The Local Remedies Rule in an Appropriate Perspective

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Introduction

The past experience of the international community in the field of alien treatment tends to show that States *in loco rei* are almost always prone to resort to the rule that local remedies should be exhausted as a means of ousting the jurisdiction of an international forum or resisting attempts to exercise diplomatic protection, while, when the shoe is on the other foot, they like vehemently to contest the applicability or relevance of the same rule to the case in which they are involved. It is not unusual for States, particularly developed States, which have been in a respondent position [1]), to try to take advantage of the rule, though they have or would be expected to oppose, if possible, the application of the rule against them. This feature of the international panorama may lead to the valid conclusion that the rule enjoys respect from and acceptance by both developed and developing States and is not a mere assertion of law made by proponents and supporters of the Calvo doctrine or

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[1]) Developed States which have recently invoked the rule when *in loco rei* include: U. K.: *Ambatielos Claim* (1956), 12 U.N.R.I.A.A., p. 83; Norway: *Norwegian Loans* Case, 1957 I.C.J. Reports, p. 9; U.S.A.: *Interhandel* Case, 1959 I.C.J. Reports, p. 6; Spain: *Barcelona Traction* Case (2), 1970 I.C.J. Reports, p. 3.

those who favor abstract doctrines of State sovereignty. Further, there can be no doubt now that the judicial organs of the international community, including the International Court of Justice[2]), regard the rule as firmly established in international law and apply it. On the other hand, this is not to say that particularly developed States have not attempted and do not attempt to avoid the effects which the application of the rule has in removing a dispute involving a national of theirs from the international arena. Indeed, the cases in which the rule has been invoked show that, while the existence and validity of the rule is not contested, there has been much argument about the exact scope and parameters of the rule[3]).

In the modern context of economic development, in contrast to mere international travel and intercourse, and involving the transfer not only of foreign material resources but also of foreign human resources, the rule becomes applicable to disputes which may arise particularly in regard to foreign private investment, while being also relevant to disputes relating to foreign personnel involved particularly in the transfer of technology. Thus, it may be argued that it is in the interests of development that the rule be clearly and reasonably interpreted. This means not only that the scope and limits of the rule should be clearly established, but also that such limits be framed with the furtherance of development in mind. What is being suggested, in short, is that in establishing the exact scope and parameters of the rule regard should be had both to the interests of respondent States in preserving their sovereignty which has hitherto been emphasized a great deal in the cases[4]) and the literature[5]) on the subject, and also to the need to eschew a result whereby the rule becomes a cause of inequity or undue hardship to the alien, and particularly to the foreign investor, in his

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[2]) See *e.g.* the *Interhandel* Case, 1959 I.C.J. Reports, p. 27, and the *Ambatielos Claim* (1956), 12 U.N.R.I.A.A., p. 83.

[3]) For a recent example see the briefs and proceedings in the *Barcelona Traction Co.* Case (2), (1970) 1 I.C.J. Pleadings, Oral Arguments, Documents, Exceptions préliminaires présentées par le Gouvernement Espagnol, pp. 237 ff., 269 ff., Observations at conclusions du Gouvernement Belge, pp. 215 ff., pp. 279 ff. 2 *ibid.*, pp. 272 ff., 3 *ibid.*, pp. 600 ff., 791 ff., and unpublished counter-memorial, reply and rejoinder on the merits.

[4]) See *e.g.*, the *Interhandel* Case, 1959 I.C.J. Reports, at p. 27, and the *Norwegian Loans* Case, 1957 I.C.J. Reports, at p. 97 *per* Judge Read.

[5]) See *e.g.*, Borchard, Diplomatic Protection of Citizens Abroad (1915), p. 817, De Visscher, Denial of Justice in International Law, 2 Recueil des Cours (1935), at pp. 365 ff., Law, The Local Remedies Rule in International Law (1961), p. 15.

quest for the impartial settlement of disputes that might arise, particularly in regard to investments, turns into a formidable hurdle for such a person in the event of a dispute and consequently acts as a deterrent to the flow of foreign private investment and the transfer of human resources as a means towards development.

Some attention has been paid in the cases to the aspect of the problem which relates to the interests of the alien in avoiding undue hardship[6]), although till recently this had not squarely been set in the context of promoting the development of the developing nations[7]). But it is submitted that in the future, and particularly in the context of the progressive development and codification of the law being undertaken by the International Law Commission, it is desirable that the rule of local remedies, and particularly its exact scope, be examined within the framework of the law of economic development. In the past it may have become customary in certain circles to regard the area of the law in which this rule operates as a more or less unsatisfactory, unbalanced and tenuous imposition by the so-called economic imperialists on the less fortunate "victims of exploitation"[8]), but in a modern context it would not be possible or even advisable to deny that the law of State responsibility, of which the rule of local remedies is a part, has its validity and justification in terms of and is relevant to progressive economic development, particularly of the developing nations.

The main reason for emphasizing the inextricable involvement between economic development and the law of State responsibility and, therefore, the rule of local remedies, is to highlight the need for considering the interests of both capital-importing States and the States and other relevant persons responsible for exporting capital and personnel in having a healthy and viable law, including a rule of local remedies. Just as much as it would be improper to stress excessively the interests of exporting States and their nationals in, for example, avoiding resort to a multiplicity of proceedings, including an international forum in order to settle disputes, it would be harmful to the evolution of an

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[6]) See *e.g.*, the *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., at p. 1497.

[7]) Much of the literature on the rule of local remedies (or for that matter, on the law of State responsibility as such) has not hitherto focussed sufficiently on this general area of the law as an aspect of the law of economic development. For a recent work which purports to do this, see Amerasinghe, State Responsibility for Injuries to Aliens (1967), pp. 7 ff. and 169 ff.

[8]) See *e.g.*, the underlying premise in Roy, Responsibility of the State for Injuries to Aliens, 55 A.J.I.L. (1961), p. 863.

equitable rule to lay too much store by doctrines of sovereignty as a means of protecting the interests of recipient States. Indeed, a logical extension of the theory of sovereignty as applied to the rule of local remedies would be the assertion that disputes between aliens and receiving States should be settled entirely in the municipal fora of the receiving State without any competence being awarded to international fora or to diplomatic intervention. Clearly, such a conclusion would have a deterrent effect on the flow of foreign private investment and the transfer of human resources and a detrimental effect on economic development. Equally, to lay too much stress on the interests of the exporting State and its nationals would result in the creation of inequitable rules of law which would lead to tension and hostility and again damage prospects of economic development. On the one hand, developing nations, in the modern context of needed resource transfers, apparently have an immediate interest in promoting the flow of foreign private investment and, therefore, should be willing to make reasonable concessions towards a balanced law. On the other hand, both in the short and long-term, developed States and their nationals have now a sufficiently vested and enduring interest in the economic development of developing nations particularly through the utilization of foreign private investment, from the point of view of their own well-being and future growth, and also in order to protect investments already made, not to adopt an uncompromising attitude to the law but rather to accommodate the legitimate aspirations of developing States[9]).

The Operation of the Rule

In much of the jurisprudence and literature on the subject of local remedies, it would appear that the situations in which local remedies become a relevant aspect in the application of the law are not clearly distinguished.

On the one hand, are those situations in which an international wrong does not arise until some local remedy has been invoked. An example of this would be a breach of a State contract with an alien[10]) which does not usually become an international wrong until the alien

[9]) For an approach to the law based on a reconciliation of conflicting interests, see Amerasinghe, *op. cit.*, pp. 172 ff.

[10]) See Amerasinghe, *op. cit.*, pp. 66 ff.

fails to get redress from a judicial or quasi-judicial organ of the State party, and that too for special reasons. Similarly, an expropriation of alien property does not become an international wrong if compensation is offered, until the compensation is assessed within a reasonable time and it proves to be inadequate or inappropriate. In such a case, there may be a requirement that the alien have resort to a judicial or quasi-judicial organ in order to have his compensation determined. The international wrong would arise after this resort is had. There is also the case where the initial wrong is not attributable to the host State. An international wrong would arise usually only after the courts have failed to redress the initial wrong. In all the examples given the resort to local remedies, so to speak, is necessary before an international wrong arises and is an integral part of the international wrong. When the alien or his national State alleges that an international wrong has been committed against him, *i. e.*, that there has been a violation of international law in regard to him, he must show that he has had resort to some judicial or quasi-judicial organ of the respondent State. In short, what he claims is some denial of justice in a narrow sense of that term — it is an allegation that in some way the particular organs have not acted in accordance with international law. In the first two examples given, the international claims would be respectively that the host State had not compensated the alien for the breach of contract and that the host State had not, through its organs, compensated him according to international law for the taking of his property. In the third example, the international claim would be that the courts of the host State acted illegally in not redressing the initial wrong done to the alien.

The other kind of situation is where the international wrong is committed against the alien before any resort to local remedies is had. In such a case the alien would normally be required to pursue his remedies through the organs of the host State before his claim can be espoused at an international level. Here the alien must pursue his local remedies as part of the logical procedure of having what is an international wrong redressed. What is involved is a step or steps in the procedure of redress of an international wrong. The local remedies are really part of an international procedure. This would be the case, for example, where the property of an alien is expropriated with no provision for compensation or probably where there has been a legislative termination of a State contract with an alien[11]). In both these cases the alien would

[11]) See Amerasinghe, *op. cit.*, pp. 100 ff.

normally have to resort to local remedies for redress of what is an international wrong before his case could be taken up at an international level.

In both types of situations described the alien may be the object of the host State's action. In that sense they both may have international aspects at the time the alien has reason to complain of an interference with his rights. However, at that time, a violation of international law takes place only in the second, but not in the first situation. Clearly, in the first case the violation of rights which takes place at that time is rooted in some other legal system than the international. And in this situation there is need for a further failure on the part of the host State, namely, by one of its judicial or quasi-judicial organs, before a violation of international law can take place. In this situation, too, there can be a need to resort to further local remedies before the alien's case may be dealt with at an international level. This further resort would operate as a part of the procedure of settlement of a dispute about a violation of international law and would be on a par with the resort to local remedies in the second situation[12]).

There is no real problem about the resort to local remedies in the first situation, since there can be no violation of international law until there has been a resort to some local remedy. On the other hand, the kind of resort involved here does not really involve the full "exhaustion" of local remedies. The question of "exhaustion" really arises in the second situation where the determination to be made is not merely whether local remedies have been resorted to but whether they have been "exhausted" after the alleged violation of international law took place[13]). It is the scope and parameters of the rule relating to such exhaustion of local remedies that are the cause for concern.

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[12]) The distinction between the two situations have other consequences in law: See Amerasinghe, *op. cit.*, pp. 201 ff.

[13]) The view that an "exhaustion" of local remedies really takes place when there is an initial breach of international law is supported by the cases: see *e.g.*, the *Norwegian Loans* Case, 1957 I.C.J. Reports, at p. 41 *per* Judge Lauterpacht, and p. 97 *per* Judge Read, the *Interhandel* Case, 1959 I.C.J. Reports, at pp. 27 ff., the *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., at pp. 1498 ff., and for other supporting material see discussion in Amerasinghe, *op. cit.*, pp. 216 ff.

The Jurisprudential Basis for the Rule

The commonest reason given for the rule of local remedies as identified above is that the host State must have full opportunity to do justice to a claimant before it is called upon internationally to answer to the national State of the claimant. Indeed, this was the reason for the rule given by the International Court of Justice in the *Interhandel* Case [14]). It was also supported by some dissenting judges in that case [15]) and in the *Norwegian Loans* Case [16]). This may be a sound basic and practical reason for the rule. In the usual case the investigative machinery to be found in the host State would be the best equipped to perform the task of establishing the existence of the international wrong. Secondly, resort to the local courts may be cheaper both for the host State and the alien than resort to an international proceeding, particularly if satisfaction is received at the lowest level in the adjudicatory hierarchy and the case is laid to rest there. Thirdly, the likelihood of wide publicity and of international disharmony for the host State consequent upon such publicity is generally minimized if the dispute is settled at a municipal level rather than by international adjudication.

Nevertheless, it would be inappropriate to conclude from the above reasons, particularly the first, that until the local organs have investigated the matter it is not clear whether any international injury has in fact been occasioned [17]) and to justify the rule of local remedies on this basis. Of the same genre is the view that there can be no wrong except through a defect in the administration of justice consequent upon the exhaustion of local remedies [18]). This kind of reasoning is at variance with the view expressed earlier in this paper, concerning the nature of the local remedies rule as an aspect of the procedure of settling international disputes relating to what is, or at least is alleged to be, a violation of international law and rights. It also does not explain, for instance, why local remedies must usually be "exhausted" and not merely resorted to at the level of the first instance; for if the wrong is not redressed at the level of first instance, there would, according to the theory being discussed, immediately be an international wrong (at least allegedly), so that the situation would then be ripe for

[14]) 1959 I.C.J. Reports, at p. 27.

[15]) *Ibid.*, at pp. 83 and 88 *per* Judges Winiarski and Armand Ugon respectively.

[16]) 1957 I.C.J. Reports, at p. 97 *per* Judge Read.

[17]) See *e.g.*, O'Connell, 2 International Law (1965), p. 1024.

[18]) See Judge Hudson, in a dissenting opinion, in the *Panevezys-Saldutiskis Railway* Case (1939), P.C.I.J. Series A/B No. 76, at p. 47, and Judge Morelli, in a dissenting opinion, in the *Barcelona Traction Co.* Case (1), 1964 I.C.J. Reports, at p. 114.

settlement by resort to international machinery. Conversely, queries may also be raised as to how, if the local courts decide that there is no injury, an international action could subsequently lie, if the purpose of the rule is to establish the existence of an injury.

A logical deduction from the tenable reasons that may be adduced for the rule is, therefore, that the rule is not an essential one in the sense that without it there cannot be some valid ground for international disputation. The rule would appear to be basically one of practical convenience. In a sense also it is a concession to the sovereignty of the host State *insofar as such State is in reality being permitted to settle through its own organs a dispute to which it is a party*. The history of the practice which led to the recognition of the rule could indeed support this view, since the rule seems to have been initially recognized in response to insistence by host States on claims founded on sovereignty rather than as emanating from a basic principle of justice inherent in the international legal order. This fact cannot be emphasized too much, even though the rule may have gained full acceptance also for the reason that national States of aliens found it a practical one in terms of their own non-involvement in disputes arising from the problems of their nationals in their relations with other States.

It would seem to follow from all this that host States are in some sense being accorded a privilege in the process of international dispute settlement. Local courts and quasi-judicial organs perform functions as agents of the international legal order in settling disputes involving aliens and arising from a violation of international law. Hence, while, on the one hand, the quest for methods to improve local justice and the investigation of local judicial and quasi-judicial institutions, in order to discover how far impartial justice can be expected from the congeries of extant systems and ultimately to demonstrate that the rule of local remedies can still operate equitably[19]), may be fully warranted, it is submitted that it is equally important to establish the scope and limits of the local remedies rule on bases comparable to and commensurate with those underlying the rule itself, with the ultimate object in view that the best interests of the international community are saved in ensuring that the adjudication process within its legal order operates not merely in some way but equitably. In this exercise a basic consideration would be the fact that the rule of local

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[19]) For this approach see the challenging work by Dawson/Head, International Law, National Tribunals and the Rights of Aliens (1971).

remedies as part of the law of State responsibility is relevant to the promotion of private foreign investment and technology flows and, therefore, to economic development.

Principles Relevant to the Scope of and Limitations on the Rule

The basic principle underlying the scope of the rule of local remedies is clearly that the host State should be given every opportunity to redress the alleged international wrong[20]). This principle results in such aspects of the rule which require resort to be had up to the highest tribunal in the host State[21]), not only ordinary remedies to be exhausted but also special or extraordinary remedies[22]), including administrative remedies[23]), and even, perhaps, generally alternative or successive remedies also to be exhausted[24]). There seems to be no difficulty with the positive principle determining the scope of the rule, since it stems from the basic object of the rule. Hence, it is equally not difficult to derive consequences from the principle.

The problems that arise are really in connection with the limitations on and parameters of the rule. These are based on other modifying principles relating to the interests of aliens and their host States and to the interests of the international community in efficient dispute settlement[25]). The need is not merely to recognize such principles as elements which operate to contain the rule of local remedies, but also to avoid allowing the application of such principles virtually to erode the rule itself. Such principles are relevant only as balancing influences to mitigate what would become rigorous and inequitable effects of the rule.

The three major principles involved in limiting the scope of the rule would seem to rest on consent, on the nature of the rule and on the concept of "undue hardship". The first principle permits the rule not to be applied, where otherwise it may be applicable, when the host State has in some way consented to the non-application of the rule. Such consent may be express or implied. This is not a difficult principle to justify nor does it need specific support in the authorities, since it would seem to be an obvious one.

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20) See the statement by Judge Read in the *Norwegian Loans* Case, 1957 I.C.J. Reports, at p. 97.

21) See the *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., p. 1497.

22) See the *Phosphates in Morocco* Case (1938), P.C.I.J. Series A/B No. 74, at p. 28.

23) See *ibid.*

24) See by implication, the *Ambatielos Claim* (1956), 12 U.N.R.I.A.A., p. 83.

25) See Amerasinghe, *op. cit.*, (note 7), pp. 172 ff.

Difficulties, however, may arise, *inter alia*, in deciding when consent to the exclusion of the rule may be implied. The second principle is based on the nature of the rule itself. Limitations arise because the rule is a means for the impartial settlement of particular kinds of disputes in which aliens are involved. The principle in its application has some support in practice. The third principle from which flow limitations on the rule may be described as resting on the concept of "undue hardship." It is submitted that this principle is supported in international jurisprudence principally by the *Finnish Ships Arbitration*. In this case it was stated that it appeared h a r d to lay on an alien the b u r d e n of incurring loss of money and time to exhaust a very unsatisfactory remedy[26]). Although the case specifically referred to the situation where a remedy was unsatisfactory — obviously futile, to be more precise — a broader principle based on the imposition of burdens or hardships could be discerned in the approach of the arbitral tribunal. The principle may, therefore, be validly postulated as underlying certain exceptions, since it is clearly implicit in the reasoning of the tribunal. The concept of "undue hardship" in fact covers a multitude of exceptional circumstances and is clearly based on equitable concerns requiring the rule not to be stretched too far. The problem really lies not in accepting the validity of such a principle of limitation but in determining how it should be applied. Indeed, all the exceptional circumstances not covered by the first principle which operate to exempt the alien from resorting to local remedies or exhausting them could be related in some way to this principle. However, it is evident that the principle contains what may technically be called a vacuous concept which requires a careful balancing of conflicting interests in its application. It is with the application of this principle that problems connected with the rule really arise.

The Principle of Consent

The principle of consent would require that, where the host State expressly waives or agrees to the non-application of the rule, it becomes irrelevant and permits the non-exhaustion of local remedies. The waiver or agreement could occur before or after the dispute has arisen and be by a unilateral act to be relied upon by the alien.

Where there is a waiver by bilateral or multilateral treaty between the host State and the national State of the alien no problem arises. The waiver

[26]) (1934), 3 U.N.R.I.A.A., at p. 1497.

cannot be affected by subsequent acts of the host State. This is the case under the Convention for the Settlement of Disputes between States and Nationals of Other States[27]). By virtue of Article 26 of the Convention, where a host State and an alien whose national State is a party to the Convention agree to submit to arbitration under the auspices of the Centre, there is a presumption that local remedies need not be exhausted unless there is specific provision made to the contrary. Similar waivers have been made in bilateral treaties.

Difficulties arise in connection with express agreements made between host States and aliens and with implied waivers. In the case of the above express agreements the question is whether such agreements can be unilaterally revoked. Clearly, if the agreement is governed by a law other than that of the host State, no revocation according to the law of the host State can take place. But what if, for instance, the agreement appears in a contract governed by the law of the host State which was legally terminated according to the law of the host State? Can the alien or his national State then rely on the express waiver of the rule by the host State? The answer would seem to hinge on whether parts of a contract could be governed by a different law from that which governs other parts. In the case of arbitration clauses in State contracts with aliens, as will be seen, it seems possible to take the view that cancellation of the contract does not result in the cancellation of the arbitration clause, probably on the basis that the arbitration clause stands on its own and is not subject to the total law of the host State. While it may be interpreted in accordance with that law, it cannot be unilaterally and arbitrarily terminated under that law, though there may be refinements of this rule. A similar principle may be applicable to a waiver of the rule of local remedies in a State contract with an alien.

Implied waivers present different problems. The question in most of these cases is when can a waiver be implied. This question obviously raises problems of interpretation and in general each situation should be looked at individually to determine whether there has been a waiver[28]). Clearly, to the extent that there has been a waiver, there generally can be no room for unilateral determination of the waiver. The view taken of express waivers in the previous paragraph would support this view. Further, while the existence of a waiver will usually have to be determined on the merits

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[27]) 55 U.N.T.S., p. 159; 17 U.S.T., p. 1270; 4 I.L.M. (1965), p. 524.

[28]) In general estoppel and waiver would be equivalents in this area. See the French argument in the *Norwegian Loans* Case, 1 I.C.J. Pleadings, Oral Arguments and Documents (1957), at p. 407.

of each case, there has been some practice on the question which warrants discussion.

(a) First, in connection with signatures of the optional clause under Article 36 of the Statute of the International Court of Justice, the Permanent Court of International Justice in the *Panavezys-Saldutiskis Railway* Case took the view that such a signature of the corresponding clause under its Statute did not involve waiver of the rule of local remedies by the signatory[29]). In the same case, Judge van Eysinga disagreed with this view in a dissenting opinion[30]). The issue was not raised by the applicant State in the *Interhandel* Case[31]) where the International Court of Justice was confronted with the question of local remedies, although a signature of the optional clause under Article 36 of the Statute of the Court was involved. Since the acceptance of the compulsory jurisdiction of the International Court of Justice does not basically militate against the preservation of the jurisdiction of national courts, the view may be taken that the opinion of the Permanent Court of Justice has validity.

(b) Second, submissions to international arbitration or adjudication by agreements between States entered into before the dispute has arisen probably stand on the same footing as acceptance of the optional clause of Article 36 of the Statute of the International Court of Justice. There is a direct analogy between the two situations. In regard to general arbitration treaties, whether they are entered into before or after the dispute arises, the case law is contradictory. There are some cases which regard the agreement to arbitrate as a waiver of the rule, while the majority seem to take the opposite view[32]). It would seem that the view of the minority, as a general principle, would contradict the cogent analogy to be drawn from the cases decided by the International Court of Justice relating to Article 36, at any rate insofar as the case of the arbitration treaty signed before the dispute arises, is concerned. Hence, to this extent it would be less persuasive. On the other hand, the situation is not quite the same in regard to treaties signed after disputes have arisen. In fact, it would seem that the Permanent Court of International Justice and the International Court of Justice have not addressed themselves to this situation, insofar as the situation did not arise in the cases decided by them. However, insofar as the two courts have

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29) (1939), P.C.I.J. Series A/B No. 76.

30) *Ibid.*, at p. 37.

31) 1959, I.C.J. Reports, p. 6.

32) See Law, *op. cit.* (note 5), p. 97. The weight of textual authority favors the latter view: Law, *ibid.*, pp. 95 ff.

enunciated an undifferentiated general principle which supports the view of the majority taken in other decisions, there is added support for that view. In the last analysis, it would seem that the better view is that whether such treaties are signed before or after disputes arise, no waiver of the rule of local remedies may be implied.

Even in the case of general treaties to settle by arbitration, however, it may be possible, in the absence of an express waiver, to find from the natural meaning of the text or the circumstances surrounding the agreement that a waiver of the rule was in fact intended. For example, if it is stated that there shall be direct settlement by arbitration or international adjudication, the natural meaning of the text indicates that the rule was waived[33]).

(c) A third situation where an implied waiver may be construed to take effect, as a result of the circumstances surrounding an agreement between States, is where the issue to be decided by an international tribunal concerns the arbitrability of the dispute or where a declaratory judgment is sought. In both situations the Permanent Court of International Justice and the International Court of Justice have held that the rule of local remedies is not applicable[34]). On the question of the declaratory judgment, it would seem that since reparation is not being sought but only a declaration relating to a breach of international law, a waiver could reasonably be implied while the jurisdiction of the local courts to redress the injury is not superseded. The rule would be applicable, however, when reparation for the injury is sought. On the question of arbitrability, there seems to be a conflicting decision pronounced by the International Court of Justice. In the *Interhandel* Case, the Court refused to determine the question of arbitrability because local remedies had not been exhausted. However, in this case there were some strong dissenting opinions which took the view adopted in the earlier *Ambatielos* Case that the local remedies rule was not applicable to the issue of arbitrability[35]). It would seem that the better view is that the question of arbitrability may be decided without local remedies

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[33]) See *Steiner and Gross* v. *Polish State,* Annual Digest 1927–1928, Case No. 322, at pp. 472 ff.

[34]) See for the declaratory judgment, The *German Interests in Upper Silesia* Case (1926), P.C.I.J. Series A Nos. 6 and 9, and the American argument in the *Interhandel* Case, I.C.J. Pleadings, Oral Arguments and Documents (1959), at p. 502. For the issue of arbitrability see the *Ambatielos* Case, 1953 I.C.J. Reports, p. 16, and see the *Chemin de Fer Zeltweg* Case, 3 U.N.R.I.A.A., at p. 1803.

[35]) See the *Interhandel* Case 1959, I.C.J. Reports, at p. 84 *per* Judge Winiarski, at pp. 120 ff. *per* Judge Lauterpacht, at p. 82 *per* Judge Klaestad, at p. 29 *per* Judge Carry.

having been exhausted, since in particular the issue does not relate to material compensation or restitution[36]), as is also the case with the declaratory judgment. Also it is important in this connection that even if a pronouncement is made on the issue of arbitrability, this does not preempt the arbitral tribunal from making a determination on the question whether local remedies had been exhausted[37]). In both situations, however, it must be noted that it may be expressly agreed that local remedies should be exhausted before an international tribunal gives a declaratory judgment or decides the issue of arbitrability.

(d) Fourth, the question whether and to what extent there has been an implied waiver of the rule of local remedies arises in connection with arbitration clauses which are included in ordinary State contracts with aliens. Such contracts would not be on a par with treaties[38]), nor would they strictly be contracts within the international legal system nor between international persons, though they might be governed by transnational law[39]). A preliminary question that must be answered is whether arbitration clauses included in such contracts would become ineffective if the contracts themselves are terminated or cease to have effect for some reason. The question is of some importance, since, if arbitration clauses could become ineffective in this way, the question of whether there has been an implied waiver of the rule of local remedies may often become moot. The problem becomes particularly significant where, for example, the contract is governed by the municipal law of the State party to the contract and the contract is terminated under that law, perhaps by legislation.

In an arbitration between Yugoslavia and a Swiss national it was argued by Yugoslavia that the cancellation of the contract between Yugoslavia and the alien resulted in the cancellation of the arbitration clause and thus terminated the right of recourse to arbitration. The arbitral tribunal rejected the submission[40]). The decision was by an arbitral tribunal which was not an organ of the international legal system, as it would have been had the dispute been between States, but one which was set up by a State and an alien to settle a dispute between them. Hence, its decision probably does not share the prestige and value

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[36]) See Judge Lauterpacht in the *Interhandel* Case, *ibid.*, at p. 120.

[37]) See the *Ambatielos* Case, 1953 I.C.J. Reports, p. 16.

[38]) See the *Anglo-Iranian Oil Co.* Case, 1952 I.C.J. Reports, p. 93.

[39]) See the discussion in Amerasinghe, *op. cit.* (note 7), pp. 108 ff. and authorities there cited.

[40]) See the *Losinger & Co.* Case (1936), P.C.I.J. Series C No. 78, at pp. 119 ff.

of an international decision or award. However, in the absence of any international cases on the matter, this decision may have some persuasive force. The rationale of the decision would seem to lie in postulating that an arbitration clause in a contract between a State and an alien stands on its own and is separable from the contract as such, whatever may be the position under the municipal law of that State applicable to arbitration clauses in contracts between the State and an individual or between two individuals. The arbitration clause may have to be interpreted according to a municipal law but the issue of its termination falls to be determined outside particular municipal systems of law, probably by some general principles of law applicable to international contracts or treaties. Importance really attaches to the negative conclusion reached above, even if there is no clear support for the positive suggestion. If the above were not the case, the purpose of having an arbitration clause in a contract between a State and an alien would be defeated.

Since it is the better view that arbitration clauses survive contracts between States and aliens, the substantive issue whether and to what extent a waiver of the rule of local remedies can be implied where such an arbitration clause occurs assumes importance. There appear to be many cases in which arbitration has been resorted to under a State contract with an alien and in which the argument has not been raised by the respondent State that the alien has not exhausted local remedies before seeking arbitration[41]). In a few cases concerning arbitration which came before the Permanent Court of International Justice and the International Court of Justice, the issue has been raised by the respondent State, but in no case has the issue been decided[42]). The fact that the issue of local remedies has not been contested in the majority of cases may lend some support to the view that an arbitration clause does imply a waiver of the rule of local remedies at least in regard to the merits of the dispute, although it may not be conclusive. The absence of an international decision to the contrary would also support in some degree this position. Indeed, it would be reasonable to conclude from the fact that arbitration

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41) See Schwebel/Wetter, Arbitration and the Exhaustion of Local Remedies, 60 A.J.I.L. (1966), p. 484 at pp. 486 ff.

42) The *Losinger & Co.* Case (1936), P.C.I.J. Series A/B No. 67, Series C. No. 78, the *Anglo-Iranian Oil Co.* Case, 1952 I.C.J. Reports, p. 93, I.C.J. Pleadings, Oral Arguments and Documents (1951), the *Electricité de Beyrouth Co.* Case, 1954 I.C.J. Reports, p. 107, I.C.J. Pleadings, Oral Arguments and Documents (1954), the *Compagnie du Port* Case, I.C.J. Pleadings, Oral Arguments and Documents (1960).

has been chosen as the means of settling disputes that it was intended to withdraw the merits of disputes from the jurisdiction of the local courts and institutions at least until the arbitral award had been given. It would seem to be difficult to find acceptable arguments for the opposite view.

On the other hand, while it may be clear that some waiver of the local remedies rule may readily be implied, the extent of the waiver is not so clear[43]). The evidence referred to above is not inconsistent with a partial waiver. It is compatible with the view that where there is an arbitration clause resort to local remedies may be required, before an international forum is invoked, even though the alien has indicated his willingness to arbitrate, or after the arbitration. The choice of arbitration as a means of dispute settlement does not exclude the possibility that the alien is expected, where possible, to exhaust local remedies in the event of a refusal to arbitrate on the part of the host State in order to secure enforcement of the obligation to arbitrate, or where the award has been rendered in favor of the alien in order to secure enforcement or interpretation of the award, or where the award has been rendered against the alien, in order to have the award upset. Whether local remedies need not be exhausted for such purposes would generally depend on other exceptions to the rule of local remedies and not on any theory of implied waiver.

However, the question may be raised whether the implied waiver could not be extended to cover even the situations and remedies excluded above, depending on the nature of the arbitration clause. It has been suggested that where the arbitral process is intended to be governed by a law other than the municipal law of the host State, a waiver of all local remedies is implied[44]). This argument may well be based on the view that by choosing a different law than its own for the settlement of disputes by arbitration, the host State has impliedly agreed that resort to the remedies offered by its own legal system is not necessary. However, this conclusion is not inescapable for the postulated situation, *per se*, in the absence of other indications of waiver. It is quite compatible with such a choice of a different law[45]) than that of the host State to govern the arbitral process that the intention was that resort should be had

[43]) For a discussion of the question taking a different approach see Schwebel/Wetter, *loc. cit.* (note 41), at pp. 499 ff.

[44]) See Schwebel/Wetter, *loc. cit.*, at p. 499.

[45]) The law chosen may be "international law". In such a case, it has been argued elsewhere, the relevant law is transnational law not international law as such: see Amerasinghe, *op. cit.* (note 7), pp. 109 ff., 113 ff. and authorities cited therein.

to the remedies of the host State, if available, for the purpose of enforcing the obligation to arbitrate, or of enforcing or interpreting the award, or of upsetting the award. The choice of a different legal system for the particular purpose of the arbitral process does not necessarily involve the renunciation of local remedies which may be relevant for other purposes, if they are available. Nor can an implied waiver of the remedy relating to the obligation to arbitrate be assumed on the ground that the host State would lack the means to enforce a decision that there is an obligation to arbitrate because enforcement must take place outside its territory. In such a situation the mere decision on the issue may have the desired effect on the host State, and for that reason it could very well have been contemplated that resort should be had to local remedies on that issue.

(e) Fifth, if the objection that local remedies have not been exhausted is not raised at the appropriate time in the international proceedings, this operates as an implied waiver of the rule and the objection cannot be raised thereafter. This conclusion is too obvious to need extensive documentation. It is, however, evidenced in the jurisprudence of the European Commission on Human Rights, where the rule of local remedies is applied as it is in international law[46]).

The Principle Based on the Nature of the Rule

The rule of local remedies has a specific nature, insofar as it is negatively not meant to be applicable to all injuries committed anywhere by a State against an alien and positively is intended essentially to be a means for impartial dispute settlement. From this nature of the rule may flow certain limitations on the principle which have some, if not all-important, relevance to the problems of private foreign investment and the transfer of technology. The nature of the rule as described above has not been specifically discussed in the diplomatic practice and international jurisprudence but it would seem to be inherent in the actual results reflected in such practice and jurisprudence. Some of the effects of the principle flowing from the nature of the rule may appear to be related to the third principle of undue hardship. However, they are better dealt with under this principle.

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[46]) Application No. 1994/63, 7 Yearbook of the European Convention on Human Rights (hereinafter referred to as the Yearbook of the Convention), p. 252.

The very nature of the rule may lead to many more limitations on the application of the rule than are herein discussed. These would, of course, require justification in each particular case. Those that have hitherto been reflected in the practice and jurisprudence, however, do justify a broad principle such as that stated above. The principle as thus enunciated has found application in three areas, namely, the nature of the injury, the jurisdictional connexion and the kind of remedy.

(a) The direct injury

The argument has been raised that where the wrong committed against the alien is a "direct" injury to his national State, local remedies need not be exhausted[47]). No clear definition has, however, been given in practice of this concept. Negatively, it has been held that the mere fact that an injury to an alien is a violation of an international agreement or contrary to an international judgment does not make it a direct injury[48]). *A fortiori*, an injury to an alien amounting to a mere violation of customary international law by the host State would not eliminate the incidence of the rule[49]), although it has been argued that it would[50]). Beyond this little help is to be found in the precedents. It has been suggested that the "subject of the dispute"[51]) and the "objects and interests" of a national State's claims[52]) are relevant to determining whether there has been a direct injury, but no indication has been given as to how such criteria should be applied.

While it is not clear what constitutes a "direct" injury for the purposes of the rule of local remedies, it seems clear that in the case of some such injury the rule would not be applicable. It is submitted that a suitable criterion for "direct" injury relates to the "nature of the injury to the State or of the State's right violated"[53]). The essence of the State's right

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47) See the Israeli argument in the *Aerial Incident* Case, I.C.J. Pleadings, Oral Arguments and Documents (1959), at pp. 530 ff. and 589 ff.

48) The *Interhandel* Case, 1959 I.C.J. Reports, p. 6.

49) See Judge Lauterpacht in a separate opinion in the *Norwegian Loans* Case, 1957 I.C.J. Reports, at p. 38.

50) See the French argument in the *Norwegian Loans* Case, I.C.J. Pleadings, Oral Arguments and Documents (1957), at pp. 182 ff.

51) See Judge Basdevant in a separate opinion in the *Interhandel Case*, 1959 I.C.J. Reports, at p. 30.

52) See the *Interhandel* Case, *ibid.*, at p. 30.

53) See the discussion in Amerasinghe, *op. cit.* (note 7), pp. 179 ff.

violated becomes relevant. Broadly speaking, where the State's right in its essence has for its object the protection of its nationals as such, and if this is the main interest sought from it, local remedies must be exhausted. If the essence of the State's right is different, the rule is inapplicable. Thus, for example, where a diplomat is injured, the right of his State which has been violated has for its object the carrying on of functions of State and not merely the protection of nationals. In such a case the local remedies rule would be inapplicable.

At this stage of the development of international law, while some negative propositions connected with the concept of "direct" injury have been clearly established, the positive scope of the concept has not been clearly delineated in the precedents. In these circumstances, it is possible to assert with certainty only that there is a situation concerned with a "direct" injury in which the rule of local remedies is inapplicable. The exact scope of the situation cannot be described with clarity, although a basis for delimitation has been suggested. It would seem from its nature, however, that the positive aspects of this limitation on the scope of the rule of local remedies has little significance for the flow of private foreign investment and the transfer of technology, though the negative findings on the nature of a "direct" injury are highly relevant.

(b) Jurisdictional connexion

It may be necessary to establish some jurisdictional connexion between the injury and the respondent State before the rule of local remedies could become applicable. There has been some attention paid to this question in State practice and international jurisprudence, but no clear answer to it emerges[54]). In all of the decided cases in which the rule has been applied, the alien has been temporarily or permanently resident in the delinquent State, his property has been there, or he has entered into contractual relations with the delinquent State.

One view canvassed is that there must be a "voluntary, conscious and deliberate connection" between the alien and the delinquent State for the incidence of the rule[55]). On the other hand, while this "link" theory

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[54]) See the *Salem* Case (1932), 2 U.N.R.I.A.A., at p. 1202, the *Norwegian Loans* Case, 2 I.C.J. Pleadings, Oral Arguments and Documents (1957), at pp. 156, 409, the *Interhandel* Case, 1959 I.C.J. Reports, at pp. 27, 46, the *Aerial Incidents* Case, I.C.J. Pleadings, Oral Arguments and Documents (1959), at pp. 531, 590, 565.

[55]) *Ibid.*, at pp. 531, 590.

does not have specific support in the decided cases, residence or presence of the alien in the delinquent State would seem to be too narrow a requirement in terms of the decided cases. For example, in the *Norwegian Loans* Case[56]) the rule was applied by Judge Lauterpacht in a situation where the aliens were not so resident or present, in spite of arguments that it should not be applied. The problem has been discussed elsewhere and it has been submitted that a principle based on "the location of the wrong" and "free and voluntary submission to the jurisdiction" is more in accord with what has been decided and stated in the cases[57]). This principle would have certain definite refinements. For example, in a contract case where the breach of contract is internationally wrongful, it may be necessary to use concepts of private international law relating to the *situs* of a chose in action to determine where the wrong was committed. In the ordinary case of a State contract with an alien, it should be noted that, since a breach of such contract would not *per se* be a breach of international law, there would usually have to be some resort to local remedies before there can be a violation of international law. The international wrong would then lie in the failure of a local organ to give redress and this would take place in the respondent State so that the local remedies rule would become applicable. It would seem that in the usual case a contractual situation would always potentially be subject to the rule of local remedies because no international wrong arises till there has been some act or refusal by an organ of the host State.

The limitation flowing from jurisdictional connexion on the incidence of the local remedies rule may become important in a negative sense for private foreign investors and foreign technical personnel to the extent that in most cases involving foreign investment and transfer of technology the rule would potentially be applicable. Hence, it would generally not be possible in such cases to rely on an absence of jurisdictional connexion to avoid the incidence of the rule.

(c) The kind of remedy

The limitations on the scope of the rule arising from the kind of remedy subject to exhaustion have greater significance for foreign investors and foreign technical personnel. While there seems to be a

56) 1957 I.C.J. Reports, p. 38.

57) See Amerasinghe, *op. cit.* (note 7), pp. 182 ff. and the cases cited therein.

lack of precedent on the matter, an argument may be made for limiting the rule to remedies which enjoy a judicial character[58]). This does not mean that the remedy must be available through a regular judicial organ in order to be subject to exhaustion, nor that it must be dispensed by a strictly judicial organ. There are cases for instance, where administrative courts have been, in effect, agreed to be subject to exhaustion[59]). Also, in the jurisprudence relating to human rights under the European Convention on Human Rights[60]), where the rule of local remedies is applicable to the same extent that it is in customary international law, it has been held that, for example, an administrative detention commission, a special person or committee with judicial powers and the Attorney-General acting in a quasi-judicial capacity would qualify as exhaustible remedies[61]). In this same jurisprudence an indication has been given of where the line should be drawn. It has been held, for example, that where a remedy consists of dispensing a favour and not of making a determination of rights, resort need not be had to it[62]). The focus is not on the person or organ which dispenses the remedy, but rather on the nature of its activity. Where the organ enjoys a complete discretion in relation to the claim, it may be said that its assistance need not be canvassed. A distinction may have to be made between a judicial and a non-judicial discretion. A judicial discretion is legally to be exercised according to principles, while a non-judicial discretion is not so controlled. Ordinarily a discretion exercised by a judicial organ is of a judicial nature, but the converse need not be true, namely, that a non-judicial organ always enjoys a non-judicial discretion. The distinction involved is between decisions taken in a judicial manner and those taken in a non-judicial manner. On this basis, for instance, where an international wrong is made subject to redress by reference to a political body exercising an uncontrolled or absolute discretion, it would appear that no resort need be had to such body in order to exhaust remedies.

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58) See the discussion in Amerasinghe, *op. cit.*, pp. 188 ff., and Amerasinghe, The Rule of Exhaustion of Local Remedies and the International Protection of Human Rights, Indian Yearbook of International Affairs (1968), p. 3 at pp. 42 ff.

59) See the *Phosphates in Morocco* Case (1938), P.C.I.J. Series A/B No. 74, at p. 17.

60) See Article 26: 45 A.J.I.L. (1951), Supplement, p. 24.

61) See Amerasinghe, *loc. cit.* (note 58), at p. 43.

62) See the *De Becker* Case, Application No. 214/56, 2 Yearbook of the Convention, pp. 237—238. See also Application No. 458/59, 3 *ibid.*, p. 234, Application No. 299/57, 2 *ibid.*, p. 192.

Difficulties are likely to arise in applying the criterion outlined above. However, it would probably have to be recognized as a method of containing the rule and preventing it from defeating its own purposes. As indications of how the criterion might be applied, it may be suggested that, while a legislative remedy which is dependent entirely on the untrammelled will of the legislature, in regard to the recognition of rights involved, whether it is preceded by a quasi-judicial inquiry or not, may not be subject to exhaustion, an administrative remedy which is subject to judicial review, although it may be discretionary, would generally be exhaustible. Thus where several administrative authorities in a hierarchy may have to be referred to, subject ultimately to judicial determination of legal rights and obligations, such remedies would *prima facie* be exhaustible[63]). Similarly, an administrative remedy which is not quasi-judicial nor subject to principal or judicial review would not be exhaustible.

The basis of these limitations on the scope of the remedy lies in the recognition of two factors inherent in the rule of local remedies. First, the rule is intended to allow the host State to settle a legal dispute relating to international rights and obligations, and hence it must use the appropriate means to do this. Second, the alien can only be expected to resort to such remedies as give him a reasonable prospect of an impartial settlement of the dispute which would recognize his rights flowing from international norms. Thus, if the remedy involved is not compatible with the above basic purposes of the rule, in that it inherently lacks the requirements which could reasonably assure their realization, it does not qualify for inclusion in the category of remedies to be exhausted. However, insofar as the primary object of the rule is to enable the host State to settle a dispute, the limitations should probably be strictly construed and the burden of proving that a given situation warrants their application should probably be on the alien.

The Principle Based on Undue Hardship to the Alien

While the rule of local remedies has a fairly wide extension within the limits of its scope, it is equally clear, as already pointed out, that limitations have been set on its operation on the basis that undue hardship, in having his dispute settled through the organs of the host

63) See the position in the *Barcelona Traction Co.* Case (2), Counter-Memorial of the Government of Spain, Section III, sub-section 1.

State, should not be caused to the alien. The principle of undue hardship itself seems to have been unmistakeably accepted and applied in certain instances. There may, however, be certain areas in which there is room for argument about the way in which the principle should be applied. Apart from and in spite of the guidance afforded by the precedents, much of the argument relating to its applicability would clearly have to be based on pragmatism and the balancing of conflicting interests. There are, indeed, a few significant cases such as the *Finnish Ships Arbitration*[64]) in which the principle has been applied on the basis apparently of such a balancing of interests. While in general all concerned, including the international community, may have an interest in seeing a dispute between a State and an alien settled at the municipal level, the alien particularly has an interest in having the most efficient justice done at the lowest cost and in the quickest way. In terms of cost, a multiplicity of proceedings means greater expense, so that in a given situation it may be necessary to consider whether the alien should be compelled to go through all remedies at a municipal level before his State litigates at an international level or whether he should be spared the cost of municipal proceedings which he would incur, if he were to exhaust local remedies before his State instituted proceedings at an international level. The problem is clearly to delineate the situations in which the alien should not be required to exhaust at all or fully the local remedies. In the *Finnish Ships Arbitration,* which concerned an appeal to a higher court, the resulting principle was formulated in terms of not laying upon the alien the burden of incurring loss of time and money in exhausting an unsatisfactory remedy. While the principle is eminently acceptable, the real problem lies in deciding how this principle should be applied in different situations. Clearly expenditures of time and money are related in direct proportion to the efficiency of justice in this principle. Where the chances of efficient justice are high, it is more reasonable to expect the alien to spend time and money on going through the municipal system, even if eventually he does not receive satisfaction and is compelled ultimately to seek a remedy at an international level. Conversely, where the chances of efficient justice are low, it is less reasonable to expect such expenditure of time and money before the alien invokes international procedures.

It must be pointed out at an early stage that there does not appear to be uniformity in the decisions in determining the proper relationship between expenditures of money and time and the degree of efficiency

64) (1934), 3 U.N.R.I.A.A., p. 1479.

of justice. This lack of uniformity need not be interpreted as inconsistency or conflict in identical situations, but certainly gives rise to difference of treatment of situations which are not identical but bear some resemblance to each other.

A further point may be made. It would appear that some cases have decided that in certain circumstances the right of the host State to have local remedies exhausted is virtually forfeited, even if it may not be clear that the chances of efficient justice are necessarily low. The basis of forfeiture seems to be that what the alien has experienced at the hands of the host State is such that it would be unfair by him to expect an exhaustion of local remedies prior to invocation of an international instance.

(a) Appeals and Resort to Organs or Courts

In regard to appeals from one court to another, the principle of undue hardship has been applied in such a way as to include such resort, if the further remedy is "obviously futile"[65]). This been interpreted to mean that there must be a high probability, *i.e.* more than a mere probability or possibility, that the resort will not succeed. The same principle would logically be applicable to any stage of the resort to local remedies in canvassing institutions or organs in the host State, whether the point at which proceedings cease to be exhausted occurs at the very beginning of the resort to local remedies, in regard to alternative remedies or even in regard to cumulative remedies. In fact, the decided cases dealing with resort to institutions or organs of the host State are explicable on this basis. Thus, in both the *Panavezys-Saldutiskis Railway* Case[66]) and the *Interhandel* Case[67]) it was held that the recourse to the courts which was available was not clearly likely to be unsuccessful and, therefore, no exception could be afforded to the alien. The obvious futility of the remedy may lie in the high probability of repeated decisions, as in the

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[65]) The *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., p. 1479. Though the meaning of "futility" was not discussed by them, Judges Lauterpacht, in the *Norwegian Loans* Case, 1957 I.C.J. Reports, at p. 39, and Judge Gross, in the *Barcelona Traction Co.* Case (2), 1970 I.C.J. Reports, at p. 284, seem to support the view taken in the *Finnish Ships Arbitration.*

[66]) (1939), P.C.I.J. Series A/B. No. 76.

[67]) 1959 I.C.J. Reports, p. 6.

case of the *Finnish Ships Arbitration*[68]), whether they relate to the jurisdiction of the court or the substance of the dispute, or in the clear meaning of legislative instruments[69]), or in the inadequacy of the available remedy for the object sought[70]), if such inadequacy can be established taking into account all the surrounding circumstances of the case[71]). In this connexion it would seem to be clear that the personal opinion of the applicant that a remedy is highly unlikely to succeed is inadequate, if it is not supported by the facts of the case judged objectively[72]), and it would seem to be reasonable that the facts must be considered as they stand at the time the alien is due to institute proceedings, and not at a subsequent point of time[73]). It may also be added that mere absence of knowledge of the existence of a remedy[74]) or of the precise extent of a court's jurisdiction[75]) cannot be a good reason for not exhausting local remedies.

While it is understandable that it would be too hard on the alien to expect him to exhaust all remedies of the above kind unless they are certain or absolutely certain to fail, and that it would perhaps not be fair by the host State to allow the alien not to exhaust any remedies, if it is merely possible that they may fail, it may be asked why this exception to the rule of local remedies has been so strictly construed in the *Finnish Ships Arbitration* as to require that the remedy in question be highly probable to fail rather than that it be reasonably probable to fail. The criterion used in the *Finnish Ships Arbitration* seems almost to verge on the test of certainty. The question would seem to be not out of order, particularly in view of decisions taken by the European Commission of Human Rights[76]), and, as will be seen, in the

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[68]) See also Application No. 808/60, 5 Yearbook of the Convention, p. 108. Application No. 515/593, 3 *ibid.*, p. 202, Application No. 1936/63, 7 *ibid.*, p. 224.

[69]) See the *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., p. 1479.

[70]) See *e.g.*, Application No. 1008/61, 5 Yearbook of the Convention, p. 82, Application No. 332/57, 2 *ibid.*, pp. 318, 326, Application No. 788/60, 4 *ibid.*, p. 172.

[71]) See the *Lawless* Case, Application No. 332/57, 2 *ibid.*, p. 318. Compare Application No. 712/60, 4 *ibid.*, p. 400.

[72]) Application No. 289/57, 1 *ibid.*, p. 148.

[73]) See Amerasinghe, *loc. cit.* (note 7), at p. 55.

[74]) See Application No. 1918/68, 6 Yearbook of the Convention, p. 484, Application No. 1404/62, 7 *ibid.*, p. 124.

[75]) See Application No. 1094/61, 5 *ibid.*, p. 214, Application No. 1661/62, 6 *ibid.*, p. 360.

[76]) In these cases, referred to earlier, the test of "reasonable probability of failure" was used: see *e.g.* Application No. 788/60, 4 Yearbook of the Convention, p. 172, Application No. 808/60, 5 *ibid.*, p. 108, Application No. 515/59, 3 *ibid.*, p. 202, the *Lawless* Case, 2 *ibid.*, p. 318.

light of the approach taken to measures within the same court, where a less strict test than that used in the *Finnish Ships Arbitration* seems to have been applied.

The criterion explained above seems to have been based on the analogy of a few prize cases[77]). Prize cases may strictly be distinguished from such cases of State responsibility as are being discussed here, particularly because they pertain to the law of war, where in any case no question of encouraging investment or the transfer of technical personnel is at issue, but also because in regard to prize States may be given special jurisdictional powers over the property of non-nationals. The real objection, however, to the strict criterion enunciated in the *Finnish Ships Arbitration* would seem to lie in the absence of justification for applying such a strict criterion to the resort by aliens to local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonably rather than highly probable that they are not likely to succeed. The argument in the case of the alien is even more cogent. In his case what is involved is really not a choice between resorting to remedies and completely failing to secure redress by not so resorting, as is the case with the ordinary litigant. It is a choice between resorting to remedies both at the local level and at the international level and not resorting to remedies at the local level while invoking an international remedy which could result in adequate redress. It is precisely because local remedies are, so to speak, part of a larger orderly international procedure for settling international disputes that a less strict approach could justifiably be taken than that expressly taken in the *Finnish Ships Arbitration.*

(b) Questions of Substance

A question of some importance is: how far must an alien go in raising arguments of substance in order to have exhausted his local remedies? Situations may arise in which the manner in which a claim is formulated will determine the outcome of the proceeding in a local organ. The two related issues are: in what form must the alien raise the issues, and should he have to resort cumulatively to more than one formulation of issues in order to achieve his objective?

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[77]) See the *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., at p. 1504.

It has been held that the alien need only raise in local proceedings the arguments which he raises in international proceedings[78]). He does not have to formulate his arguments in a manner entirely suitable to the host State. On the other hand, his argument must disclose an international cause of action or else he cannot succeed at the international level. However, it would seem that the alien cannot fulfil his obligation to exhaust local remedies by merely formulating his claim as a breach of international law, in the expectation that the local organs would give redress on the basis of such breach. While municipal systems may recognize as wrongful a particular act, they may not regard such act for the purpose of redress through their courts as a violation of international law. Thus, it may be incumbent upon the alien to find a suitable formulation in terms of the relevant municipal law, though the substance of the argument may remain unchanged[79]). Thus, he may have to seek out a formulation of his claim founded on the violation of provisions in the constitution of the host State, rather than as a violation of the international law. Or, where there has been a taking of property without offer of compensation, he may have to base his claim on the law of property ownership in the host State. This kind of adaptation would be within the four corners of the rule stated above, since only a few municipal systems necessarily incorporate the international law of alien treatment *qua* international law.

Also, unless an argument has been raised, in substance, in local proceedings it can be met in international proceedings by the objection that local remedies have not been exhausted in regard to that argument[80]). The alien may, of course, claim the benefit of the converse of this principle: that where he has raised the argument in substance before the local courts, though in a different form, he is not foreclosed from raising it before the international instance[81]).

It is accepted that the alien must resort to cumulative or alternative remedies, if they are available, and he has failed in his resort to a particular

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[78]) The *Finnish Ships Arbitration* (1934), 3 U.N.R.I.A.A., at p. 1502.

[79]) Thus he may have to seek a declaration of title in which he could question the constitutionality of legislative decrees rather than institute a different form of action: see the *International Petroleum Co.* Case in Peru: Furnish, Days of Revindication and National Dignity: Petroleum Expropriations in Peru and Bolivia, in: Lillich (ed.), The Valuation of Nationalized Property in International Law (1973), p. 55 at pp. 67 ff.

[80]) See Application No. 263/57, 1 Yearbook of the Convention, p. 146, Application No. 1816/63, 7 *ibid.*, p. 204, Application No. 2002/63, 7 *ibid.*, p. 262, Application No. 617/59, 3 *ibid.*, p. 370, Application No. 1661/62, 6 *ibid.*, p. 360.

[81]) See Application No. 785/60, 4 *ibid.*, p. 176.

remedy. Though the rule has in the jurisprudence been applied to alternative or successive courts, it is conceivable that it be extended to cover forms of action or arguments within a court. The alien may reasonably be expected to exhaust all the alternative arguments and formulations of his claim that the municipal system extends to his case.

The principle applicable in the case of procedural measures in the same court that a litigant is expected to use an alternative remedy where he is prevented from using a measure which might have been available to him may be applied with similar limitations to arguments of substance and forms of action.

(c) Procedural Measures in the Same Court

The problem of procedural measures in the same court was the subject of fairly exhaustive consideration in the *Ambatielos Claim*[82]). The question is how far must an alien go in resorting to such measures as the calling of witnesses or the production of evidence in order to prove his case.

In the *Ambatielos Claim* it was stated that the alien must but exhaust all essential measures. There are, therefore, limitations on the extent of resort to measures by the alien. An analysis of the problem would suggest that there may be some difficulty in determining what is an essential remedy in a given set of circumstances[83]).

The measures involved may be obligatory under the municipal law or permissive. In the case of obligatory measures it is probable that the alien must use all these[84]), unless the measure can be characterized as discriminatory, as contrary to the host State's treaty obligations, or as falling below the international minimum standard. The rule in its positive aspects has some support in international jurisprudence[85]). Clearly the limitations on the rule are as important as the rule itself, although there may, indeed, be some difficulty in determining what is the minimum standard of international law in a given situation.

As for discretionary measures, where the litigant is permitted to take certain action in order to achieve his objectives, while not being obligated

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[82]) (1956), 12 U.N.R.I.A.A., p. 83.

[83]) See Amerasinghe, *op. cit.* (note 7), pp. 238 ff. for analysis and discussion.

[84]) See Spiropoulos in the *Ambatielos Claim* (1956), 12 U.N.R.I.A.A., at p. 128.

[85]) See Application No. 225/56 (not published), cited in K. Vasak, La Convention Européenne des Droits de l'Homme (1964), p. 128, Application No. 352/58, 1 Yearbook of the Convention, p. 342, Application No. 1404/62, 7 *ibid.*, p. 124.

to do so, the question is when can they be characterized as essential within the meaning intended in the *Ambatielos Claim.* On the basis of statements made by Commissioner Spiropoulos in a separate opinion[86]), it may be suggested that an essential measure is one (a) which will affect the course of the proceedings and (b) such as a reasonable counsel would have used. The first requirement covers only those measures which, if used, would probably result in a favorable decision. Thus, the criterion is different from that which has been laid down in the *Finnish Ships Arbitration* for appeals. According to that test, only those appeals which are highly likely to fail can be disregarded. In this case those measures which will not probably result in a favorable decision need not be invoked. It is not only those which are highly not likely to result in a favorable decision which may be disregarded, but also those which are not highly likely to result but may just probably so result. The test advocated for discretionary procedural measures seems reasonable, since what is involved is the proof of a case. Furthermore, the second requirement is as important as the first. It means that not only must the measure be likely to produce a favorable result, but it must be such that reasonable counsel would have been able to determine that it was likely to produce such a result. This is an objective test and requires more than that counsel or the alien had failed to use a measure, even for a *bona fide* reason[87]). Clearly, the two principles should be applied in respect of the time at which the measure could, in the ordinary course of affairs, have been resorted to, and not of a later or earlier time[88]).

While an alien cannot refrain from resorting to alternative or cumulative measures freely available to him, according to a general principle recognized in this area of the law, problems do arise where the host State prevents the alien from utilizing an alternative measure which is essential in the sense described above. In the *Ambatielos Claim,* the tribunal stated unqualifiedly that if an alien has two alternative remedies and is prevented from utilizing one, he fails to exhaust remedies, if he refrains from

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[86]) (1956), 12 U.N.R.I.A.A., at p. 37.

[87]) It should be observed that the test advocated here is different from that proposed by Commissioner Alfaro in the same case which is in a sense less strict. According to the learned Commissioner, even if a measure not taken was an essential one, the alien would be excused from taking it, providing he had used other measures of the same general category: *ibid.,* at p. 33. The application of this test resulted in a different conclusion from that reached on the facts by the tribunal. Hence, it conflicts with the precedents.

[88]) See Commissioner Alfaro (1956), 12 U.N.R.I.A.A., at p. 34.

resort to the other[89]). While recognizing that it was valid for the situation confronting the tribunal in that case and perhaps, even in general, it may be necessary to modify it in regard to certain other situations[90]).

(d) Forfeiture

There are circumstances in which the host State forfeits its right to have local remedies exhausted by the alien, on the basis that it would be unfair by the alien to expect him to exhaust local remedies because of a lack of good faith attributable to the host State.

An obvious case is where the courts or relevant organs of the host State lack independence[91]) or are biased against the alien or aliens in general.

A denial of justice in a technical sense would have the same effect. Thus, where the alien is denied access to the courts[92]), he is normally not required to resort to local remedies. In the jurisprudence of the European Commission of Human Rights, it has been held that though an individual had been prevented from entering the respondent State, he, nevertheless, should have exhausted his remedies by communicating with and retaining counsel, which he was able to do, in order to assert his rights, including the right of entry into the State[93]). This holding would appear to go too far. In the circumstances of that case, the actions of the respondent State were sufficiently reflective of a lack of good faith towards settling disputes with the alien through its organs to warrant the recognition of an exception. Gross delay[94]) or gross deficiency in the administration of the judicial process[95]) could also exempt the alien from further

[89]) (1956), 12 U.N.R.I.A.A., at p. 30.

[90]) For discussion see Amerasinghe, *op. cit.* (note 7), pp. 257 ff.

[91]) See the *Robert E. Brown* Case (1923), 6 U.N.R.I.A.A., p. 120.

[92]) The European Commission has indicated that the question whether an alien should be given the opportunity of personally appearing to present his case before domestic courts should be given serious consideration: *X* v. *Government of Sweden* (1959), European Yearbook of Human Rights (1958/59), p. 354.

[93]) See Application No. 1211/61, 5 Yearbook of the Convention, p. 224, Application No. 172/56, 1 *ibid.*, p. 211.

[94]) *El Oro Mining and Railway Co.* Case (1931), 5 U.N.R.I.A.A., p. 191.

[95]) See Judge Fitzmaurice in the *Barcelona Traction Co.* Case (2), 1970 I.C.J. Reports, at p. 106 ff. In Application No. 263/57, 2 Yearbook of the Convention, p. 146, the view was taken that where the judiciary had acted improperly, there had to be an exhaustion of remedies in respect of this denial of justice.

exhausting local remedies. As for delay, in one case it was held that nine years was gross delay[96]) while in another it was held that ten years was not[97]). This kind of discrepancy merely testifies to the fact that what is gross delay depends on the circumstances of each case[98]). What is gross maladministration of justice will depend on the minimum standard of civilization established by reference to the practice of States.

There is one circumstance which may be called a denial of justice but which may require different treatment. This is where a decision is given which is manifestly wrong[99]). This is normally characterized as a denial of justice amounting to a violation of international law for the purpose of State liability. However, it is arguable that in such a case the alien should still be expected to exhaust his local remedies, on the basis that, as in the case of a merely unfavorable decision, the possibility of redress at a higher level is not ruled out unless, of course, it can be shown that there is added reason, such as bias against aliens, corruption or absence of independence of the judiciary, leading to the decision to exempt the claimant from exhausting local remedies. Moreover, in the usual case, the distinction between a judgment which is unfavorable and one which is manifestly wrong may not be easy to establish, so that it would not be too hard on an alien to expect him to continue exhaustion of remedies in spite of a manifestly wrong judgment.

Another case of forfeiture is where further damages are expected or the same injury will be repeated in spite of recourse to local remedies[100]). This is another instance where the fact that the host State is not responsive to the outcome of resort to its organs reveals a lack of good faith on its part towards the settlement of the dispute[101]).

Conclusion

The rule of local remedies has in some respects had a distinguished history. The position certainly cannot be taken at this stage of the development of international law that the rule has become defunct,

[96]) *El Oro Mining and Railway Co.* Case (1931), 5 U.N.R.I.A.A., p. 191.

[97]) The *Interhandel* Case, 1959 I.C.J. Reports, p. 6.

[98]) For other cases concerned with delay, see Application No. 222/56, 2 Yearbook of the Convention, p. 344, Application No. 214/56, 2 *ibid.*, p. 238, Application No. 343/57, 2 *ibid.*, p. 440.

[99]) See Judge Fitzmaurice in the *Barcelona Traction Co.* Case (2), 1970 I.C.J. Reports, at p. 106 ff.

[100]) See the *De Sabla Claim* (1934), 28 A.J.I.L. (1934), at p. 607.

[101]) This may also be characterized as a case of "obvious futility".

though in some cases it may be of less relevance. However, without in any way jettisoning the rule, its future may appropriately be shaped by viewing it not only as an important element in the modern law of economic development but also in a practical and realistic perspective.

Local remedies would appear to operate as a step or steps in the orderly procedure of settling international disputes. The rule is no more nor less than a method of ascribing to sovereign States a dispute settlement function in international disputes to which they are parties. While States are surely capable of responsibly and constructively discharging the trust placed in them by the international community in conferring on them a role which appears on analysis to be somewhat in the nature of a privilege, it is reasonable to expect that the rule should operate essentially and entirely as a means of securing the efficient and economic settlement of international disputes in the strictly confined area relating to the protection of aliens.

Hence, while on the one hand a sovereign State should be given every opportunity of settling such disputes equitably through its own organs and it is in the interests of all concerned that such disputes should be settled at the earliest possible opportunity at a local level, on the other, some recognition should be given to the contervailing interests of the interested parties in efficient justice without financial waste. It is easier to spell out the positive aspects of the rule, *i.e.* those relating to the extent of exhaustion required, than the negative, but it would seem that the latter particularly require attention, if the rule is to be meaningful, on the one hand, in its positive aspects and, on the other, as an equitable means for the settlement of certain kinds of international disputes. It would emerge from this study that the jurisprudence and practice have recognized limitations on the rule which are likely to enhance its practical usefulness and also contribute to its increased effectiveness. For the law of economic development, of particular relevance are the constraints on the extent of the rule arising from implied waivers, the character of the remedy and the quality of the remedy.

Clearly, there are circumstances in which a waiver of the rule can be implied in the absence of express consent, though the presumption is that the rule applies unless the contrary can be proved. Implications of waivers, however, can only be recognized sparingly and are subject to strict proof. The jurisprudence has apparently rejected the implication of waivers in certain circumstances. Similar constraints apply in the case of the extent of a waiver.

An important limitation on the rule arises from the nature of the remedies subject to exhaustion. Jurisprudence and practice have paid little attention to the basic criteria underlying this limitation, but it is possible to evolve a reasonable approach to them on the basis of such jurisprudence and practice. The justification for and the scope of such a limitation are clearly related to the objectives of the rule as a mechanism for the settlement of disputes about legal rights.

The principle of undue hardship, which has been clearly recognized in international jurisprudence and practice, governs the quality of the remedy but its application can be very difficult, particularly because of the sharp conflict of interests. It has been suggested that the criterion laid down in the *Finnish Ships Arbitration* may have been too strictly construed. In any case there seems to be a difference between this criterion and that which can reasonably be extracted from the *Ambatielos Claim* and which is applicable in a more restricted area. Also the issue of suppressed alternative remedies deserves a more sensitive analysis than was afforded by its rather cursory and inadequate treatment in the *Ambatielos Claim.* While the situations in which the exception based on undue hardship would operate may not be closed, it is clear that the burden would be on the alien claiming an exception from the rule adequately to prove [102]) that a particular situation falls within the exception. This applies as much to situations concerned with the forfeiture of the right to the exhaustion of remedies as it does to those involving the effectiveness of remedies. However, in the process of determining whether a situation qualifies to be characterized as exceptional, a more realistic and critical balancing of the interests involved may be advocated. This could work both ways. Thus, while it may be reasonable to modify somewhat the test laid down in the *Finnish Ships Arbitration* (which approach has some support in other cases and other areas of the rule of local remedies), it may be necessary, for instance, to recognize that there can be no forfeiture of the benefit of the rule in the case where simply a manifestly wrong decision has been given by an organ.

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[102]) On the burden of proof in general in the context of the rule of local remedies see Amerasinghe, *op. cit.* (note 7), pp. 263 ff.