility.”¹⁷³ The Tribunal rejected Claimant's first contention but found the futility claim “persuasive.”¹⁷⁴ Cabining the Claimant's argument that asking the Russian tax authorities for an opinion was akin to asking Russia to be a judge in its own cause, the Tribunal focused on practicability. It found it “inconceivable” that the tax authorities would be able to render an informed opinion within the necessary timeframe given the thousands of pages and more than 8,000 exhibits that would have to be

169. *Id.* at 55-56.

170. *Id.* at 89, ¶ 8.1.7 (“Article VII.2 of the BIT does not require the exhaustion of local remedies as the concept is understood under international law. It simply requires an investor with a dispute to take the matter to the host state's courts and not to have received a final award within one year.”).

171. *Yukos Universal Limited (Isle of Man) v. Russian Federation*, *supra* note 95, Final Award.

172. Article 21 of the treaty provides: “(b) Whenever an issue arises under Article 13 [“Expropriation”], to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply: (i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities.” Energy Charter Treaty, 2080 U.N.T.S. 95 (1995).

173. *Yukos Universal Limited (Isle of Man) v. Russian Federation*, *supra* note 95, Final Award at 450, ¶ 1419.

174. *Id.* at 451, ¶¶ 1420-21.

reviewed.¹⁷⁵ After acknowledging that Article 21(5)(b)(i) did not include any exceptions, the Tribunal cited Article 15(a) of the Draft Articles on Diplomatic Protection, arguing that compliance “must be regarded as clearly futile if there is no possibility that the relevant authorities would in fact be able to come to some timely and meaningful conclusion about the dispute.”¹⁷⁶

The *Yukos* Tribunal’s additions and modifications to Article 15(a) of the ILC Draft Articles are instructive. “Clear,” for example, does not appear in the ILC’s formulation. The term points toward an “obvious” rather than a “reasonably possible” standard. Note further what the *Yukos* Tribunal excluded. Whereas Rapporteur Dugard argued that the leading feature of the intermediate option was its inclusion of “reasonableness”—indeed, the final language of Article 15(a) repeats the term “reasonable” twice—the *Yukos* Tribunal drops this more subjective standard entirely. As opposed to the ILC’s “no reasonable possibility” approach, the Tribunal argues that a futility claim must show “clear” evidence that “there is no possibility” of a remedy.

The *Yukos* Tribunal ultimately found that, notwithstanding this strict standard, the futility exception should apply. Without over-reading a few statements in a lengthy opinion, it is fair to conclude that the Tribunal reached this decision only after applying a standard akin to “obviousness.” *Yukos* thus underscores that much like the “strict” scrutiny applied by the Supreme Court of the United States, “obvious” futility need not be “fatal in fact.”¹⁷⁷

The Tribunal’s approach in *ICS Inspection and Control Services Limited v. The Republic of Argentina*¹⁷⁸ offers a final illustration of the strict standard. The United Kingdom-Argentina BIT included a local remedies rule mandating that claimants litigate their dispute in domestic courts for eighteen months prior to invoking the arbitration clause. The Tribunal compared this provision to the requirement in public international law to exhaust local remedies, and what other investment tribunals (adopting what this Note has described as a “lenient” standard) had referred to as a mere “waiting period.”¹⁷⁹ The Tribunal concluded that the local remedies provision in the BIT fell “between these extremes, both in respect of its content and object and purpose.”¹⁸⁰

175. *Id.* at 451, ¶ 1422.

176. *Id.* at 452, ¶¶ 1424-26.

177. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

178. *ICS Inspection and Control Services Ltd. (U.K.) v. Arg.*, PCA Case No. 2010-9, Award on Jurisdiction (Feb. 10, 2012).

179. *Id.* at 82, ¶ 246.

180. *Id.* at 83, ¶ 248.

The Tribunal found that its approach to Claimant's futility argument would therefore have to be similarly balanced. On the one hand, the Tribunal acknowledged that "limitations on the excessively strict application of a treaty provision can be implicit and need not be stated expressly."¹⁸¹ On the other hand, such limitations "must find support in more than a tribunal's personal policy analysis of the provisions at issue. This is especially dangerous in the absence of conclusive evidence adduced to support a tribunal's teleological inferences."¹⁸² "Any given rule of interpretation," the Tribunal granted, "is liable to produce results in certain cases that some regard as undesirable."¹⁸³ However, such dissatisfaction should not excuse arbiters from enforcing the clear terms of the treaty.

Recognizing that the parties had presented conflicting evidence, and that each had marshalled experts demonstrating the plausibility of their submissions, the Tribunal concluded that this was therefore "not a case of obvious futility," and the relief sought by ICS was not "patently unavailable."¹⁸⁴ Noting the Claimant's failure to make "even a cursory" appeal to the Argentine courts, the Tribunal found itself incapable of finding those courts "completely ineffective" in resolving the dispute.¹⁸⁵

The Tribunal went on to argue that disputes under IIAs require a particularly stringent approach to futility claims.¹⁸⁶ Unlike when construing contracts between an investor and a host state—where a tribunal may infer exceptions to certain provisions from the behavior of the contracting parties—an investor seeking arbitration under a BIT is akin to a third-party beneficiary taking advantage of terms that it did not negotiate. These terms, the Tribunal noted, were formulated to protect a broad group of potential claimants. The Tribunal cited Article 36(2) of the Vienna Convention on the Law of Treaties by way of analogy. That provision requires that "[a] State exercising a right in accordance with paragraph 1 [addressing the rights of third states] shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."¹⁸⁷ Substituting "investor" for "state," the Tribunal concluded that the principle of this provision mandated strict construal of the claims of what are essentially

181. *Id.* at 87, ¶ 265.

182. *Id.*

183. ICS Inspection and Control Services Ltd., PCA Case No. 2010-9, Award on Jurisdiction, *supra* note 178, at 88, ¶ 268.

184. *Id.* ¶ 269.

185. *Id.* at 88-89, ¶ 269.

186. Compare this claim to the discussion in subsection II.A.iii, *supra*, where I argue that that there is no reason to believe that investment disputes call for a *less* onerous standard than general customary international law.

187. Vienna Convention on the Law of Treaties, *supra* note 10, at art. 36(2).

third parties seeking to “exercis[e] a right” without meeting “the conditions for its exercise.”¹⁸⁸

The disputes just discussed are indicative of the opposite poles of investment law jurisprudence addressing futility claims. What remains are those disputes in which tribunals have adopted an interpretation of futility that lies between these extremes. These are the cases in which an “obvious” approach may be most likely, as the Tribunal in *ICS* put it, “to produce results . . . that some regard as undesirable.”¹⁸⁹ In this light, the pithy version of my claim is that hard cases have made bad law.¹⁹⁰ In the remainder of the Note, I indicate why “obvious futility” is not only preferable as a matter of history or logic, but will also make better law.

3. Intermediate applications

In *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*,¹⁹¹ a tribunal formed pursuant to the arbitration provisions of the North American Free Trade Agreement (NAFTA) confronted what the first sentence of the Award described as “an important and extremely difficult case.”¹⁹² The underlying dispute concerned competing funeral businesses in Mississippi. The Claimant, a Canadian entity, argued that the courts of Mississippi had violated NAFTA’s minimum standard of treatment and expropriation provisions. The Tribunal ultimately concluded that it lacked jurisdiction because Loewen had assigned its claim to a United States’ company. Technically, the majority of the *Loewen* Award is thus dicta. Because precedential weight is not our concern, the ensuing analysis is unaffected by this aspect of the decision.

In its 2001 Decision on Jurisdiction, the *Loewen* Tribunal considered the United States’ contention that the Claimant had failed to comply with NAFTA’s rule concerning the exhaustion of local remedies, or what the Tribunal accepted as its practical equivalent, a “rule of judicial finality” requiring the Claimant to appeal to the highest domestic tribunal before seeking arbitration.¹⁹³ The United States maintained that when claimants challenge a judicial action, NAFTA Article 1121’s mandate that claimants

188. *ICS Inspection and Control Services Ltd., PCA Case No. 2010-9, Award on Jurisdiction, supra* note 178, at 89, ¶¶ 270-73.

189. *Id.* at 88, ¶ 268.

190. *See* *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 405 (K.B.) (Rolfe, J., concurring) (“This is one of those unfortunate cases in which . . . it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been observed, are apt to introduce bad law.”).

191. *Loewen Group, Inc. and Raymond L. Loewen v. U.S., ICSID Case No. ARB (AF)/98/3, Award* (June 26, 2003) (hereinafter *Loewen*).

192. *Id.* at 2, ¶ 1.

193. *Id.* at 46, ¶ 158.

“waive their right” to pursue most domestic remedies¹⁹⁴ does not apply or does not supersede this judicial finality rule. The Tribunal withheld judgment on this aspect of the dispute until its Award on the Merits.

Returning to the “judicial finality” argument more than two years later, the Tribunal first agreed with the parties’ experts that Article 1121 “is not about the local remedies rule.”¹⁹⁵ What was “reasonably clear” to the Tribunal was that Article 1121 “says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.”¹⁹⁶ NAFTA’s silence nonetheless counseled in favor of the United States’ position, because “[i]t would be strange indeed if sub silentio the international rule [of judicial finality] were to be swept away.”¹⁹⁷

In a conclusion that has received some criticism,¹⁹⁸ the Tribunal found that Article 1121 did not excuse the Claimant from appealing judicially created harms. Given the sophistication of the contracting states’ legal systems, and their presumptive desire to avoid international liability, the Tribunal argued that any other conclusion “would seem surprising.”¹⁹⁹

Having determined that some appeal was necessary, the question then became how far, or to what extent. After acknowledging a “body of opinion” supporting an “obvious” standard (citing, inter alia, *Finnish Ships*), the Tribunal went on to note Justice Lauterpacht’s contention in *Norwegian Loans* that the rule of local remedies “is not a purely technical or rigid rule” but rather a rule “which international tribunals have applied with a considerable degree of elasticity.”²⁰⁰ The Tribunal eventually settled upon a standard similar to that recommended by Rapporteur Dugard and the ILC: local remedies rules imply “an obligation to exhaust remedies which are *effective* and *adequate* and are *reasonably available* to the complainant in the circumstances in which it is situated.”²⁰¹

194. Article 1121 provides: “A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.” North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605, 643.

195. *Loeven*, ICSID Case No. ARB (AF)/98/3, Award, *supra* note 191, at 46, ¶ 161.

196. *Id.*

197. *Id.* ¶ 162.

198. See, e.g., CHRISTOPHER DUGAN ET AL., *supra* note 2, at 360-65; Bradford K. Gathright, *A Step in the Wrong Direction: The Loeven Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven*, 54 EMORY L.J. 1093 (2005).

199. *Loeven*, ICSID Case No. ARB (AF)/98/3, Award, *supra* note 191, at 47, ¶ 162.

200. *Id.* at 47-48, ¶ 166.

201. *Id.* at 49, ¶ 168 (emphasis added).

It is precisely Lauterpacht's "elasticity" that undermined the *Loewen* Tribunal's reasoning. The "obvious" standard would have provided much needed restraint. The *Loewen* Tribunal applied its "effective and adequate and . . . reasonably available" standard to three judicial remedies that the United States argued the Claimant was required to pursue before submitting its dispute to international arbitration. First, the United States asserted that Loewen should have appealed the decisions of the Mississippi state court. Searching for a method that would allow it to ascertain what is "effective," "adequate," and "reasonably available," the Tribunal considered a series of counterfactuals. Perhaps, if Loewen had appealed without posting a mandatory bond, it would have suffered execution against its assets and a resulting decline in its share price.²⁰² Or, perhaps Loewen's opponent in the domestic courts would have refrained from execution, fearing that such an action would later be held unlawful. Perhaps Loewen's share price would have been volatile regardless. The Tribunal concluded that given the commercial risks, this first remedy was not "reasonably available."²⁰³

Second, the United States argued that Loewen could have sought the protection of Chapter 11 of the Bankruptcy Code in order to prevent execution on its assets. The Tribunal refrained from reaching a conclusion on this contention, deciding that the reasonableness of Loewen's decision not to pursue protection under the Bankruptcy Code was intermixed with its decision to settle the case.²⁰⁴ The Tribunal instead addressed the reasonableness of that decision while considering the United States' final contention, that Loewen should have petitioned the Supreme Court for review and a stay of execution. The Tribunal noted that the parties' experts disagreed over whether Loewen had a "reasonable opportunity" of obtaining review, and, as such, found itself unable "to decide whether the opinion of Professor Days or that of Professor Tribe is to be preferred."²⁰⁵ Unable to reach a conclusion, the Tribunal reverted once more to hypotheticals, conjecturing that if Loewen had petitioned the Supreme Court and failed to obtain a stay, market perceptions may have turned against the company. The Tribunal concluded its discussion of this third claim with a non-conclusion: "the absence of any certainty about the outcome . . . is a significant consideration in deciding whether either option involved an adequate remedy which was reasonably available to Loewen."²⁰⁶

Responding to the subsidiary claim that Loewen's decision to enter into a settlement was a business judgment, and therefore voluntary, the Tribunal responded by reciting its standard of analysis once more: the fact that a

202. *Id.* at 58-59, ¶ 208.

203. *Id.*

204. *Id.* at 59, ¶ 209.

205. *Id.* at 60, ¶ 211.

206. *Id.* ¶ 212.

decision is voluntary “does not dispose of the point. The question is whether the remedies in question were reasonably available and adequate.”²⁰⁷ It appears that the *Loewen* Tribunal hoped that if it repeated the term “reasonable” with enough frequency, it would become clear whether or not Loewen’s behavior qualified.

Loewen highlights the difficulty of implementing an intermediate “reasonableness” approach. At times, the Tribunal attempted to determine reasonableness by reconstructing the facts from the Claimant’s point of view (a subjective analysis). At other times, it reaches its own conclusions regarding what actions would have been reasonable under the circumstances (an objective analysis). An “obvious” approach, by contrast, requires claimants to demonstrate that the remedies available were so patently futile that it will likely be immaterial whether the Tribunal adopts a subjective or objective point of view. After using such “elasticity” to tie itself into knots, the *Loewen* Tribunal ultimately chose to dispense with the entire exercise. It settled the futility claim by finding that Loewen had not presented sufficient evidence to support its position.²⁰⁸ The argument of this Note is, in part, that when tribunals adopt a standard of “reasonableness,” it is not clear that such evidence will ever exist.

The Tribunal in *Abaclat and Others v. Argentine Republic* faced similar frustrations. Instead of resorting to an evidentiary escape, however, the *Abaclat* Tribunal purported to dismiss with futility analysis entirely. The Tribunal stipulated that its conclusions concerning futility “derive[] more from a weighting of the specific interests at stake . . . than from the application of the general principle of futility.”²⁰⁹ In other words, the Tribunal embraced a general balancing approach. At issue in *Abaclat*, inter alia, was whether the Claimants had complied with the domestic litigation requirements in Article 8 of the Argentina-Italy BIT. As the Tribunal noted at the beginning of its analysis, “It is undisputed that Claimants did not submit their dispute to the Argentine courts before initiating the present arbitration.” The question before the Tribunal was “whether Claimants should have done so.”²¹⁰

The Tribunal emphasized the systemic and normative character of that query. “The real question,” the Tribunal argued, was whether the Claimant’s disregard of the terms of Article 8 was compatible with the object and purpose of the “system put in place by Article 8.”²¹¹ The Tribunal construed that system as fundamentally interested in balancing the values of fairness and efficiency. “Fairness” was understood in terms of Argentina’s interest

207. *Id.* at 61, ¶ 214.

208. *Id.* at 61, ¶¶ 215-17.

209. *Abaclat*, ICSID Case No. ARB/07/5, *supra* note 147, at 229, ¶ 584.

210. *Id.* at 226, ¶ 576.

211. *Id.* at 228, ¶ 580.

in addressing the claim within its own legal system. “Efficiency” amounted to the Claimant’s interest in resolving the dispute without undue costs.²¹²

Because of the *Abaclat* Tribunal’s implicit reliance on the “reasonableness” and “effectiveness” of the intermediate standard, its balancing exercise was inaccurate and oversimplified. The Tribunal’s balance was inaccurate because it assumed that the investor and host state’s interests were entitled to equal weight. Although this Note has indicated that the *Abaclat* Tribunal is not alone in this assumption, it is incorrect all the same. More distinctive to *Abaclat* are the Tribunal’s oversimplifications. First, the Tribunal bifurcates fairness and efficiency, assigning the former interest to the Respondent and the latter to the Claimants. Yet, just as plausible a case can be made for reversing those assignments. Rather than vindicating Argentina’s abstract “sovereign interests” alone, the value of fairness may pertain to the satisfaction of a claimant’s reasonable, investment-backed expectations. Likewise, rather than assuming that commercial considerations are the province of claimants alone, “efficiency” is likely to be an interest of respondent states as well.²¹³ Second, the Tribunal oversimplifies because fairness and efficiency are not the only values at stake. Reputation, autonomy, and equity—to name only a few prominent examples—are also implicated in a claimant’s assertion that resorting to the adjudicative systems of a host state would have been futile.

Using this mis-weighted scale, the *Abaclat* Tribunal proceeded to “determin[e] whether Argentina’s interest in being able to address the specific claims through its domestic legal system would justify depriving Claimants of their interests of being able to submit it to arbitration.”²¹⁴ Thus construing futility as the rule rather than the exception—in a reversal akin to that in *Link-Trading*—the Tribunal concluded that Argentina’s interest in fairness could not justify the efficiency costs that would be imposed on the Claimant.

For present purposes, the merits of the Tribunal’s conclusion are less significant than the process by which it was reached. This process was based on the “reasonableness” and “effectiveness” standards that are the hallmarks of the intermediate approach to futility analysis. Yet the Tribunal explicitly renounced doctrinal standards in favor of a general balancing approach. In this sense, the *Abaclat* Tribunal may have simply been more forthcoming than its peers. If the intermediate standard calls for placing the claimant’s and host state’s interests on equal footing, and “reasonableness” appears to provide few checks on the tribunal’s interpretive discretion, a

212. *Id.* at 227-29, ¶¶ 579-84.

213. This contention holds even if efficiency is understood as referring to economic interests alone. Note further that insofar as investment flows under the Argentina-Italy BIT are bilateral, “respondent state” incorporates Italian and Argentine interests.

214. *Abaclat*, ICSID Case No. ARB/07/5, *supra* note 147, at 229, ¶ 584.

“balance” may not only be the right metaphor but also the prescribed process. Here again, “obvious futility” offers a doctrinally and operationally superior standard

*Ambiente Ufficio S.p.A. and others v. Argentine Republic*²¹⁵ demonstrates that even if a tribunal renounces untethered balancing exercises in favor of closely adhering to doctrine and precedent, the intermediate standard may still lead the tribunal astray. Santiago Torres Bernárdez’s dissenting opinion in *Ambiente* also helps illustrate how the “obvious futility” standard may facilitate a more nuanced analysis than the intermediate alternative.

Interpreting the same provisions at issue in *Abaclat*, the Tribunal in *Ambiente* first undertook an extensive analysis of the rule of exhaustion, its relation to local remedies rules, and what place, if any, futility claims have in international investment law. The Tribunal concluded that the rule of exhaustion applicable to claims for diplomatic protection and the local remedies rules included in investment agreements “[b]oth serve the purpose of honoring the host State’s sovereignty by providing the [state] the opportunity to settle a dispute in its own fora before moving on to the international level.”²¹⁶ The Tribunal thus “d[id] not consider it . . . far-fetched” to find that the futility exception applied not just to diplomatic protection but also to local remedies rules in international investment law.²¹⁷

Having accepted futility’s place in investment disputes, the Tribunal turned to identifying the appropriate standard for futility claims. The Tribunal applauded the “well-reasoned and well-balanced restatement” of the ILC Draft Articles and explicitly adopted its recommendations, concluding that compliance with local remedies rules may only be excused where there were no “reasonably available local remedies to provide effective redress.”²¹⁸ Before applying this standard to the facts, the Tribunal distinguished the appropriate standard of analysis for futility claims in investment disputes from that applied to claims for diplomatic protection: “as opposed to a fully-fledged exhaustion of local remedies requirement, the threshold to be met for the futility exception to be realized in the present case cannot possibly be considered higher than in the context of diplomatic protection; on the contrary, it is arguably rather lower.”²¹⁹

As noted above,²²⁰ the Tribunal in *Kiliç* reached exactly the opposite conclusion. With good reason: it is difficult to conceive why the *less* onerous local remedies rules in IIAs should lead to *more* lenience when they are ignored. The Tribunal appears to assume that if local remedies rules are not

215. *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, *supra* note 8.

216. *Id.* at 204, ¶ 602.

217. *Id.* at 205, ¶ 603.

218. *Id.* at 208, ¶ 610.

219. *Id.* ¶ 611.

220. *See Kiliç, supra* note 164 at 89, ¶ 8.1.7.

particularly arduous, then compliance must not be particularly important either. That presumption, and the disposition toward futility claims which follows from it, are dubious. More specifically, they are at odds with the history and logic of the futility exception, and with the “honor” for host state sovereignty that the *Ambiente* Tribunal recognized as the purpose of local remedies rules.

Admittedly, it is difficult to trace this questionable reasoning directly to the Tribunal’s decision to apply an intermediate standard. Unlike in the disputes considered above, the *Ambiente* Tribunal’s misstep does not appear to be a direct product of the undue discretion conferred by terms such as “reasonable” and “effective.” Instead, the Tribunal’s error follows from its failure to recognize the implications of its historical analysis. “[H]onoring the host State’s sovereignty” entails a great deal more than “providing the [state] the opportunity to settle a dispute.”²²¹ It is because the Tribunal ignored the reputational, economic, and normative interests embedded in that “opportunity” that it devalued the consequences of noncompliance with local remedies rules. Thus, the intermediate standard appears less the cause than the consequence of the Tribunal’s unsatisfactory analysis. Nonetheless, an “obvious” standard would still have been a more fruitful alternative, insofar as it may have forced the Tribunal in *Ambiente* to reconsider the implications of its historical analysis of the futility exception.

Finally, consider how an “obvious futility” standard may have helped Santiago Torres Bernárdez’s dissent to identify the principal flaw in the majority’s analysis.²²² Among other arguments, Bernárdez contends that the Claimant’s futility contention is “merely speculative as the Argentine courts were never presented with Claimant’s claims. . . . Speculative arguments are not supposed to derogate *pacta sunt servanda* nor the international law rule of State’s consent to jurisdiction with its corollaries.”²²³ Repeating *pacta sunt servanda* is not responsive to a futility claim. Claimants alleging futility grant the validity of their obligation to resort to local remedies, but argue that the equities demand an exception. The Latin does not reach this argument. “Obvious futility,” by contrast, confronts futility claims on their own terms.²²⁴ Rather than a blanket “no,” the “obvious” standard responds with a “yes, but” formulation. Thus, rather than challenging the existence of the futility exception, or the Tribunal’s reliance upon an ILC formulation that had not been ratified by the U.N. General Assembly,²²⁵ Bernárdez’s dissent

221. *Id.* at 204, ¶ 602.

222. *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility (Feb. 8, 2013) (Bernárdez, J., dissenting).

223. *Id.* at 142, ¶ 451.

224. Note that Bernárdez does use the magic words—*see id.* (“[F]utility has not been established in the first place by the facts of the case relating to the conduct of Claimants. It is not therefore a case of obvious futility”)—however he does not appear to appreciate their implications.

225. *Id.* at 20, ¶ 56.

could have targeted the substance of the claim itself. “Obviousness” would have pressed Bernárdez to indicate what threshold these “speculative” claims failed to meet, and, by extension, the more serious shortcomings of the majority opinion.

IV. CONCLUSION

*BG Group Plc v. The Republic of Argentina*²²⁶ puts this Note’s claims to perhaps their most difficult test. The Tribunal’s carefully reasoned Final Award is therefore a fitting foil, allowing me to summarize the Note’s conclusions, highlight the strongest counterarguments against them, and reiterate why I believe a stringent “obvious futility” standard is nonetheless the best way forward.

Article 8(2) of the Argentina-United Kingdom BIT stipulates that claimants may submit a dispute to international arbitration only when (i) eighteen months have elapsed since either party has submitted the dispute to a domestic tribunal, and the tribunal has not rendered a decision; (ii) the tribunal has rendered its decision and the parties remain in dispute; or (iii) the parties agree to resort to international arbitration.²²⁷ Argentina argued that BG Group had not brought its dispute before domestic courts, nor had Argentina agreed to submit the dispute to arbitration. BG’s claim was therefore inadmissible. BG Group responded by pointing to a series of executive and legislative actions through which, as the Tribunal elaborated, Argentina had

- (a) restrict[ed] the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;
- (b) insist[ed] that Claimant[s] go to domestic courts to challenge the very same measures; and
- (c) exclude[d] from the renegotiation process any licensee that does bring its grievance to local courts.²²⁸

The Tribunal concluded that a “serious problem would loom” if it denied admissibility on these grounds.²²⁹ Put differently, the Tribunal refused to let Argentina erect a Catch-22 in order to elude its domestic and international responsibilities.

Setting out the legal framework for its analysis, the Tribunal noted that “The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly . . . investors are entitled to seek enforcement of their treaty rights by directly bringing action

226. *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award (Dec. 24, 2007).

227. Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 94 U.N.T.S. 2.

228. *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, *supra* note 226, at 53, ¶ 156.

229. *Id.*

against the State in whose territory they have invested.”²³⁰ This Note began with a similar discussion of the evolution of the rule of local remedies and the futility exception. While that discussion similarly found that BITs had reintroduced the interests of individual claimants relative to the era of gunboat diplomacy, I argued that host state interests remained, as Amerasinghe puts it, “the heart” of futility analysis. Investors today may enjoy the capacity to seek private enforcement of their treaty rights, but those rights are subject to corresponding obligations imposed by sovereign states.

After reviewing the impediments restricting BG Group’s ability to obtain domestic or international relief, the Tribunal emphasized:

It is not within the province of this Tribunal to pass judgment on the policy reasons prompting promulgation of [Argentina’s decrees], nor to question the sovereign prerogative of their adoption. However, it seems fitting to examine the reasonableness of the expectation that judicial remedies should have been exhausted at a time where the Executive Branch was seeking to prevent any judicial interference with the emergency legislation.²³¹

This Note has argued that all too often investment tribunals have bowed to host state sovereignty only to then find it “fitting to examine” that sovereign’s “reasonableness.” In particular, I argued that the intermediate standard of futility, in its focus on the “reasonableness” and “effectiveness” of complying with local remedies rules, conferred undue discretion on investment tribunals. The products of “reasonableness” analysis include an erratic and often bewildering jurisprudence.

In the final Section, I detailed some of the specific consequences of lenient and intermediate approaches to futility claims, and argued that an “obvious futility” approach, while no panacea, promised better. *BG Group* places the costs of this position into stark relief. Restraining arbitral discretion may in some cases entail denying equity to claimants such as BG Group and rewarding the obstructive and cynical behavior of respondents such as Argentina. I argue that these costs are worth bearing, and indeed, may be necessary in order to enjoy the larger benefits of international investment law.

The normative foundations of international investment law are threatened today not by claimants denied the right to a hearing of their legitimate grievances, but rather by civil society groups objecting to the inability of states to protect their sovereign prerogatives. Among these prerogatives is the right to demand compliance with the clear terms of investment agreements—to calibrate what the state will offer international investors and what investors will owe that state in return. To be clear, “obvious futility” is by no means a full response to protests

230. *Id.* at 49, ¶ 145.

231. *Id.* at 52, 153.

demanding, and in some instances already achieving, a fundamental reconsideration of international investment law.²³² Yet it is a response. One that contends futility claims are an exception and state sovereignty is the rule.

* * *

232. See generally THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel, et al., eds. 2010); UNCTAD Secretariat, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, (2013); Cory Adkins & David Singh Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, 126 YALE L.J. F. 65 (2016); Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, INT'L CENTRE TRADE & SUSTAINABLE DEV., WORLD ECON. F. (2015).

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