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CHAPTER V

DIPLOMATIC PROTECTION

Addendum

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C. Text of draft articles 8 to 10 of the draft articles on diplomatic protection provisionally adopted by the Commission (*continued*)

2. Text of the draft articles with commentaries thereto

1. The texts of draft articles 8 to 10 with commentaries thereto adopted by the Commission at its fifty-fifth session, are reproduced below.

DIPLOMATIC PROTECTION

Article 8 [10][1]

Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8][2] before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Commentary

(1) Article 8 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"[3] and by a Chamber of the International Court in the *Elettronica Sicula* (*ELSI*) case as "an important principle of customary international law".[4] The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic

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[1] Articles 8 [10], 9 [11] and 10 [14] are to be included in a future Part Four to be entitled "Local Remedies", and will be renumbered.

[2] The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles.

[3] 1959 I.C.J. Reports 27.

[4] 1989 I.C.J. Reports 42, para. 50.

system".[5] The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.[6]

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in article 7 [8], are also required to exhaust local remedies.

(3) Paragraph 1 refers to the bringing of a claim rather than the presentation of the claim as the word "bring" more accurately reflects the process involved than the word "present" which suggests a formal act to which consequences are attached and is best used to identify the moment in time at which the claim is formally made.

(4) The phrase "all local remedies" must be read subject to article 10 [14] which describes the exceptional circumstances in which local remedies need not be exhausted. Suggestions that reference be made in this provision to the need to exhaust only "adequate and effective" local remedies were not followed for two reasons. First, because such a qualification of the requirement that local remedies be exhausted needs special attention in a separate provision. Secondly, the fact that the burden of proof is generally on the respondent State to show that local remedies are available, while the burden of proof is on the applicant State to show that there are no effective remedies open to the injured person,[7] requires that these two aspects of the local remedies rule be treated separately.

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[5] *Interhandel* case, supra note 3, 27.

[6] Article 22 on First Reading. See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.7), Chap. III D 1; *Yearbook* … 1977, Vol. II (Part Two), pp. 30-50; article 44 on Second Reading: *Official Records of the General Assembly Fifty-sixth Session*, Supplement No. 10 (A/56/10) pp. 304-307.

[7] See the judgment of the Chamber of the International Court of Justice in the *Elettronica Sicula* (*ELSI*) case, 1989 I.C.J. Reports, p. 14 at pp. 46-48 (paras. 59-63). The question of burden of

(5) The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of remedies that must be exhausted.[8] In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Courts in this connection include both ordinary and special courts since "the crucial point is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".[9]

Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which lie as of right and may result in a binding decision, in accordance with the maxim *ubi jus ibi remeduim*. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies as of grace[10] or those whose "purpose is to obtain a favour and not to vindicate a right".[11]

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proof was considered by the *Special Rapporteur* in the Third Report on Diplomatic Protection; A/CN.4/523 and Add.1, paras. 102-118. The Commission decided not to include a draft article on this subject: *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10) paras. 240-252.

[8] In the *Ambatielos Claim* the arbitral tribunal declared that "it is the whole system of *legal* protection, as provided by municipal law, which must have been put to the test": (1956) 12 U.N.R.I.A.A. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law* (1990).

[9] *B. Schouw Nielsen v. Denmark*, Application no. 343/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights* 438. See also *Lawless* case, Application No. 332/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights*, pp. 318-322.

[10] *Finnish Ships Arbitration* (1934) 3 *U.N.R.I.A.A.* 1479.

[11] *De Becker v. Belgium*, Application No. 214/56, (1958-9), 2 *Yearbook of ECHR* 238.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise in the municipal proceedings all the arguments he intends to raise in international proceedings. In the *Finnish Ships Arbitration* the arbitrator stated that:

> "all the contentions of fact and the propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts."[12]

This principle has been confirmed by the International Court of Justice in the *ELSI* case.[13] From this it follows that the foreign litigant must produce all the evidence available to him to support his case in the process of exhausting local remedies.[14] He cannot use the international remedy afforded by diplomatic protection to overcome faulty preparation or presentation of his claim at the municipal level.[15]

Article 9 [11][1]

Classification of claims

Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8][2].

Commentary

(1) The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national.[16] It does not apply where the claimant

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[12] Supra note 10 at 1502.

[13] Supra note 4, at pp. 45-46.

[14] *Ambatielos Claim, supra* note 8, p. 120.

[15] D.P. O'Connell, *International Law*, vol. 2, p. 1059.

[16] This accords with the principle expounded by the Permanent Court of International Justice in the *Mavrommatis Palestine Concession* case that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State

State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim. Moreover, it could not be expected of a State to exhaust local remedies in such a case, as this would violate the principle of *par in parem non habet imperium non habet jurisdictionem.*

(2) In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before international courts have presented the phenomenon of the mixed claim. In the *Hostage* case,[17] there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,[18] there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that Switzerland had failed to exhaust local remedies.

(3) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

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is in reality asserting its own right - its right to ensure, in the person of its subjects, respect for the rules of international law": 1924 *P.C.I.J., Series A, No.* 2, p. 12.

[17] *United States Diplomatic and Consular Staff in Tehran*, 1980 *I.C.J. Reports*, 3.

[18] Supra note 3.

> "the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole is the alleged damage to Raytheon and Machlett [United States corporations]."[19]

Closely related to the preponderance test is the sine qua non or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered affirmatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the "but for" test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances the Commission preferred to adopt one test only - that of preponderance.

(4) Other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a diplomatic official[20] or State property[21] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national the claim will be indirect.

(5) Article 9 [11] makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be

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[19] Supra note 4, p. 43, para. 52. See, too, the *Interhandel* case, supra note 3, p. 28.

[20] *Hostages* case, supra note 17.

[21] *Corfu Channel* case, 1949 I.C.J. Reports, p. 4.

exhausted,[22] there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.[23] Article 9 [11] makes it clear that a request for a declaratory judgment per se is not exempt from the exhaustion of local remedies rule. Where the request for declaratory judgment is incidental to or related to a claim involving injury to a national - *whether linked to a claim for compensation or restitution on behalf of the injured national or not* - it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgment is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgment in order to avoid compliance with the local remedies rule.

Article 10 [14][1]

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(*d*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.[24]

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[22] *Air Services Agreement,* (1978) 19 *U.N.R.I.A.A.* 415; *Applicability of the Obligation to Artibtrate under Section 21 of the United Nations Headquarters Agreement,* 1988 I.C.J. Reports, p. 29, para. 41.

[23] See *Interhandel*, supra, note 3, pp. 28-29; *ELSI*, supra note 4, p. 43.

[24] Paragraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled “Waiver”.

Commentary

(1) Article 10 [14] deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (c), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a pre-condition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (d) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rules. As this exception is not of the same character as those contained in paragraphs (a) to (c) it may be necessary, at a later stage, to provide for this situation in a separate provision.[25]

Paragraph (a)

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the "futility" or "ineffectiveness" exception. The Commission considered three options for the formulation of a rule describing the circumstances in which local remedies need not be exhausted:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of an effective remedy.

All three of these options enjoy some support among the authorities.

(3) The Commission considered that the "obvious futility" test, expounded by Arbitrator Bagge in the Finnish Ships Arbitration,[26] but decided that it set too high a threshold. On the other hand, the Commission took the view that the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions,[27] was too generous

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[25] See footnote 24.

[26] *Supra*, note 11, at p. 1504.

[27] *Retimag v. FRG,* Application No. 712/60, 4 *Yearbook of the European Convention on Human Rights*, p. 385 at p. 400; *X, Y and Z v. UK*, Application Nos. 8022/77, 8027/77, 18 *European Commission of Human Rights, Decisions and Reports*, p. 66 at p. 74. See, too, the commentary

to the claimant. It therefore preferred the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective remedy. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case[28] and is supported by the writings of jurists.[29] Moreover, it accords with judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;[30] the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;[31] the local courts are notoriously lacking in independence;[32] there is a consistent and well-established line of precedents adverse to the alien;[33] the local courts

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to article 22 of the draft articles on State Responsibility adopted by the Commission on first reading: *Yearbook* … 1977, vol. 11 (Part Two) p. 47, para. 48.

[28] 1957 I.C.J. Reports 9 at p. 39.

[29] See Third Report on Diplomatic Protection of 2002, A/CN.4/523 and Add.1, para. 35.

[30] *Panevesys-Saldutiskis Railway* case, 1939 P.C.I.J. Series A/B, No. 76, p. 4 at p. 18, *Arbitration under Article 181 of the Treaty of Neuilly*, reported in (1934), 28 *A.J.I.L.* p. 760 at p. 789; R. Gelbtrunk and "Salvador Commercial Co." et al. (1902), 15 *U.N.R.I.A.A.*, p. 467 at pp. 467-477; *Lotti May Incident* (1899), 15 *U.N.R.I.A.A.*, p. 29 at p. 31; Judge Lauterpacht's separate opinion in the *Norwegian Loans* case, *supra* note 28, pp. 39-40; *Finnish Ships Arbitration*; supra note 10, p. 1535.

[31] *Arbitration under Article 181 of the Treaty of Neuilly*, supra note 32, p. 789. See also *Forests of Central Rhodope*, (1933) 3 *U.N.R.I.A.A.* p. 1405; *Ambatielos* claim, supra note 8, p. 119; *Interhandel* case, supra note 3, p. 28.

[32] *Robert E. Brown Claim* (1923) 6 *U.N.R.I.A.A.* p. 120; *Vélasquez Rodríguez* case (1989) 28 *I.L.M.* p. 291 at pp. 304-309.

[33] *Panevezyz-Saldutiskis Raoway* case, supra note 30, p. 18; *S.S. Lisman* (1937), 3 *U.N.R.I.A.A.*, p. 1769 at p. 1773; *S.S. Seguranca* (1939), 3 *U.N.R.I.A.A.* p. 1861 at p. 1868; *Finnish Ships Arbitration*, supra note 10, p. 1495; *X. v. Federal Republic of Germany* (1956), 1 *Yearbook of the European Convention on Human Rights*, p. 138; *X v. Federal Republic of Germany* (1958), 2 *Yearbook of the European Convention on Human Rights*, p. 342 at p. 344; *X v. Austria* (1960), 3 *Yearbook of the European Convention on Human Rights*, p. 196 at p. 202.

do not have the competence to grant as appropriate and adequate remedy to the alien;[34] or the respondent State does not have an adequate system of judicial protection.[35]

(4) The question whether local remedies do or do not offer the reasonable possibility an effective redress must be determined with regard to the local law and circumstances at the time at which they are to be used. This is a question to be decided by the competent international tribunal charged with the task of examining the exhaustion of local remedies. The decision on this matter must be made on the assumption that the claim is meritorious.[36]

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts,[37] human rights instruments and practice,[38] judicial decisions[39] and scholarly opinion. The Commission was, aware of the

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[34] *Finnish Ships Arbitration,* supra note 10, pp. 1496-1497; *Vélasquez Rodrígues* case, supra note 32, pp. 304-309; *Yagci and Sargin v. Turkey*, Application No. 16426/90 (1995) *European Court of Human Rights, Reports and Decisions*, No. 319, p. 3 at p. 17, para. 42; *Hornsby v. Greece*, Application No. 18357/91, 1997-II) *European Court of Human Rights, Reports and Decisions*, No. 33, p. 495 at p. 509, para. 37.

[35] *Mushikiwabo and others v. Barayagwiza* (1977) 107, I.L.R. 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies; resolution 1a/88, case 9755, *Ann.Rep 1 A Com HR* 1987/88.

[36] *Finnish Ships Arbitration,* supra note 10, p. 1504; *Ambatielos Claim*, supra note 8, pp. 119-120.

[37] See the discussion of early codifications attempts by *F. v. Garcia Amador* in First Report, *Yearbook* … 1956, Vol. II, p. 173 at 223-226; article 19 (2) of 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in (1961) 55 *A.J.I.L.* p. 545 at p. 577.

[38] International Covenant on Civil and Political Rights (article 41 (1)(c)); American Convention on Human Rights (article 46 (2)(c)); *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57, at p. 59; *Las Palmeras*, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdogen v. Turkey*, Application No. 19807/92, 84 A, European Commission of Human rights (1996), *Decisions and Reports*, p. 5 at p. 15.

difficulty attached to giving an objective content or meaning to "undue delay", or to attempting to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claim Commission stated in the *El Oro Mining* case:

> "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render a judgment. This will depend upon several circumstances, foremost among them upon the volume of the work involved by a thorough examination of the case, in other words upon the magnitude of the latter."[40]

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase "remedial process" is preferred to that of "local remedies" as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(7) The exception to the exhaustion of local remedies rule contained in article 10 [14] (a), to the effect that local remedies do not need to be exhausted where "the local remedies provide no reasonable possibility of effective redress", does not cover situations where the local remedies might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down by a State whose airspace has been accidentally violated; or where serious obstacles are placed in the way of his using local remedies by the respondent State or some other body. In such cases it has been suggested that

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[39] *El Oro Mining and Railway Co*. (1931) 5 *U.N.R.I.A.A.*, p. 191 at p. 198. *Administration of the Prince of Pless* (1933) *P.C.I.J. Series A/B*, No. 52, p. 16.

[40] Supra note 39 at p. 198.

local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State or because of the existence of a special hardship exception.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.[41] Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Soviet Union, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the Aerial Incident in which Bulgaria shot down an El Al flight that had accidentally entered its airspace).

The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in

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[41] See Amerasinghe, supra note 8, p. 138; T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", (1959) 35 *B.Y.I.L.* p. 83 at p. 94.

support the existence of such an exception in the *Interhandel*[42] and *Salem*[43] cases, in other cases[44] tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[45] and the Aerial Incident (*Israel v. Bulgaria*)[46] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,[47] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[48] in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Recent State practice suggests that a State responsible for accidentally shooting down a foreign aircraft will not require the exhaustion of local remedies as a precondition for claims brought against it by the families of victims. China did not require local remedies to be exhausted before paying compensation to those who had suffered when it shot down a British

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[42] Here the International Court stated: "it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means", supra note 3, at p. 27. Emphasis added.

[43] In this case an arbitral tribunal declared that "as a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence", (1932) 2 *U.N.R.I.A.A.* p. 1165 at p. 1202.

[44] *Finnish Ships Arbitration,* supra note 10; *Ambatielos Claim,* supra note 8.

[45] Oral Pleadings of France, 1957 I.C.J. Pleadings, vol. I, p. 408.

[46] Oral Pleadings of Israel, 1959, I.C.J. Pleadings, pp. 531-532.

[47] (1935) 3 *U.N.R.I.A.A.* p. 1905.

[48] *Virginius* case, reported in J.B. Moore, *A Digest of International Law* (1906), vol. II, p. 895 at p. 903; *Jessie* case, reported in (1922) 16 *A.J.I.L.* pp. 114-116.

Cathay Airliner in 1960.[49] Nor did the United States when it offered ex gratia payments to nationals of Iran following the shooting down by United States missiles of an Iranian passenger aircraft over Iran.[50] India did not raise the non-exhaustion of local remedies as a preliminary objection to a claim by Pakistan for damages resulting from the destruction by India of a Pakistani aircraft.[51] The same practice seems to apply in the case of transboundary environmental damage. Thus Canada waived the requirement of exhaustion of local remedies when it agreed to compensate United States citizens who had suffered loss as a result of the construction of the Gut Dam.[52] Article XI (1), of the 1972 Convention on International Liability for Damage caused by Space Objects gives further support to this view in providing that: "Presentation of a claim to a launching State for compensation for damage under this convention shall not require the prior exhaustion of local remedies which may be available to a claimant State or to natural or juridical persons it represents."[53]

(11) While the Commission took the view that it is necessary to provide expressly for this exception to the local remedies rule, it preferred not to use the term "voluntary link" to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. Moreover, it would be difficult to prove such a subjective criterion in practice. Hence the decision of the Commission to require the existence of a "relevant connection" between the injured alien and the host State. This connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the

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[49] This incident is described in C.H.P. Law, *The Local Remedies Rule in International Law* (1961) p. 104.

[50] See *Aerial Incident of 3 July 1988* (*Iran v. United States of America*), *I.C.J. Pleadings*, Preliminary Objections submitted by the United States of America, Part I, chap. III, sect. I, pp. 44-48.

[51] *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court,* (2000) 39 *I.L.M.* p. 1116.

[52] See the United States-Canada Lake Ontario (Gut Dam) Arbitration Agreement, (1965), 4 *I.L.M.* p. 468.

[53] United Nations, *Treaty Series*, vol. 961, p. 187 at pp. 191-192.

question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word "relevant", it was decided, would best allow a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien.

(12) The second part of paragraph (c) is designed to give a tribunal the power to dispense with the need for the exhaustion of local remedies where, in all the circumstances of the case, it would be unreasonable to expect compliance with this rule. Each case will obviously have to be considered on its own merits in making such a determination and it would be unwise to attempt to provide a comprehensive list of factors that might qualify for this exception. It is, however, suggested that the exception might be exercised where a State prevents an injured alien from gaining factual access to its tribunals by, for instance, denying him entry to its territory or by exposing him to dangers that make it unsafe for him to seek entry to its territory; or where criminal conspiracies in the host State obstruct the bringing of proceedings before local courts; or where the cost of exhausting local remedies is prohibitive.

Paragraph (d)

(13) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

> "In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it

> before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly."[54]

(14) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(15) An express waiver may be included in an ad hoc arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

> "Consent of the parties to arbitration under its 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 its Convention."[55]

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[54] *Government of Costa Rica* case, Inter-American Court of Human Rights, (1984) 67 *I.L.R.*, p. 578 at 587, para. 26. See also *ELSI* case, supra note 7, p. 42, para. 50; *De Wilde, Ooms and Versyp* cases ("Vagrancy Cases"), European Court of Human Rights (1971) 56 *I.L.R.*, p. 37 at p. 370, para. 55.

[55] United Nations, *Treaty Series*, vol. 575, p. 159.

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.[56]

(16) Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was:

> "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[57]

(17) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[58] and the writings of jurists support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the contracting parties espouses the claim of its national."[59] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.[60] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen.

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[56] *Government of Costa Rica* case, supra note 54, p. 5887, para. 26; *De Wilde, Ooms and Versyp* cases, supra note 54, p. 370, para. 55.

[57] Supra note 7, p. 42, para. 50. Emphasis added.

[58] See, for example, *Steiner and Gross v. Polish State* (1927-28) 4 *Annual Digest of Public International Law Cases*, p. 472; A*merican International Group Inc. v. Iran,* Award No. 93-2-3 (1983) 4 *Iran-US CTR* p. 96.

[59] F.A. Mann, "State contracts and international arbitration" (1967), 42 *B.Y.I.L.* p. 1 at p. 32.

[60] Supra note 7. In the *Panevezys-Saldutiskis Railway* case the Permanent Court of International Justice held that acceptance of the Optional Clause under Article 36, paragraph 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule: 1939 P.C.I.J. Series A/B, No. 76, p. 4.

In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(18) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,[61] the Commission preferred not to refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. The Commission took the view that it was wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

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[61] See *ELSI* case, supra note 7 at p. 44, para. 54; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* (Arbitration Tribunal), (1966) 102 *I.L.R.* p. 216, para. 6.33; *Foti and others*, (1982) 71 *I.L.R.* p. 360 at p. 380, para. 46.