

DIPLOMATIC PROTECTION

[Agenda item 4]

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Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur

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Multilateral instruments cited in the present report

	<i>Source</i>
Convention relative to the Rights of Aliens (Mexico City, 29 January 1902)	<i>The International Conferences of American States, 1889–1928</i> , p. 91.
Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Porter Convention) (The Hague, 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd ed. (New York, Oxford University Press, 1918), p. 89.
General Treaty of Inter-American Arbitration (Washington, D.C., 5 January 1929)	<i>Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers 1923–1937</i> (Washington, D.C., United States Government Printing Office, 1938), vol. IV, p. 4756.
Convention on Rights and Duties of States (Montevideo, 26 December 1933)	League of Nations, <i>Treaty Series</i> , vol. CLXV, No. 3802, p. 19.
American Treaty on Pacific Settlement (Pact of Bogotá) (Bogotá, 30 April 1948)	United Nations, <i>Treaty Series</i> , vol. 30, No. 449, p. 55.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965)	<i>Ibid.</i> , vol. 575, No. 8359, p. 159.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Agreement on Andean subregional integration (Cartagena Agreement or Andean Pact) (Bogotá, 26 May 1969)	ILM, vol. VIII, No. 5 (September 1969), p. 910.
American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969)	United Nations, <i>Treaty Series</i> , vol. 1144, No. 17955, p. 123.
Convention on international liability for damage caused by space objects (London, Moscow, Washington, D.C., 29 March 1972)	<i>Ibid.</i> , vol. 961, No. 13810, p. 187.
Convention establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985)	<i>Ibid.</i> , vol. 1508, No. 26012, p. 99.
North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (Mexico City, Ottawa, Washington, D.C., 17 December 1992)	<i>The NAFTA</i> , vol. I (Washington, D.C., United States Government Printing Office, 1993).

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Introduction¹

A. Present state of the study on diplomatic protection

1. The International Law Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.² In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.³ At the same session the Working Group submitted a report which was endorsed by the Commission.⁴ The Working Group attempted to (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.⁵

2. At its 2510th meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.⁶ The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

3. The Commission considered the preliminary report on diplomatic protection⁷ at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.⁸

4. At its 2534th meeting, on 22 May 1998, the Commission established an open-ended working group, chaired by Mr. Bennouna, Special Rapporteur for the topic, to consider conclusions that might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission, in 1999. The Working Group held two meetings, on 25 and 26 May 1998. As regards the approach to the topic, the Working Group agreed on the following, *inter alia*:

(a) The customary-law approach to diplomatic protection should form the basis for the work of the Commission on the topic;

(b) The topic would deal with secondary rules of international law relating to diplomatic protection; primary rules would only be considered when their clarification was essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and providing them with more direct and indirect access to international forums to enforce their rights.

5. At its 2544th meeting, on 9 June 1998, the Commission considered and endorsed the report of the Working Group.⁹

6. In 1999, Mr. Bennouna resigned from the Commission. On 14 July 1999, the Commission, at its 2602nd meeting, elected the author of the present report as Special Rapporteur on the topic of diplomatic protection.¹⁰

7. At its fifty-second session, in 2000, the Commission considered the present Special Rapporteur’s first report.¹¹ The Commission deferred its consideration of the report to the fifty-third session, in 2001, owing to lack of time. At the same session, the Commission established open-ended informal consultations, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.¹² The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5–8 to the Drafting Committee together with the report of the informal consultations.

8. At its fifty-third session, in 2001, the Commission considered the remainder of the Special Rapporteur’s first report as well as his second report.¹³ The Commission discussed the first report at its 2680th and 2685th to 2687th meetings, held on 25 May and from 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, from 12 to 17 July 2001. Owing to lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10–11, and deferred consideration of the remainder of the report, concerning draft articles 12–13, to the fifty-fourth session, in 2002.

9. At its 2688th meeting, on 12 July 2001, the Commission decided to refer draft article 9 to the Drafting

¹ The Special Rapporteur wishes to acknowledge with gratitude the assistance of Ms. Zsuzsanna Deen-Racsmany in the preparation of this report.

² *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 248, and p. 137, annex II, addendum I.

³ *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

⁴ *Ibid.*, para. 171.

⁵ *Ibid.*, pp. 62–63, paras. 189–190.

⁶ *Ibid.*, p. 63, para. 190.

⁷ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 309.

⁸ *Ibid.*, vol. I, pp. 4–31.

⁹ *Ibid.*, pp. 181–182, paras. 31–44.

¹⁰ *Yearbook ... 1999*, vol. I, 2602nd meeting, p. 260, para. 49, and *ibid.*, vol. II (Part Two), p. 17, para. 19.

¹¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, p. 205.

¹² The report of the informal consultations appears in *Yearbook ... 2000*, vol. II (Part Two), pp. 85–86, para. 495.

¹³ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514, p. 97.

Committee. At its 2690th meeting, on 17 July 2001, it decided to do likewise with draft articles 10–11.

10. The Drafting Committee has not yet had the opportunity to examine any of the draft articles referred to it. The Committee is expected to begin work on these draft articles at the fifty-fourth session of the Commission, in 2002.

B. Approach of the Special Rapporteur

11. Diplomatic protection is a subject on which there is a wealth of authority in the form of codification, conventions, State practice, jurisprudence and doctrine. Indeed, it is probably true to say that no other branch of international law is so rich in authority. This does not, however, mean that there is necessarily clarity or certainty regarding the rules governing diplomatic protection in general or the exhaustion of local remedies in particular. On the contrary, the authorities are frequently inconsistent and contradictory and point in several directions. In these circumstances the task of the Commission is to choose between competing rules. In exercising this choice it should be guided both by the weight of the authorities in support of a rule and the fairness of the rule in contemporary international society. While the Commission's task is largely that of codification, it does nevertheless progressively develop the law in exercising its choice between rival rule claims.

12. The function of the Special Rapporteur is not to dictate a particular rule to the Commission, but rather to lay all the authorities and options before the Commission so that it can choose the appropriate rule. The Commission, not the Special Rapporteur, is the decision maker. On occasion the Special Rapporteur presents several options to the Commission. In most instances, however, the Special Rapporteur proposes a particular rule which he believes to be most suitable in all circumstances. Competing rules or formulations of the rule are included in the explanatory part of this report together with the authorities in support of such a rule so that the Commission may make an informed choice if it prefers an option not proposed by the Special Rapporteur.

C. Future direction of the draft articles

13. The first report on diplomatic protection dealt principally with the nationality of claims, while the second report introduced the exhaustion of local remedies rule. The present report is confined to two draft articles: article 14, which examines the circumstances in which local remedies need not be exhausted; and article 15, which considers the burden of proof in the application of the local remedies rule. The Special Rapporteur aims to produce a chapter on two controversial topics which have featured prominently in the history and development of the local remedies rule: the Calvo clause¹⁴ and the denial of justice. The Special Rapporteur is aware of the opposition in certain quarters to the inclusion of a provision on denial of justice in the draft articles on diplomatic protection on the ground that this concept belongs largely

(but certainly not exclusively) to the realm of primary rules.¹⁵ Despite this, the Special Rapporteur believes that the Commission must properly decide whether to include such a provision, as it is as central to the study of the local remedies rule as is the Prince of Denmark to *Hamlet*. Diplomatic protection is a topic with deep roots in the history and jurisprudence of Latin America. Much of this history has been concerned with the scope and content of the concept of denial of justice and the legal consequences of the Calvo clause. No proper study on diplomatic protection can therefore avoid consideration of these topics.

14. A key component of the nationality of claims has yet to be considered in the draft articles: the nationality of corporations. Several articles will be introduced on this subject in the fourth report. Time permitting, the Special Rapporteur proposes that a working group consider tentative suggestions on this subject in the second part of the current session.

15. When the draft articles referred to in paragraph 14 above have been considered, this will complete the study of the secondary rules of diplomatic protection in their traditional context. The Special Rapporteur proposes that the Commission should not seek to extend the scope of the draft articles beyond matters normally and traditionally viewed as belonging to the nationality of claims and the exhaustion of local remedies. If this proposal is accepted, it should be possible to complete the present study, both at first and second reading, by the end of the present quinquennium.

16. Suggestions have been made that the present draft articles should be expanded to include a number of matters linked to the nationality of claims that do not traditionally fall within this field.¹⁶ These include: (a) functional protection by international organizations of their officials;¹⁷ (b) the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned;¹⁸ (c) the case where one State exercises diplomatic protection of a national of another State as a result of the delegation of such a right; and (d) the case where a State or an international organization administers or controls a territory.

17. The Special Rapporteur is opposed to the expansion of the draft articles to include such matters. He is particularly opposed to the inclusion of functional protection in the present study. That is a complex topic that would take the Commission beyond diplomatic protection as it is traditionally understood and ensure that the completion of the present draft articles within the present quinquennium would become impossible. This is not to say that functional protection is not an important subject. It certainly is. However, it is suggested that if the Commission

¹⁵ *Yearbook ... 2001* (see footnote 13 above), pp. 101–102, para. 10.

¹⁶ *Ibid.*, vol. II (Part Two), p. 199, para. 183.

¹⁷ See *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

¹⁸ See the *M/V "Saiga" case (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, para. 172, reprinted in *ILM*, vol. 38 (July 1999), p. 1357.

¹⁴ See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 206–208.

believes it should consider this topic, it should do so as a separate study. The Special Rapporteur would welcome such a decision, as such a study would draw on and complement the present articles. During the previous quin-

quennium this issue was frequently raised, with a clear majority of members opposed to the inclusion of functional protection in the present study. The time has come for an immediate and final resolution of the matter.

CHAPTER I

Exceptions to the general principle that local remedies must be exhausted

“Article 14

“Local remedies do not need to be exhausted where:

“(a) The local remedies:

“(i) Are obviously futile (option 1)

“(ii) Offer no reasonable prospect of success (option 2)

“(iii) Provide no reasonable possibility of an effective remedy (option 3);

“(b) The respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

“(c) There is no voluntary link between the injured individual and the respondent State;

“(d) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

“(e) The respondent State is responsible for undue delay in providing a local remedy;

“(f) The respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.”

A. Futility (art. 14 (a))

“Article 14

“Local remedies do not need to be exhausted where:

“(a) The local remedies:

“(i) Are obviously futile (option 1)

“(ii) Offer no reasonable prospect of success (option 2)

“(iii) Provide no reasonable possibility of an effective remedy (option 3) ...”

1. PRELIMINARY REMARKS

18. The second report on diplomatic protection proposed that a State might not bring an international claim arising out of an injury to a national before the injured individual

had exhausted “all available local legal remedies” (art. 10, para. 1).¹⁹ In debates in the Commission and in the Sixth Committee of the General Assembly, it was suggested that this provision should be amended to require the exhaustion of “all available *adequate and effective** local legal remedies”.²⁰ This suggestion was understandable as the second report had made no reference to the requirement that remedies should be “effective” (or that they not be “ineffective”) other than in the paragraph dealing with future work,²¹ which served notice that the matter would be dealt with in the third report.

19. There is no objection to including a reference to the need for adequate and effective available remedies in article 10, provided a separate provision deals with the subject of ineffective or futile remedies. As shown in article 15, the burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective or futile. Ineffectiveness therefore belongs to the category of exceptions to the local remedies rule and is treated as such in this provision.

20. A local remedy is ineffective when it is “obviously futile”, “offers no reasonable prospect of success” or “provides no reasonable possibility of an effective remedy” (art. 14 (a) above). These phrases are more precise than the generic term “ineffective” and are therefore preferred by courts and writers in describing the phenomenon of the ineffective local remedy. The test of “obvious futility” is higher than that of “no reasonable prospect of success”, while the test of “no reasonable possibility of an effective remedy” occupies an intermediate position. All three options are presented for the consideration of the Commission. All enjoy some support among the authorities.

21. Denial of justice is a concept that belongs largely to the realm of the primary rule. It is, however, inextricably linked with many features of the local remedies rule, including that of ineffectiveness, and as such may be said to have a secondary character. As suggested in the second report on diplomatic protection,²² it may be seen as a secondary rule when it excuses recourse to further local remedies and as a primary rule when it gives rise to international responsibility. The two faces of denial of justice are well illustrated by the articles adopted on first reading

¹⁹ *Yearbook ... 2001* (see footnote 13 above), sect. B, p. 100.

²⁰ *Yearbook ... 2002*, vol. II (Part Two), p. 56, para. 177.

²¹ *Yearbook ... 2001* (see footnote 13 above), p. 114, para. 67.

²² *Ibid.*, pp. 101–102, para 10.

by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), which in article 9 defined denial of justice as a primary rule when a foreigner “has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice”²³ and then gave it a secondary character in exempting an injured foreigner from exhausting local remedies when the person had been subjected to such a denial of justice (art. 4, para. 2).

22. Every effort will be made to avoid the language of denial of justice in this comment. This will not, however, always be possible, as the local remedies rule and denial of justice are historically intertwined. As the introduction to this report indicates, the place of denial of justice in the present draft articles will be considered in due course.

2. INTRODUCTION

23. There is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile. The reason for this is that a claimant is not required to exhaust justice in a foreign State “when there is no justice to exhaust”.²⁴ This principle is endorsed by judicial decisions,²⁵ legal doctrine,²⁶ State practice²⁷ and codifications of the local remedies rule.²⁸ Article 22 of the draft articles on State responsibility adopted on first reading required the exhaustion only of those remedies which are “effective”.²⁹ Although this principle is accepted, its precise formulation is subject to dispute, as will be shown below.

24. The futility of local remedies must be determined at the time at which they are to be used.³⁰ Moreover, the decision on the futility of such remedies must be made on the assumption that the claim is meritorious.³¹

²³ *Yearbook ... 1956* (see footnote 14 above), report on international responsibility by Mr. F.V. García Amador, p. 226.

²⁴ *Robert E. Brown (United States) v. Great Britain* (1923), UNRIAA, vol. VI (Sales No. 1955.V.3), p. 129; see also Mr. Fish, United States Secretary of State, to Mr. Pile (29 May 1873), in Moore, *A Digest of International Law*, vol. VI, p. 677; and *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* (1934), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1497.

²⁵ See the cases referred to above in footnote 24 and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 19; the *Ambatielos Claim* (1956), UNRIAA, vol. XII (Sales No. 63.V.3), pp. 122–123; and *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 27–29.

²⁶ See below, particularly footnotes 64–65, 70–71, 75 and 77.

²⁷ For statements on American and British State practice respectively, see *Restatement of the Law Second: Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute, 1965), para. 207 (b), pp. 615–616; *ibid. Third*, vol. 2 (St. Paul, Minn., American Law Institute, 1987), chap. II, para. 713. (f), p. 219; and Warbrick, “Protection of nationals abroad”, p. 1008.

²⁸ See footnotes 37–38 and 41–42 below. The exception to this is the Guerrero report of 1926, which excused compliance from local remedies only where access to domestic courts was denied to foreigners (*Yearbook ... 1956* (see footnote 14 above), annex 1, pp. 221–222). See also the *Supplement to the American Journal of International Law*, vol. 20, July and October 1926, pp. 202–203.

²⁹ *Yearbook ... 1996*, vol. II (Part Two), p. 60.

³⁰ Amerasinghe, “The exhaustion of procedural remedies in the same court”, p. 1312.

³¹ *Finnish Ships Arbitration* (see footnote 24 above), p. 1504; and the *Ambatielos Claim* (footnote 25 above), pp. 119–120. See

25. It would seem obvious that the competent international tribunal should decide on the issue of the effectiveness *vel non* of local remedies. As Amerasinghe states:

Broadly speaking, there are three possible alternatives. The tribunal may accept the word of the claimant State as to the effect of the remedy or it may accept the word of the respondent State or it may investigate the matter on the evidence presented to it and come to its own conclusion. Looking to reason and good sense, it would seem that this is a matter of law and fact which the tribunal must ordinarily investigate and decide on the evidence before it. To determine the effect of the remedy an estimate of probabilities has to be made and there is no reason why a tribunal should not be competent to make such an estimate.³²

This obvious truth may appear to be contradicted by the following PCIJ dictum in the *Panevezys-Saldutiskis Railway* case:

The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision. It is not for this Court to consider the arguments which have been addressed to it for the purpose either of establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (seizure *jure imperii*) to the act of the Lithuanian Government.³³

That the Court did not intend to leave the final determination of such matters to domestic courts is, however, clear from its comment in the same judgment that “[t]here can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief”.³⁴ The view that an international tribunal is the appropriate body to pronounce on questions of futility is confirmed by Lauterpacht³⁵ and García Amador.³⁶

3. FORMULATING THE EXCEPTION

26. While it is agreed that local remedies need not be exhausted when they are futile or ineffective, there is no agreement as to how this exception is to be formulated. Some choose to formulate it in terms of a denial of justice: local remedies need not be exhausted when there is a denial of justice. Others prefer to require that the remedies be effective, not obviously futile; offer a reasonable prospect of success; or provide a reasonable possibility of an effective remedy. These tests will be expounded, after which the principal examples of futility or ineffectiveness recognized by judicial decisions will be considered. Once this has been done, a proposal will be made for the most appropriate formulation of the exception.

27. Early codifications excused compliance with the local remedies rule when there was a denial of justice. As shown above, the articles adopted on first reading by the Third Committee of the Conference for the Codifica-

also Schwarzenberger, *International Law*, p. 609; Fitzmaurice, “Hersch Lauterpacht—the scholar as judge: part I”, p. 60; O’Connell, *International Law*, p. 1057; and Borchard, “The local remedy rule”, p. 730.

³² “The exhaustion of procedural remedies ...”, p. 1307.

³³ *Panevezys-Saldutiskis Railway* (see footnote 25 above).

³⁴ *Ibid.*, p. 18.

³⁵ *The Development of International Law by the International Court*, p. 101. See also Law, *The Local Remedies Rule in International Law*, pp. 66–67.

³⁶ *Yearbook ... 1956* (see footnote 14 above), p. 205, para. 169.

tion of International Law provided that the claimant was excused from exhausting local remedies when he was “hindered by the judicial authorities in the exercise of his right to pursue judicial remedies” or had “encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice”.³⁷ The Seventh International Conference of American States held in Montevideo in 1933 likewise excepted “those cases of manifest denial or unreasonable delay of justice” from the local remedies rule.³⁸ García Amador adopted a similar approach.³⁹

28. The simple test of “effectiveness” enjoys some support in codifications. The Institute of International Law stated in its resolution adopted at the Granada session in 1956 that the local remedies rule applied only “if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be *effective** and *sufficient*.*”⁴⁰ Article 22 of the draft articles on State responsibility adopted by the Commission on first reading requires “effective local remedies” to be exhausted.⁴¹ In a similar vein, Kokott proposed in her report of 2000 to the Committee on Diplomatic Protection of Persons and Property of the International Law Association that the claimant was exempt from the local remedies rule where, “for whatever reason, no remedy is available to him, which would effectively redress the violation incurred”.⁴²

29. The stringent test of “obvious futility” for release from the local remedies rule has its origin in the following statement by Arbitrator Bagge in the *Finnish Ships Arbitration* case:

As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a.a. § 383): “In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.”⁴³

This formulation of the test for exemption from the local remedies rule was subsequently accepted by the majority of the commissioners in the *Ambatielos*⁴⁴ arbitration and accords substantially with the strict test expounded in the

³⁷ *Ibid.*, p. 226, annex 3. See also Law, *op. cit.*, p. 71.

³⁸ *Yearbook ... 1956* (see footnote 14 above), p. 226, annex 6, para. 3.

³⁹ *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Addendum, sixth report on international responsibility, pp. 46–48, arts. 3, para. 2, and 18, para. 2. See also García Amador, “State responsibility: some new problems”, p. 452; see further the separate opinion of Judge Tanaka in *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 145.

⁴⁰ *Annuaire de l’Institut de Droit International*, vol. 46 (Granada session, 1956), p. 364.

⁴¹ See footnote 29 above.

⁴² “The exhaustion of local remedies”, p. 630.

⁴³ UNRIAA (see footnote 24 above), p. 1504. According to Judge Tanaka in his separate opinion in the *Barcelona Traction* case, the local remedies “rule does not seem to require from those concerned a clearly futile and pointless activity” (see footnote 39 above).

⁴⁴ UNRIAA (see footnote 25 above), p. 119.

Panevezys-Saldutiskis Railway case—that the ineffectiveness of the remedy be “clearly shown”.⁴⁵

30. The “obvious futility” test has been strongly criticized by some writers and was not followed in the *ELSI* case⁴⁶ in which an ICJ chamber was ready to assume the ineffectiveness of local remedies. Amerasinghe has argued that it was wrong for Arbitrator Bagge to import the strict test expounded in prize cases, arising in the context of war and in respect of which States have special powers of jurisdiction, to the law of diplomatic protection,⁴⁷ while Mummery has submitted that the test of obvious futility “contributes very little to precision and objectivity of thought”.⁴⁸ Amerasinghe adds that:

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.⁴⁹

31. Exemption from the local remedies rule on the ground of ineffectiveness may be better achieved by a formulation which renders the exhaustion of local remedies unnecessary when the remedies offer no reasonable prospect of success to the claimant. Support for this formulation is to be found in tests which stress the reasonableness of the claimant pursuing domestic remedies. This test is less demanding than that of “obvious futility”, which requires evidence not only that there was no reasonable prospect of the local remedy succeeding, but that it was obviously and manifestly clear that the local remedy would fail.

32. The clearest support for this test comes from the jurisprudence of the European Commission on Human Rights, which on several occasions has applied the

⁴⁵ See footnote 25 above. This test seems to reflect British practice, which requires that the ineffectiveness of the remedy must be “clearly established” (Warbrick, *loc. cit.*, p. 1008). The United States of America, in an opinion of 1930 by the Solicitor for the Department of State, also required that it be “shown” that local remedies were ineffective (Hackworth, *Digest of International Law*, p. 511).

⁴⁶ The Chamber stated:

“With such a deal of litigation [lasting from 1968 to 1975 before various Italian courts] in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted.”

(*Elettromica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 46, para. 59)

“In the present case ... it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.”

(*Ibid.*, p. 47, para. 62)

⁴⁷ Amerasinghe, “The local remedies rule in an appropriate perspective”, p. 752; and Borchard’s approval of Arbitrator Bagge’s approach in Borchard, “The local remedy rule”, pp. 732–733.

⁴⁸ “The content of the duty to exhaust local judicial remedies”, p. 401.

⁴⁹ “The local remedies rule ...”, p. 752.

standard of “real” or “reasonable prospect of success”.⁵⁰ Commentators are divided as to whether the Commission intended to substitute this test for that of “obvious futility” and have raised doubts about the application of this test to the general law of diplomatic protection.⁵¹ The American Law Institute’s *Restatement of the Law Second: Foreign Relations Law of the United States*, provides some support for this test:

Exhaustion of a remedy does not require the taking of every step that might conceivably result in a favorable determination, but the alien must take all steps that offer a *reasonable possibility, even if not a likelihood*,* of success... The expense or delay involved, if substantial in relation to the amount or nature of the reparation sought, may be relevant in determining what steps should reasonably be taken to exhaust the available remedies. The alien is not required to incur substantial expense and delay in trying to invoke a remedy where there is no *reasonable possibility** that the remedy would be available.⁵²

33. As shown above,⁵³ article 22 of the draft articles on State responsibility adopted by the Commission on first reading simply requires local remedies to be effective. The commentary to the provision does, however, support the “reasonable prospect of success” formulation:

From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a *real prospect* of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be explored.⁵⁴

34. While the “obvious futility” test is too strict, that of “reasonable prospect of success” is probably too generous to the claimant. It seems wiser, therefore, to seek a formulation that invokes the concept of reasonableness but which does not too easily excuse the claimant from compliance with the local remedies rule. A possible solution is to be found in option 3, that there is an exemption from the local remedies rule where there is “no reasonable

possibility of an effective remedy” before courts of the respondent State. This formulation 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 is a stricter test than that of “no reasonable prospect of success”, the test employed in some legal systems for refusing leave to appeal to a higher court.

35. This test is adopted from the separate opinion of Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case, in which he stated, after considering the grounds on which it might be doubted that the Norwegian courts could afford any effective remedy:

However, these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out, as a matter of reasonable possibility, an effective remedy before Norwegian courts.⁵⁵

A number of writers have endorsed this view.⁵⁶ Perhaps the best exposition of the test is given by Fitzmaurice:

Lauterpacht propounded the criterion of there being a “reasonable possibility” that a remedy would be afforded, as being the test of effectiveness—or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the *existence* of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.⁵⁷

36. The text proposed arguably accords more with the reasoning of Arbitrator Bagge in the *Finnish Ships Arbitration* than that of “obvious futility”. This is made clear by Simpson and Fox:

The use of such terms as “obviously futile” and “obviously insufficient” in relation to rights of appeal is, however, misleading. In the *Finnish Ships* case the arbitrator heard lengthy argument about the ship-owners’ right of appeal from the decision of the Arbitration Board to the Court of Appeal and their failure to exercise it, and in his award entered into most detailed reasoning before arriving at the conclusion that the appealable points of law were “obviously” insufficient to secure a reversal of the decision of the Arbitration Board. “*Obviously*” is therefore not to be understood in the sense of *immediately apparent*.* To judge from the *Finnish Ships* case, the test is whether the *insufficiency of the grounds of appeal has been conclusively, or at least convincingly, demonstrated*.⁵⁸

This interpretation is consistent with Bagge’s own views, expressed in another context, where he argued, referring to the *Finnish Ships Arbitration* decision, that

it would not be reasonable to require that the private party should spend time and money on a recourse which *in all probability** would be futile.

...

⁵⁰ *Retimag S.A. v. Federal Republic of Germany*, application No. 712/60, decision of 16 December 1961, *Yearbook of the European Convention on Human Rights*, 1961, p. 400; *X, Y and Z v. the United Kingdom*, application Nos. 8022/77, 8025/77 and 8027/77, decision of 8 December 1979, *European Commission of Human Rights, Decisions and Reports*, vol. 18, p. 76.

⁵¹ Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: its Rationale in the International Protection of Individual Rights*, p. 97; and Amerasinghe, *Local Remedies in International Law*, p. 202.

⁵² *Restatement of the Law Second* ... (see footnote 27 above). It should, however, be noted that in paragraph 208 the terms “apparent” and “clearly ineffective” are used (*ibid.*, p. 618). See also *Restatement of the Law Third* ... (footnote 27 above), which requires United States nationals to exhaust local remedies “unless such remedies are clearly sham or inadequate”. Earlier statements of United States officials demonstrate a stricter requirement, namely that “there appears to be no adequate ground for believing that sufficient remedy is afforded”, that “[t]he Department ... can not assume that the regularly established courts of a country will not administer justice until *it has been shown** that such is the case” (Hackworth, *op. cit.*, p. 511), or that “[t]he policy of the Department has always been, and is, not to intervene when the claimant has his day in court, unless the courts are of such a character as to preclude hope of a possibility* of justice” (letter of 27 February 1907 by the Department, quoting an opinion of the Solicitor concerning a claim against Canada, *ibid.*, p. 520.)

⁵³ Para. 28.

⁵⁴ *Yearbook* ... 1977, vol. II (Part Two), p. 47, para. (48). See also Law, *op. cit.*, pp. 78–79, who formulates the test as “reasonable expectation of success”.

⁵⁵ *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 39.

⁵⁶ Brownlie, *Principles of Public International Law*, p. 499. Mummery prefers to ask whether the local remedy in question “may reasonably be regarded as incapable of producing satisfactory reparation” (*loc. cit.*, p. 401).

⁵⁷ *Loc. cit.*, pp. 60–61. See also Herdegen, “Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen”, p. 70.

⁵⁸ *International Arbitration: Law and Practice*, p. 114.

Even if the facts alleged by the intervening State in the diplomatic correspondence as to damage caused by an act for which the defendant State is responsible may seem to the international tribunal firmly established, there may be other bases required by the municipal law, which are decisive for the acceptance or dismissal on the national plane of the private claim, and whose existence may be a subject for different opinions. *Only where such a difference of opinion seems reasonably not possible [i.e. where there is no reasonable prospect of success], ... ought an application of the local remedies rule to be held unnecessary by reference to the merits of the claim.*⁵⁹

37. The objection to the “obvious futility” test that it suggests that the ineffectiveness of the local remedy must be *ex facie* “immediately apparent”⁶⁰ is overcome by introducing the element of “reasonableness” into the test. This allows a court to examine whether, in the circumstances of the particular case, an effective remedy was a reasonable possibility. The necessity to do this was stressed by Mr. Manley O. Hudson in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case⁶¹ and by Sir Hersch Lauterpacht in his separate opinion in the *Certain Norwegian Loans* case.⁶² The correct approach is admirably put by Mummery:

The international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the state’s activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule. This flexibility of approach is consonant with the social function of the rule ...—to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving state is reasonably capable of fulfilling its duty of providing a remedy. Thus the result in any particular case will depend on a balancing of factors. For example, in a situation in which the best local legal advice suggests that it is “highly unlikely” that further resort to local remedies will result in a disposition favorable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting; otherwise, if little or no trouble or cost is involved in proceeding further.⁶³

4. CIRCUMSTANCES IN WHICH LOCAL REMEDIES HAVE BEEN FOUND TO BE INEFFECTIVE OR FUTILE

38. *The local court has no jurisdiction over the dispute in question.*⁶⁴ This principle has been widely accepted both in jurisprudence and in the literature.⁶⁵ The *Panevezys-*

⁵⁹ “Intervention on the ground of damage caused to nationals, with particular reference to exhaustion of local remedies and the rights of shareholders”, pp. 166–167.

⁶⁰ Simpson and Fox, *op. cit.*, p. 114.

⁶¹ *P.C.I.J.* (see footnote 25 above), p. 48.

⁶² *I.C.J. Reports 1957* (see footnote 55 above), p. 39.

⁶³ Mummery, *loc. cit.*, pp. 400–401. See also Herdegen, *loc. cit.*, p. 71.

⁶⁴ See Kokott, *loc. cit.*, p. 622; Amerasinghe, *Local Remedies ...*, pp. 197–198; Jennings and Watts, eds., *Oppenheim’s International Law*, p. 525; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 884; and Mummery, *loc. cit.*, pp. 396–397.

⁶⁵ See “International arbitral awards of Östen Undén: arbitration under article 181 of the Treaty of Neuilly”, *American Journal of International Law*, vol. 28 (1934), p. 789 (“the rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or by a member of the government performing his official duties. There rarely exist local remedies against the acts of the authorized organs of the state”); *Claims of Rosa Gelbrunk and the “Salvador Commercial Company”* et al. (1902), UNRIAA, vol. XV (Sales No. 66.V.3), pp. 467–477; *The Lottie May Incident* (1899), *ibid.*, p. 31; Sir Hersch Lauterpacht’s separate opinion in *Certain Norwegian Loans* (footnote 55 above), pp. 39–40; Borchard, *The Diplomatic Protection of Citizens Abroad or the Law*

Saldutiskis Railway case does not negate this principle. There PCIJ held that it was not satisfied that the courts of Lithuania had no jurisdiction over an act of State, as argued by Estonia, in the absence of a Lithuanian court decision.⁶⁶ On the facts this was an extremely cautious,⁶⁷ possibly timid approach, but the Court made it clear that it accepted the principle that there was “no need to resort to the municipal courts if those courts have no jurisdiction to afford relief”.⁶⁸

39. A necessary corollary of this principle is that it is not necessary to exhaust appellate procedures when the appeal court has limited jurisdiction. Thus in the *Finnish Ships Arbitration* Arbitrator Bagge held that local remedies had been exhausted where the disputed issue was a question of fact and the Court of Appeal had competence to decide questions of law only.⁶⁹

40. *The national legislation justifying the acts of which the alien complains will not be reviewed by the courts.* Where, for instance, legislation has been adopted to confiscate the property of an alien and it is clear that the courts are obliged to enforce this legislation, there will be no need to exhaust local remedies. Thus in the *Arbitration under article 181 of the Treaty of Neuilly*, concerning the confiscation of forests by Bulgaria under a Bulgarian law passed in 1904, Arbitrator Undén held that:

The Ministry of Agriculture, in proceeding definitely to confiscate the forests, relied upon the ... Bulgarian law of 1904 according to which all the *yailaks* were to be considered as domains of the state. Considering that this law was not modified so as to admit of the application of a special régime in the annexed territories, the claimants had reasons for considering as useless any action before the Bulgarian courts against the Bulgarian Treasury.⁷⁰

41. *The local courts are notoriously lacking in independence.*⁷¹ The leading authority in support of this principle

of International Claims, p. 823; Jennings and Watts, *op. cit.*, p. 525; Brownlie, *op. cit.*, p. 500; Amerasinghe, *Local Remedies ...*, p. 198, and “Whither the local remedies rule?”, p. 306; Jiménez de Aréchaga, “International responsibility”, pp. 587–588; Verzijl, “La règle de l’épuisement des recours internes”, p. 266; *Affaire des Forêts du Rhodope Central (fond)*, decision of 29 March 1933, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1420; *Interhandel* case (footnote 25 above), p. 27; Verdross and Simma, *op. cit.*, p. 883; Law, *op. cit.*, p. 69; and Schwarzenberger, *op. cit.*, p. 608.

⁶⁶ See footnote 25 above.

⁶⁷ See Lauterpacht, *op. cit.*, p. 101.

⁶⁸ *Panevezys-Saldutiskis Railway* case (see footnote 25 above), p. 18.

⁶⁹ UNRIAA (see footnote 24 above), p. 1535. See also Schwarzenberger, *op. cit.*, p. 609; Jiménez de Aréchaga, “International responsibility”, p. 588; Brownlie, *op. cit.*, p. 499; Mummery, *loc. cit.*, p. 398; and Law, *op. cit.*, p. 68.

⁷⁰ “International arbitral awards of Östen Undén ...” (footnote 65 above). See also *Affaire des Forêts du Rhodope Central* (footnote 65 above), p. 1405; the *Ambatielos Claim* (footnote 25 above), p. 119; the *Interhandel* case (footnote 25 above), p. 28; Amerasinghe, *Local Remedies ...*, p. 198; Jennings and Watts, *op. cit.*, p. 525; Jiménez de Aréchaga, “International responsibility”, p. 589; Law, *op. cit.*, pp. 66 and 70; Doehring, “Local remedies, exhaustion of”, p. 240; Schwarzenberger, *op. cit.*, p. 608; and *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. (50).

⁷¹ Jiménez de Aréchaga, “International responsibility”, p. 589; Amerasinghe, *Local Remedies ...*, p. 198; Borchard, *The Diplomatic Protection ...*, p. 823 (referring to courts controlled by a hostile mob); Jennings and Watts, *op. cit.*, p. 525; Brownlie, *op. cit.*, p. 500; *Velásquez Rodríguez* case, ILM, vol. 28 (1989), pp. 304–309; Whiteman, *Digest of International Law*, p. 784; separate opinion by Judge Tanaka in the *Barcelona Traction* case (see footnote 39 above), p. 147; dissenting

is the *Robert E. Brown* claim.⁷² Here the President of the South African Republic, Paul Kruger, had dismissed the Chief Justice for finding in favour of Brown's claims to certain mining rights, and both the President and the legislature of the Republic had denounced the decision of the Chief Justice. In these circumstances Brown was advised by his counsel that it was pointless to proceed with his claim for damages as the reconstituted High Court was clearly hostile to him.⁷³ The tribunal that heard the international claim rejected the argument that Brown had failed to exhaust local remedies, holding that "the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified". It was not necessary, said the tribunal, "to exhaust justice ... when there is no justice to exhaust".⁷⁴

42. *There is a consistent and well-established line of precedents adverse to the alien.* It is not "necessary again to resort to those [municipal] courts if the result must be a repetition of a decision already given".⁷⁵ The mere likelihood of an adverse decision is insufficient: there must be "something more than probability of defeat but less than certainty".⁷⁶

43. *The courts of the respondent State do not have the competence to grant an appropriate and adequate remedy to the alien.*⁷⁷

opinion of Judge Levi Carneiro in *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 165; Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, pp. 1655 and 1657, vol. III, pp. 3076 *et seq.*, vol. V, p. 4902; and *A Digest of International Law*, p. 287; Mummery, *loc. cit.*, p. 403; Law, *op. cit.*, p. 68; Cançado Trindade, *op. cit.*, p. 78; Fitzmaurice, *loc. cit.*, p. 59; *Yearbook ... 1977* (see footnote 70 above); Daillier and Pellet, *Droit International Public*, p. 776.

⁷² UNRIAA (see footnote 24 above), p. 120.

⁷³ For a history of this case, see Dugard, "Chief Justice versus President: does the ghost of *Brown v Leyds* NO still haunt our judges?", p. 421.

⁷⁴ UNRIAA (see footnote 24 above).

⁷⁵ *Panevezys-Saldutiskis Railway* case (see footnote 25 above), p. 18. See also Borchard, *The Diplomatic Protection ...*, pp. 823–824; S.S. "*Lisman*" (1937), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1773; S.S. "*Seguranca*" (1939), *ibid.*, p. 1868; *Finnish Ships Arbitration* (footnote 24 above), p. 1495; *X v. Federal Republic of Germany* (1955), European Commission of Human Rights, *Documents and Decisions: 1955–1956–1957*, p. 138; *ibid.* (1958), *Yearbook of the European Convention on Human Rights: 1958–1959*, p. 344; *X* against *Austria* (1959), *ibid.*: 1960, p. 202; Jiménez de Aréchaga, "International responsibility", p. 589; Amerasinghe, *Local Remedies ...*, pp. 196–197; Brownlie, *op. cit.*, p. 499; Kokott, *loc. cit.*, p. 622; Mummery, *loc. cit.*, p. 402; Law, *op. cit.*, p. 66; Cançado Trindade, *op. cit.*; *Restatement of the Law Second ...* (footnote 27 above), p. 618, para. 208; Doehring, p. 240; Schwarzenberger, *op. cit.*, p. 609; *Yearbook ... 1977* (footnote 70 above).

⁷⁶ Amerasinghe, *Local Remedies ...*, p. 196.

⁷⁷ *Finnish Ships Arbitration* (see footnote 24 above), pp. 1496–1497; *Velásquez Rodríguez* case (see footnote 71 above), pp. 304–309; Borchard, *The Diplomatic Protection ...*, p. 332; Jennings and Watts, *op. cit.*, p. 525; Kokott, *loc. cit.*, p. 622; *Yağci and Sargin v. Turkey* case, application No. 16426/90 (1995) European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 319, p. 17, para. 42; *Hornsby v. Greece* case, application No. 18357/91, European Court of Human Rights, *Reports of Judgments and Decisions*, No. 33 (1997–II), p. 509, para. 37; Mummery, *loc. cit.*, pp. 401–402; Cançado Trindade, *op. cit.*, pp. 76–78; Verdross and Simma, *op. cit.*, p. 884; art. 19, para. 2 (a) of the 1960 draft convention on the international responsibility of States for injuries to aliens prepared by the Harvard Law School, reproduced in Sohn and Baxter, "Responsibility of States for injuries to the economic interests of aliens", p. 577; Amerasinghe, *Local Remedies ...*, pp. 198–199.

44. *The respondent State does not have an adequate system of judicial protection.* In *Mushikiwabo and Others v. Barayagwiza* a United States District Court held that the local remedies rule could be dispensed with in the case as "the Rwandan judicial system is virtually inoperative and will be unable to deal with civil claims in the near future".⁷⁸ 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.⁷⁹ Notions of a fair trial and due process of law carry greater weight in contemporary international law, as a result of the influence of international human rights jurisprudence, than they did in the first 60 years of the twentieth century when many of the seminal decisions on the exhaustion of local remedies were given. This exception to the local remedies must therefore be accorded greater weight today.

5. CONCLUSION

45. The above examples of circumstances in which recourse to local remedies has been excused suggest that the claimant is required to prove more than that the local remedies offer no reasonable prospect of success (option 2). On the contrary, they suggest that the claimant must prove their futility. They do not, however, lend support to the test of "obvious futility" (option 1), which suggests that the futility of local remedies must be "immediately apparent".⁸⁰ Instead they require a tribunal to examine circumstances pertaining to a particular claim which may not be immediately apparent, such as the independence of the judiciary, the ability of local courts to conduct a fair trial, the presence of a line of precedents adverse to the claimant and the conduct of the respondent State. The reasonableness of pursuing local remedies must therefore be considered in each case.⁸¹ This all points in the direction of option 3: a claimant is not obliged to exhaust local remedies where the courts of the respondent State provide "no reasonable possibility of an effective remedy" (art. 14 (a) above).

⁷⁸ Decision of 9 April 1996, ILR, vol. 107, p. 460.

⁷⁹ Resolution 01a/88, case 9755 (12 September 1988), *Annual Report of the Inter-American Commission on Human Rights 1987–1988*, p. 137. See also Amerasinghe, *Local Remedies ...*, p. 200, and "Whither the local remedies rule?", p. 308; Borchard, *The Diplomatic Protection ...*, p. 822; Mummery, *loc. cit.*, p. 404; *Restatement of the Law Second ...* (footnote 27 above), p. 618, para. 208; Doehring, *loc. cit.*, p. 239; and Schwarzenberger, *op. cit.*, p. 609.

⁸⁰ Simpson and Fox, *op. cit.*, p. 114.

⁸¹ Mummery states in this connection:

"As international jurisprudence develops on this subject, the analysis of cases will call for the best skills of the discipline of comparative law; for the various jurisdictions of the common and civil law have developed differing concepts of what is essential to an effective municipal remedy, and from these concepts criteria may be extracted for the purposes of the international standard involved in the local remedies rule. Hence it is important to see all the cases in the context of an underlying, unifying principle of reasonableness." (*Loc. cit.*, p. 404)

B. Waiver and estoppel (art. 14 (b))

“Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(b) The respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement.”

46. Sometimes States are prepared to waive the requirement that local remedies be exhausted.⁸² 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 defense and, as such, waivable, even tacitly.⁸³

47. In practice there would seem to be no prohibition on waiver of local remedies. From a doctrinal perspective it is, however, difficult to reconcile waiver with the substantive approach to the exhaustion of local remedies.⁸⁴ The reason for this is clearly spelled out by Amerasinghe:

If the rule of local remedies is one of procedure, then such a waiver is truly possible and comprehensible. Since the rule is only a means of establishing the orderly conduct of international litigation, an exception may be made to the rule and steps in the order excluded. The character of the alleged wrong will in no way be affected. It is only the method of settlement that undergoes a change. The wrong which remains the same is conclusively determined and redressed by an international court directly rather than by the usual preliminary court or courts.

If the rule is one of substance, it would follow that a waiver of the requirement that local remedies should be exhausted would not be possible. The resort to local remedies becomes a material part of the wrong being alleged before the international tribunal. Without that resort there would be no cause of action. If a waiver of the requirement were allowed, no cause of action involving international responsibility could be shown before an international tribunal. Either remedies will have to be exhausted with a *denial of justice* or absence of adequate remedies will have to be proved. To speak of a true waiver is incongruous in such a case.

The same arguments apply to forfeiture of the benefits of the rule by estoppel or for any other reasons. The rule is dispensed with in this manner before an international tribunal, if after it is forfeited there is still an international wrong which an international tribunal can redress. This can only be so, if the rule is of a procedural character and not if it is substantive. In the same way true exceptions to the rule [e.g. if the

⁸² There are many reasons why a State may decide on such a course. A State may, for instance, believe that such a course would save time and money. See Amerasinghe, *State Responsibility for Injuries to Aliens*, p. 207.

⁸³ Case of the *Government of Costa Rica (in the matter of Viviana Gallardo et al.)*, Inter-American Court of Human Rights (1981), ILR, vol. 67, p. 587, para. 26. See also the *ELSI* case (footnote 46 above), p. 42, para. 50; and the *De Wilde, Ooms and Versyp* cases (“Belgian Vagrancy Cases”), European Court of Human Rights (1971), ILR, vol. 56, p. 370, para. 55. See further Cançado Trindade, *op. cit.*, p. 133.

⁸⁴ See the second report on diplomatic protection, *Yearbook ... 2001* (footnote 13 above), p. 107, para. 33.

remedies are futile] can only be allowed if the international tribunal which is seized of the case has a dispute grounded in international law on which to adjudicate. This is so, only if the rule of local remedies which is not applied in a given case is of a procedural nature.⁸⁵

48. Waiver presents problems for those who advocate a substantive position on the local remedies rule. Probably for this reason there is little discussion of waiver on the part of substantivists,⁸⁶ although none deny it. On the contrary, Borchard, a prominent substantivist, admits the possibility of waiver.⁸⁷ Writers with leanings in favour of the procedural position have little difficulty in supporting the right of waiver on the part of the respondent State,⁸⁸ even in the case of human rights conventions.⁸⁹

49. 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.

1. EXPRESS WAIVER

50. 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 rule is valid,⁹⁰ and it has been suggested that this principle is ripe for codification by the Institute of International Law⁹¹ and by the Commission’s Special Rapporteur, Mr. García Amador.⁹²

⁸⁵ *State Responsibility ...*, pp. 207–208.

⁸⁶ Mr. Roberto Ago does not consider waivers in his examination of the local remedies rule (sixth report on State responsibility, *Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3); see also *Yearbook ... 1977*, vol. II (Part Two), p. 30. See further O’Connell, *op. cit.*, p. 1059.

⁸⁷ See, for instance, Borchard, *The Diplomatic Protection ...*, pp. 819 and 825.

⁸⁸ Amerasinghe, “The local remedies rule ...”, pp. 735–736; Law, *op. cit.*, p. 59; García Amador, third report on international responsibility, *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 99; and *The Changing Law of International Claims*, p. 466; Witenberg, “La recevabilité des réclamations devant les juridictions internationales” p. 55; Ipsen, *Völkerrecht*, p. 313; Borchard, “Theoretical aspects of the international responsibility of States”, p. 240. See also *Restatement of the Law Second ...* (footnote 27 above), p. 620–622, para. 209; and Kokott, *loc. cit.*, p. 613.

⁸⁹ Cançado Trindade, *op. cit.*, pp. 128–133.

⁹⁰ See the writings referred to in footnote 88 above. See also Doehring, *loc. cit.*, p. 239; Briggs, “The local remedies rule: a drafting suggestion”, p. 925; Amerasinghe, “Whither the local remedies rule?”, pp. 293–294, and *Local Remedies ...*, p. 251; Jennings and Watts, *op. cit.*, pp. 525–526; Schwarzenberger, *op. cit.*, p. 610; Verdross and Simma, *op. cit.*, p. 883; and Herdegen, *loc. cit.*, p. 69.

⁹¹ The resolution adopted at its Granada session states that: “This rule does not apply:

“... ”
“(b) if the application of the rule has been set on one side by agreement between the States concerned.”

(See footnote 40 above.)

See also the comments of Mr. Maurice Bourquin, *Annuaire de l’Institut de Droit International*, vol. 1 (Aix-en-Provence session, 1954), pp. 57–58.

⁹² *Yearbook ... 1958* (see footnote 88 above), p. 55. Article 17

51. Waivers are a common feature of contemporary State practice, and many arbitration agreements contain waiver clauses.⁹³ Probably the best-known example is to be found in article 26 of the Convention on the settlement of investment disputes between States and nationals of other States, which provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

52. 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.⁹⁴

2. IMPLIED WAIVER

53. Waiver of local remedies must not be readily implied. In the *ELSI* case an ICJ Chamber 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.*”⁹⁵ Indeed, Schwarzenberger has suggested that there is a presumption against implying a waiver:

In such a situation of uncertainty it is necessary to give due weight to three relevant presumptions: the presumption against any implicit waiver of rights, and those in favour of the minimum restriction of sovereignty and the interpretation of treaties against the background of international customary law. All three weigh the scales against any implied waiver of the local remedies rule.⁹⁶

54. Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions⁹⁷ and the writ-

states that the rule of the exhaustion of local remedies “shall not apply if the State has expressly agreed with the alien ... to dispense with local remedies”. See also *Yearbook ... 1961* (footnote 39 above), p. 48, art. 18, para. 4.

⁹³ For instance, the 1923 Convention establishing the United States–Mexican Claims Commission (art. V) and the 1910 Agreement between the United States and Great Britain, quoted in Borchard, “Theoretical aspects ...”, p. 240. See also the Agreement between the United States and Canada concerning the establishment of an International Arbitral Tribunal to dispose of United States Claims relating to Gut Dam (Ottawa, 25 March 1965), art. II, para. 2 (c) (United Nations, *Treaty Series*, vol. 607, No. 8802, p. 146; also reproduced in ILM, vol. 4 (1965), p. 469).

⁹⁴ *Government of Costa Rica ...*, p. 587, para. 26, and *De Wilde, Ooms and Versyp* cases (see footnote 83 above), p. 370, para. 55; Amerasinghe, “Whither the local remedies rule?”, pp. 294–295, *Local Remedies ...*, pp. 252–253, and “The local remedies rule ...”, p. 737; *I.C.J. Pleadings, Anglo-Iranian Oil Co.* (United Kingdom v. Iran), pp. 118–119. *Sed contra* Iran’s pleadings, *ibid.*, p. 501.

⁹⁵ *I.C.J. Reports 1989* (see footnote 46 above), p. 42, para. 50. See also Kokott, *loc. cit.*, p. 626.

⁹⁶ *Op. cit.*, pp. 610–611. See also García Amador, *The Changing Law ...*, p. 467, and *Yearbook ... 1958* (footnote 88 above), p. 60, para. 23; the *Salem* case (1932), UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1189; Law, *op. cit.*, p. 98; Jiménez de Aréchaga, “International law in the past third of a century”, p. 292; and Cançado Trindade, *op. cit.*, p. 131.

⁹⁷ See, for example, *Steiner and Gross v. Polish State* (1928), in McNair and Lauterpacht, eds., *Annual Digest of Public International Law Cases*, p. 472; and *American International Group, Inc. v. Iran*, award No. 93–2–3 (1983), *Iran–United States Claims Tribunal Reports*, vol. 4 (Cambridge, Grotius, 1985), p. 96.

ings⁹⁸ of jurists support such a conclusion. Mr. García Amador, Special Rapporteur, was equivocal on this subject: in his sixth and final report to the Commission in 1961 he contemplated only an express waiver of local remedies,⁹⁹ but later, in *The Changing Law of International Claims*, he accepted that a waiver might be implied provided it was clear and unequivocal.¹⁰⁰

55. 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.¹⁰¹ It is, however, helpful to look at different types of arbitration agreements, as special considerations may apply to different agreements.

3. GENERAL ARBITRATION AGREEMENT ENTERED INTO BEFORE DISPUTE

56. 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 States espouses the claim of its national”.¹⁰² Indeed, in several cases involving a general agreement of this kind, the applicant State has declined to raise waiver implied from the fact of submission to arbitration as a counter-argument to a preliminary objection based on the non-exhaustion of local remedies.¹⁰³ That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the ICJ Chamber in the *ELSI* case.¹⁰⁴

⁹⁸ Law, *op. cit.*, p. 93; Jennings and Watts, *op. cit.*, pp. 525–526; Amerasinghe, “The local remedies rule ...”, pp. 735–736; Borchard, *The Diplomatic Protection ...*, pp. 819 and 825.

⁹⁹ In this report he adopted the view that the exhaustion of local remedies rule “shall not apply if the respondent State has expressly agreed with the State of nationality of the injured alien that recourse to any one or to all of the local remedies shall not be necessary” (*Yearbook ... 1961* (see footnote 39 above), p. 48, art. 18, para. 4). See also *Affaire relative à la concession des phares de l’Empire ottoman* (Greece v. France) (1956), UNRIIAA, vol. XII (Sales No. 63.V.3), pp. 186–187.

¹⁰⁰ *Op. cit.*, p. 467.

¹⁰¹ In his first report Mr. García Amador stated that it was necessary to look at the *travaux préparatoires* of the agreement “to determine whether the particular dispute is included among those covered by the arbitration agreement and, if so, whether that agreement meant, explicitly or implicitly, to waive the application of the local remedies rule in those disputes. In other words, the application of the local remedies rule will necessarily depend not only on the purpose and scope of the agreement, but also on the circumstances of each particular case” (*Yearbook ... 1956* (see footnote 14 above), p. 204, para. 164). See also Law, *op. cit.*, pp. 93–98; Jiménez de Aréchaga, “International law ...”, p. 292; Amerasinghe, *Local Remedies ...*, pp. 256–257; and *Restatement of the Law Second ...* (footnote 27 above), pp. 620–621, para. 209 (b). See further *Steiner and Gross v. Polish State* (footnote 97 above).

¹⁰² Mann, “State contracts and international arbitration”, p. 32; see also Freeman, *The International Responsibility of States for Denial of Justice*, p. 414; Verzijl, *loc. cit.*, pp. 3–4; Jennings and Watts, *op. cit.*, p. 526, footnote 16; Jiménez de Aréchaga, “International law ...”, p. 292; Amerasinghe, *Local Remedies ...*, pp. 253 and 257–258, and “Whither the local remedies rule?”, pp. 295–296; and Law, *op. cit.*, p. 98.

¹⁰³ See, for example, the *Interhandel* (footnote 25 above), and *ELSI* cases (footnote 46 above). See also Amerasinghe, *Local Remedies ...*, p. 253, and “Whither the local remedies rule?”, p. 295.

¹⁰⁴ *I.C.J. Reports 1989* (see footnote 46 above), p. 42, para. 50.

57. In the *Panevezys-Saldutiskis Railway* case PCIJ 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,¹⁰⁵ as argued by Judge van Eysinga in a dissenting opinion.¹⁰⁶ That the majority opinion is accepted is confirmed by the failure of the applicant State to raise waiver in response to a preliminary objection of non-exhaustion of local remedies in either the *Certain Norwegian Loans* case¹⁰⁷ or the *Interhandel* case,¹⁰⁸ in which the jurisdiction ICJ was asserted on the basis of a declaration under the Optional Clause. As there is an analogy between submission to the jurisdiction of ICJ under the Optional Clause and a general arbitration agreement, it is possible to invoke this jurisprudence on the Optional Clause in support of a presumption against tacit waiver by means of a general arbitration agreement. Although such a presumption is strong, it is not irrebuttable.¹⁰⁹

4. AD HOC ARBITRATION AGREEMENT ENTERED INTO AFTER DISPUTE

58. A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. 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.¹¹⁰ Support for this position is to be found in the decisions of claims commissions.¹¹¹ Some see confirmation of the possibility of

waiver being implied from arbitration agreements entered into *after* the dispute has arisen in the fact that some such agreements expressly require the exhaustion of local remedies.¹¹² Neither PCIJ nor ICJ has addressed waiver in the case of agreements falling into this category.

5. CONTRACT BETWEEN ALIEN AND RESPONDENT STATE

59. A contract to arbitrate between an alien and the host State which expressly or impliedly waives local remedies is not directly relevant here, as dispute settlement in such a case does not involve the espousal of the alien's claim by the State of nationality. Such a contract may, however, become relevant for present purposes if the host refuses to arbitrate and the State of nationality intercedes to protect its national. The question will then arise whether the contractual stipulation, express or implied, to exclude domestic remedies is to prevail. While there is support for the view that an express waiver¹¹³ is to be given effect to, it is less clear whether a contract between a State and an alien agreeing to settle disputes by arbitration, without explicit mention of recourse to local remedies as a precondition to arbitration, is to be interpreted as implying a waiver of local remedies. There is strong support among writers for the view that such an agreement is intended to exclude local remedies.¹¹⁴ Some arbitral tribunal decisions expressly favour this approach,¹¹⁵ while in many cases of this kind no objection based on non-exhaustion of local remedies has been raised by the respondent State.¹¹⁶ While an argument for implied waiver in such cases has been raised before PCIJ and ICJ,¹¹⁷ neither Court has pronounced on the matter.

case (see footnote 96 above).

¹⁰⁵ See footnote 25 above. Support for this position comes from Verzijl, *loc. cit.*, p. 4; Schwarzenberger, *op. cit.*, p. 610; Jiménez de Aréchaga, "International law ...", p. 292; and Amerasinghe, *Local Remedies* ..., pp. 256–257.

¹⁰⁶ Judge van Eysinga stated:

"It would seem that Lithuania cannot rely upon this rule [the local remedies rule] as against Estonia for the very reason that the acceptance by the two States of the Court's compulsory jurisdiction under Article 36 of the Court's Statute, which acceptance is unreserved ..., implies the setting aside of the rule in question in relations between the two States."

(*Panevezys-Saldutiskis Railway* case (footnote 25 above), pp. 35–36)

¹⁰⁷ See footnote 55 above.

¹⁰⁸ See footnote 25 above.

¹⁰⁹ See *Steiner and Gross v. Polish State* (footnote 97 above). Here the Upper Silesian tribunal held that Poland had impliedly waived the local remedies rule in article 5 of the Convention relating to Upper Silesia (Geneva, 15 May 1922) (League of Nations, *Treaty Series*, vol. IX, No. 271, p. 465), which provided that:

"The question as to whether or to what extent an indemnity for the abolition or diminution of vested rights must be paid by the State, will be settled directly by the Arbitral Tribunal on the complaint of the person enjoying the right."

(Kaeckenbeeck, *The International Experiment of Upper Silesia*, p. 581) The Tribunal held that the expression "directly" was to be interpreted as conferring upon the claimants the right to have recourse to the international tribunal without first exhausting local remedies.

¹¹⁰ Law, *op. cit.*, pp. 93–94; Borchard, "Theoretical aspects ...", p. 240, and *The Diplomatic Protection* ..., pp. 819 and 825; García Amador, *The Changing Law* ..., p. 550.

¹¹¹ See the cases confirming this position in Borchard, "Theoretical aspects ...", p. 240, and *The Diplomatic Protection* ..., p. 819; and Hackworth, *op. cit.*, p. 525. See also *American International Group, Inc. v. Iran* (footnote 97 above), p. 102; and the *Giorgio Uzielli* case, Italian-United States Conciliation Commission (1963), UNRIAA, vol. XVI (Sales No. E/F.69.V.I), pp. 270–271. *Sed contra* the *Salem*

¹¹² See, for instance, Borchard, *The Diplomatic Protection* ..., p. 819. See also Judge van Eysinga's dissenting opinion in the *Panevezys-Saldutiskis Railway* case (footnote 25 above), pp. 37–38.

¹¹³ Law, *op. cit.*, p. 94; Herdegen, *loc. cit.*, p. 69; Mr. García Amador's third report, *Yearbook ... 1958* (footnote 88 above), p. 55. Article 17 of Mr. García Amador's draft states that the rule of the exhaustion of local remedies (art. 15) "shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies".

¹¹⁴ Mann, *loc. cit.*, p. 32; Jennings and Watts, *op. cit.*, p. 523, footnote 3; *Yearbook ... 1961* (footnote 39 above), p. 48, art. 18, para. 5; García Amador, *The Changing Law* ..., pp. 539–550; Schwebel, *International Arbitration: Three Salient Problems*, pp. 117–121; Schwebel and Wetter, "Arbitration and the exhaustion of local remedies", p. 499; report of the IBRD Executive Directors on the Convention on the settlement of investment disputes, quoted in Whiteman, *op. cit.*, p. 806; *Restatement of the Law Third ...* (footnote 27 above), p. 226, para. 713, reporters' note 5. See also *Restatement of the Law Second ...* (footnote 27 above), p. 621, para. 209 (c); and O'Connell, *op. cit.*, p. 1059. *Sed contra* Adede, "A survey of treaty provisions on the rule of exhaustion of local remedies", p. 8, footnote 19, who claims that statements made by States upon ratifying the General Treaty of Inter-American Arbitration, which does not explicitly require the exhaustion of local remedies, indicate their conviction that the rule is nevertheless not waived.

¹¹⁵ See *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* (1977), ILR, vol. 62, pp. 179–180; and *Elf Aquitaine Iran v. National Iranian Oil Company* (1982), *ibid.*, vol. 96, pp. 278–279, para. 44.

¹¹⁶ Amerasinghe, *Local Remedies* ..., p. 262.

¹¹⁷ See the memorial by Switzerland in *Losinger, P.C.I.J., Series C, No. 78*, p. 40; United Kingdom contentions in the *Anglo-Iranian Oil Co.* case (footnote 94 above), pp. 81–82; arguments of France in *I.C.J. Pleadings, Electricité de Beyrouth Company* (France v. Lebanon) (1953), p. 14; submissions of France in *I.C.J. Pleadings, Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient* (France v. Lebanon) (1959), pp. 39 and 91–93. *Sed contra* pleadings by Yugoslavia in *Losinger* (see above), p. 132; submission by Iran in the

6. ESTOPPEL

60. The conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted.¹¹⁸ This was acknowledged by an ICJ Chamber in the *ELSI* case when it stated that “it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said”.¹¹⁹ Support for this principle is also to be found in the 1992 *United States–United Kingdom arbitration concerning Heathrow Airport user charges*.¹²⁰

61. In the *Aerial Incident of 27 July 1955* (United States v. Bulgaria) case the United States submitted that:

If there were any local remedies available in Bulgaria to the next of kin of Americans killed in the shooting down of the El Al Airlines Constellation on July 27, 1955, the Bulgarian Government never adverted to them nor to the desirability or necessity of their being exhausted when the United States presented its diplomatic claim to the Government of Bulgaria in 1955 and 1957. Instead, the Bulgarian Government entertained the diplomatic claim and undertook to discharge it ... In view of these facts, Bulgaria is not entitled now to raise, for the first time, the assertion of a requirement that local remedies be exhausted.¹²¹

ICJ did not, however, have the opportunity to pronounce on this matter.

62. Both the European Court of Human Rights¹²² and the Inter-American Court of Human Rights¹²³ have indicated that a respondent State may be estopped from raising an objection based on non-exhaustion of local remedies when it has failed to raise this objection at the appropriate time.

Anglo-Iranian Oil Co. case (see above), p. 288; arguments by Lebanon in *I.C.J. Pleadings* (see above), pp. 67–70.

¹¹⁸ Kokott, *loc. cit.*, p. 626; Jennings and Watts, *op. cit.*, pp. 525–526; Amerasinghe, *Local Remedies ...*, pp. 268–270 and 272–275.

¹¹⁹ *I.C.J. Reports 1989* (see footnote 46 above), p. 44, para. 54.

¹²⁰ ILR, vol. 102, p. 285, para. 6.33.

¹²¹ *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 326.

¹²² In *Foti and Others*, the Court stated:

“The Court will take cognizance of preliminary objections of this kind [concerning the non-exhaustion of local remedies] in so far as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted; if this condition is not fulfilled, the Government are estopped from raising the objection before the Court*”

((1982), ILR, vol. 71, p. 380, para. 46)

See also *Artico* (1980), *ibid.*, vol. 60, pp. 192–194, paras. 24–27; *Guzzardi, ibid.*, vol. 61, pp. 301–302, para. 67; and *Corigliano* (1982), *ibid.*, vol. 71, p. 403.

¹²³ In *Castillo Petruzzi v. Peru*, the Court stated:

“The Court also indicates that the State did not allege the failure to exhaust domestic remedies before the Commission. By not doing so, it waived a means of defense that the Convention established in its favor and made a tacit admission of the non-existence of such remedies or their timely exhaustion, as has been stated in proceedings before organs of international jurisdiction (such as the European Court which has maintained that objections to inadmissibility should be raised at the initial stage of the proceedings before the Commission, unless it proves impossible to interpose them at the appropriate time for reasons that cannot be attributed to the Government).”

(*Human Rights Law Journal*, vol. 20, Nos. 4–6 (29 October 1999), p. 181, para. 56)

63. The exhaustion of local remedies rule is a rule of customary international law. A respondent State should not therefore be estopped from asserting this rule unless its conduct has clearly led the applicant State to act in a manner detrimental to its interests. This was made clear by an ICJ Chamber in the *ELSI* case when it stated: “[T]here are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.”¹²⁴ ICJ likewise adopted a cautionary approach in the *Interhandel* case, in which it stated that it did

not consider it necessary to dwell upon the assertion of the Swiss Government that “the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts”. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State ... This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were then in progress.¹²⁵

Amerasinghe states the position accurately in declaring:

There must be cogent evidence that the conduct was not only intended to lead the alien or individual to believe that local remedies need not be further exhausted, for whatever reason, but also that the latter could reasonably be expected to rely on that conduct, did rely on it and for that reason did not resort to the local remedies which were available.¹²⁶

7. CONCLUSION

64. While there is support both for implied waiver of local remedies and for estoppel as a rebuttal of an objection based on non-exhaustion of local remedies, it is clear that neither of these obstacles in the way of the application of a customary rule is to be easily accepted. Despite this, it is necessary to acknowledge their possible existence, depending on the language of the relevant instruments and the circumstances and context of the particular case. Hence the proposed exception to the local remedies rule.

¹²⁴ *I.C.J. Reports 1989* (see footnote 46 above), p. 44, para. 54.

¹²⁵ *I.C.J. Reports 1959* (see footnote 25 above), p. 27. See also the separate opinion of Judge Córdova, *ibid.*, pp. 46–47. Cf. the dissenting opinion of Judge Erich in the *Panevezys-Salutiskis* case:

“It may happen that the State to which a claim is presented may be quite prepared to discuss its merits or even prepared to submit the claim to an international tribunal, although no final decision has been rendered by the competent judicial or administrative authority of the country. If in a particular case it appears from the attitude of the government that it waives this condition and that it is so prepared to transfer the claim directly to the international plane, it cannot subsequently retreat from that position”.

(*P.C.I.J.* (see footnote 25 above), p. 52)

¹²⁶ *Local Remedies ...*, p. 273.

C. Voluntary link and territorial connection (art. 14 (c)–(d))

“Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(c) There is no voluntary link between the injured individual and the respondent State;

“(d) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State.”

65. The exceptions to the rule that local remedies must be exhausted contained in subparagraphs (c)–(d) will be considered together, as they are closely related. Although there is support for these rules, the Special Rapporteur doubts whether they are justified, on the ground that other exceptions to the local remedies rule, or general principles of international law, will normally ensure that the local remedies rule is excluded in the circumstances covered in subparagraphs (c)–(d). For this and other reasons the Commission declined to adopt such a rule in 1977 when it considered article 22 in the draft articles on State responsibility (first reading).¹²⁷ The issue does, however, require careful consideration, and for this reason the exceptions in subparagraphs (c)–(d) are presented as possible rules in the event that the Commission elects to adopt provisions on this subject. The arguments for and against these rules are presented in order to provide the Commission with a full picture.

66. Some writers argue that the exhaustion of local remedies rule does not apply where the injured alien has no voluntary link with the respondent State because there is no territorial connection between the individual and the respondent State.¹²⁸

67. In support of this view, it is argued that in all the 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. Thus Meron has stated:

While it is possible to find the broadest formulations of the rule of local remedies, an examination of the precedents reveals the following common basis of facts: In all of them the injured alien has voluntarily established, or may be deemed to have established, either expressly or impliedly, a link with the State whose actions are impugned. Such a link could be established in a variety of ways which it is not necessary to enumerate here exhaustively. It will suffice to refer to the more com-

mon examples. These include cases in which an alien resides, either permanently or temporarily, in the territory of the respondent State, engages there in business, owns there property or enters into contractual relations with the Government of that State. It appears that in all the reported cases which are relevant to the rule of local remedies and in which it was considered necessary that the allegedly wrong-doing State should in the first place be given an opportunity to redress the alleged wrong by means furnished by its own courts, a link of this character did in fact exist.¹²⁹

68. 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 deemed to take the local law as he finds it, including the means afforded for the redress of wrong”,¹³⁰ 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 former Soviet Union, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of aircraft that have accidentally strayed into a State’s airspace (as illustrated by the *Aerial Incident of 27 July 1955* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). According to Meron:

This broadening of the law of State responsibility is an important reason for the re-examination of both the basis and the scope of the rule of local remedies. Surely it would be unreasonable to refer individuals injured by a foreign State outside its territory to its courts as a condition precedent to the institution of international proceedings by the State of which the victim was a national; and this, despite the absence of a genuine link between the injured individual and the respondent State.¹³¹

69. Those who support the adoption of a voluntary link/territorial connection rule emphasize the assumption of risk undertaken by the alien in a foreign State as the basis for the local remedies rule.¹³² 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.

70. There is no clear authority either for or against the requirement of a voluntary link.

1. JUDICIAL DECISIONS

71. Judicial decisions afford little guidance on the subject. In the *Interhandel* case ICJ stated:

¹²⁹ *Loc. cit.*, p. 94.

¹³⁰ Borchard, “Theoretical aspects ...”, p. 240. See also Borchard, *The Diplomatic Protection ...*, p. 817; and Eagleton, *The Responsibility of States in International Law*, p. 96.

¹³¹ *Loc. cit.*, p. 98.

¹³² Brownlie, *op. cit.*, p. 501. Brownlie does, however, indicate that there is an opposing philosophy: “If the major objective is to provide an alternative, relatively more convenient, recourse to that of proceeding on the international plane then no condition as to a link will apply.”

¹²⁷ *Yearbook ... 1977*, vol. II (Part Two), pp. 43–45, paras. 38–42.

¹²⁸ See O’Connell, *op. cit.*, p. 951; Meron, “The incidence of the rule of exhaustion of local remedies”, p. 83; Parry, “Some considerations upon the protection of individuals in international law”, p. 688; Amerasinghe, *Local Remedies ...*, p. 138; Doehring, *loc. cit.*, p. 239; Ipsen, *op. cit.*, p. 312; Herdegen, *loc. cit.*, p. 66; Mummery, *loc. cit.*, p. 394; Head, “A fresh look at the local remedies rule”, p. 153; and Jiménez de Aréchaga, “International responsibility”, p. 583. *Sed contra*, see Geck, “Diplomatic protection”, p. 1056; and Gaja, *L’Esaurimento dei ricorsi interni nel diritto internazionale*, p. 87.

[I]t has been considered necessary that the *State where the violation occurred** should have an opportunity to redress it by its own means.¹³³

72. This dictum which *permits* the territorial State to require local remedies to be exhausted seems to be too small a peg on which to hang a doctrine, as Amerasinghe has sought to do in arguing that it lends support to the view that the wrong must be located in the territory of the delinquent State, from which it would follow “that the person or property must also be located in the delinquent State”.¹³⁴ In the *Salem* 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.”¹³⁵ Again, this trite reformulation of the local remedies rule hardly provides evidence of a rule requiring a voluntary link as a precondition for the local remedies rule.

73. The issue was raised in the *Certain Norwegian Loans* case,¹³⁶ in which France, in arguing that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway, stated:

[T]he only explanation of this rule lies in the requirement that a foreigner in dispute with the State *under whose sovereignty he has chosen to live** may not have his case transferred to the international level without having first exhausted all local means of settlement.¹³⁷

In reply, Norway argued that practice did not support the French thesis, relying on the arbitral awards in the *Finnish Ships Arbitration*¹³⁸ and *Ambatielos*¹³⁹ cases, in which the rule of local remedies was held to be applicable despite the fact that the individual claimants did not reside in the respondent State. ICJ did not find it necessary to go into the question of the exhaustion of local remedies, since the case was decided on other grounds. The only reference to the argument of the parties regarding this issue was made by Judge Read in a dissenting opinion when he stated that “France has not been able to put forward any persuasive authority ... and, indeed, the weight of authority is the other way”.¹⁴⁰

74. The requirement of a voluntary link featured prominently in the argument by Israel in the *Aerial Incident of 27 July 1955* case, in which Israel made a claim for damages from Bulgaria arising from the shooting down of an Israeli civil aircraft that had entered Bulgarian airspace by mistake. Here Mr. Shabtai Rosenne, for Israel, argued:

[I]t is essential, before the rule [of local remedies] can be applied, that a link should exist between the injured individual and the State whose actions are impugned. I submit that all the precedents show that the rule is only applied when the alien, the injured individual, has created, or is deemed to have created, a *voluntary, conscious and deliberate connection** between himself and the foreign State whose actions are

impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there—I believe that that covers the majority of the cases—or by virtue of his having made some contract with the government of that State, such as the cases involving foreign bondholders; and there may be other instances.¹⁴¹

Bulgaria contested the argument by Israel.¹⁴² Again, ICJ did not decide on the matter.¹⁴³

75. In the 1935 *Trail Smelter* case,¹⁴⁴ involving trans-boundary 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 others¹⁴⁵ 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.¹⁴⁶ The failure to insist on the application of the local remedies rule in these cases can, however, be explained on other grounds. The *Trail Smelter* case may, for instance, 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.

76. Opponents of the voluntary link/territorial connection requirement argue that tribunals have accepted the need for the exhaustion of local remedies in cases such as the *Finnish Ships Arbitration*,¹⁴⁷ *Ambatielos*¹⁴⁸ and *ELSI*,¹⁴⁹ where there was no close connection between the injured national and the respondent State. This is a misleading argument, as in all three cases there was some connection with the respondent State in the form of either a contractual relationship (*Ambatielos* and *ELSI*) or physical presence (*Finnish Ships Arbitration*). Proponents of the voluntary link requirement do not equate such a link with residence and have therefore conceded that in the above cases there was sufficient connection between the injured national and the respondent State to make the local remedies rule applicable.¹⁵⁰ If residence were to be a requirement, this would exclude the application of the local remedies rule in cases involving the expropriation of foreign-owned property and contractual transactions where the alien is a non-resident. Today no serious writer supports such a position.

¹⁴¹ Oral pleadings of Israel in the *Aerial Incident of 27 July 1955* case (Israel v. Bulgaria) (see footnote 121 above), pp. 531–532. See also page 590 (*ibid.*).

¹⁴² *Ibid.*, p. 565.

¹⁴³ *Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127.

¹⁴⁴ UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

¹⁴⁵ Case of the “*Virginus*”, reported in Moore, *A Digest of International Law*, vol. II, p. 903; and of the Schooners *Jessie, Thomas F. Bayard and Pescawha*, *American Journal of International Law*, vol. 16 (1922), pp. 114–116.

¹⁴⁶ Law, *op. cit.*, p. 104; Meron, *loc. cit.*, p. 98, footnote 2.

¹⁴⁷ See footnote 24 above.

¹⁴⁸ See footnote 25 above.

¹⁴⁹ *I.C.J. Reports 1959* (footnote 46 above), p. 42, para. 50.

¹⁵⁰ See Meron, *loc. cit.*, pp. 99–100; and Amerasinghe, *Local Remedies* ..., p. 144.

¹³³ *I.C.J. Reports 1959* (see footnote 25 above), p. 27.

¹³⁴ *Local Remedies* ..., p. 145.

¹³⁵ UNRIAA (see footnote 96 above), p. 1202.

¹³⁶ See footnote 55 above.

¹³⁷ *I.C.J. Pleadings, Certain Norwegian Loans*, Vol. I (France v. Norway) (1955), p. 409 (quoted in Mr. Ago’s sixth report, *Yearbook ... 1977* (see footnote 86), p. 38, para. 98).

¹³⁸ See footnote 24 above.

¹³⁹ See footnote 25 above.

¹⁴⁰ *I.C.J. Reports 1957* (see footnote 55 above), p. 97.

2. STATE PRACTICE

77. State practice is likewise unclear. In early British practice it was asserted that where an alien suffered injury on the high seas, as a result of the seizure or capture of a vessel, it was necessary for local remedies to be exhausted in the seizing or capturing State.¹⁵¹ Amerasinghe rightly doubts whether this practice would be recognized today.¹⁵² Certainly there is no mention of this practice, or indeed of any requirement for a voluntary link, in the most recent British practice rules.¹⁵³

78. United States practice was initially very different. In 1834, the Secretary of State, Mr. McLane, stated that local remedies had to be exhausted by United States citizens in the State “in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide”.¹⁵⁴ Whether this remains the position of the United States is unclear. *Restatement of the Law Third of the Foreign Relations Law of the United States* is silent on the need for a voluntary link as a precondition for the local remedies rule.¹⁵⁵

79. 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 Cathay Pacific airliner in 1954.¹⁵⁶ 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.¹⁵⁷ Most recently, 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.¹⁵⁸

80. 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.¹⁵⁹ Article XI of the Convention on international lia-

¹⁵¹ See McNair, *International Law Opinions*, p. 302.

¹⁵² *Local Remedies ...*, p. 143.

¹⁵³ See Warbrick, *loc. cit.*

¹⁵⁴ Moore, *A Digest of International Law*, vol. VI, p. 658.

¹⁵⁵ *Restatement of the Law Third ...* (see footnote 27 above), p. 348, para. 902 (k); p. 219, para. 713 (f); and pp. 225–226, para. 713, reporters' note 5.

¹⁵⁶ This incident is described in Law, *op. cit.*, p. 104.

¹⁵⁷ See *I.C.J. Pleadings, Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Vol. II, preliminary objections submitted by the United States, part I, chap. III, sect. I, pp. 46–50.

¹⁵⁸ *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, *I.C.J. Reports 2000*, p. 12; see also ILM, vol. 39 (2000), p. 1116.

¹⁵⁹ See the Agreement between the United States and Canada (footnote 93 above), p. 141; and the report of the agent of the United States before the Lake Ontario Claims Tribunal, reproduced in ILM, vol. VIII, No. 1 (January 1969), p. 118. The attitude of Canada may also be explained by the fact that the Canadian courts declared that they did not have jurisdiction over the relevant cases (*ibid.*, vol. 4 (1965), p. 475).

bility for damage caused by space objects provides further support for this view:

1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.¹⁶⁰

Writers have convincingly argued that the extension of the law of State responsibility to transboundary environmental harm requires a reconsideration of the applicability of the local remedies rule.¹⁶¹

3. CODIFICATION PROPOSALS

81. Early codification proposals were concerned with expounding the principles of State responsibility for damage done in its territory to the person or property of foreigners.¹⁶² Hence no attention was paid to the question of responsibility where the alien was outside the territory of the respondent State. The draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961 not only does not include the territorial voluntary link requirement in the relevant article (art. 19), but in its commentary explicitly states that the draft convention

has not adopted the view that the exhaustion of local remedies should be dispensed with when the requirement would cause hardship to the claimant ... Recourse to local remedies may be burdensome when the injured alien has no real connection with the State which is responsible for the injury, as in the case in which the alien is merely passing through

¹⁶⁰ This Convention was invoked by Canada in 1979 when a Soviet satellite powered by a small nuclear reactor broke up over Canada and crashed in its North-West Territories. The Soviet Union agreed to pay compensation of Can\$ 3 million to Canada (ILM, vol. 18 (1979), p. 899; and vol. 20 (1981), p. 689). In this case Canada made a direct claim as there was no injury to Canadian nationals or to private property.

¹⁶¹ According to Hoffman:

“While not yet recognised as a principle of international law, the ‘link theory’ appears to be gaining currency and would seem an important development in the law of State responsibility as the application of law broadens to include environmental matters”. (“State responsibility in international law and transboundary pollution injuries”, pp. 540–541)

See also Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, pp. 123–124 and 154; Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, p. 219; Jiménez de Aréchaga, “International law ...”, p. 296; and Schachter, “International law in theory and practice”, p. 203. See further Mr. Julio Barboza’s sixth report on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1, p. 109 (art. 28). See also the report of the Working Group of the Commission on this issue in *Yearbook ... 1978*, vol. II (Part Two), p. 151, para. 15.

¹⁶² See the bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), *Yearbook ... 1956* (footnote 14 above), annex 2, p. 223; the draft convention on “responsibility of States for damage done in their territory to the person or property of foreigners” prepared by Harvard Law School (1929), *ibid.*, annex 9, p. 229; and Mr. García Amador’s second report on international responsibility, *Yearbook ... 1957*, vol. II, p. 104, document A/CN.4/106.

the territory of the State concerned. If he is to make effective use of local remedies, he may have to travel a great distance from his place of residence to the State in which the injury took place. *Although such an exception to the usual rule might be desirable, it finds no support in the decided cases**.¹⁶³

82. The Commission considered this issue when it adopted article 22 of the draft articles on State responsibility on first reading.¹⁶⁴ In so doing it rejected a proposal that the local remedies rule should be excluded in the absence of a territorial connection or voluntary link¹⁶⁵ and decided that as neither State practice nor judicial decisions provided “any explicit statements of position concerning the applicability or non-applicability of the condition of the exhaustion of local remedies to cases in which injury to foreign individuals or to their property has been caused *outside the territory of the State*”,¹⁶⁶ it was therefore best “to leave the problem of the applicability of the principle of the exhaustion of local remedies to cases of injury caused by a State to aliens outside its territory, and to similar cases, to be solved by State practice according to the best criteria available”.¹⁶⁷

4. CONCLUSION

83. Judicial decisions and State practice have not yet adequately addressed the question of the applicability of the local remedies rule in the absence of a voluntary link or territorial connection. There is clearly substance in the arguments raised by the advocates of such an exception to the local remedies rule. It is unreasonable, impractical and unfair that an injured alien should be required to exhaust local remedies in hardship cases of the following kind:

(a) Transboundary environment law harm caused by pollution, radioactive fallout or man-made space objects;

(b) The shooting down of aircraft outside the territory of the respondent State or of aircraft that have accidentally entered its airspace;

(c) The killing of a national of State A by a soldier of State B stationed on the territory of State A;

(d) The transboundary abduction of a foreign national from either the national's home State or a third state by agents of the respondent State.

The question that must be addressed is whether instances of this kind require a special rule exempting them from the reach of the local remedies rule or whether such cases are covered by existing rules or general principles of international law.

¹⁶³ Sohn and Baxter's commentary cited in Whiteman, *op. cit.*, pp. 793–794.

¹⁶⁴ *Yearbook ... 1977*, vol. II (Part Two), pp. 43–45, paras. (38)–(42) of the commentary to article 22.

¹⁶⁵ *Ibid.*, p. 44, para. (40).

¹⁶⁶ *Ibid.*, p. 43, para. (38).

¹⁶⁷ *Ibid.*, p. 44, para. (40).

84. Before this question is addressed, it must be emphasized that in many of these cases there will be a direct injury to the national State of the injured individual in addition to the injury to the individual. If the preponderance rule proposed in draft article 11 is followed, the exhaustion of local remedies will be inapplicable in many such cases. Transboundary environmental harm will in most cases be characterized as direct injury, as illustrated by the *Trail Smelter* case.¹⁶⁸ So too will the shooting down of a foreign aircraft; as Israel persuasively argued in the *Aerial Incident of 27 July 1955* between Israel and Bulgaria.¹⁶⁹ Abductions, too, constitute a direct injury to the State in which the abduction originated and whose territorial sovereignty has been violated.

85. Where the claimant State prefers not to bring a direct claim or where the injury to the national outweighs the injury to the State, it seems that in most instances the local remedies rule will not apply because there will be no available or effective remedy in the respondent State, or any such remedy would be futile. It was largely for this reason that the Commission declined to adopt a special rule on the voluntary link.¹⁷⁰ A similar view is advanced by Kokott in her report of 2000 to the Committee on Diplomatic Protection of Persons and Property of the International Law Association.¹⁷¹

86. The suggestion that the requirement of an effective remedy may overcome hardship or injustice in such a case was repudiated by Jiménez de Aréchaga:

It is possible, however, that a person hurt in his own territory by a soldier from another State or by a space object may find effective remedies in the other State: yet it would be unequitable and impose an undue hardship to require him to attempt those remedies in the foreign State. This shows that the effectiveness of a remedy is not a sufficient reason to make it obligatory or to dispense with it. The preferable solution in

¹⁶⁸ See footnote 144 above.

¹⁶⁹ See footnote 143 above. Israel's argument is clearly expounded by Meron, *loc. cit.*, pp. 92–94.

¹⁷⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 44, para. (39). In his sixth report on State responsibility, *ibid.*, (Part One) (see footnote 86 above), p. 39, para. 100, Mr. Ago elaborated on this theme:

“[I]t would seem to us more consistent with the reason for the existence of the principle of exhaustion of local remedies, and with the logic of that principle, to provide, in a form to be worked out, that the collaboration of individuals should not always be required in order to set in motion machinery enabling the State to redress, by a new course of conduct, a situation which is contrary to the result internationally required of it and which has been brought about by its original conduct. Such a provision would apply, for example, in the case of injury caused to a foreigner brought into the territory of a State, or conveyed in transit by air or over land, against his will. *It might be found in fact that the burdens that would otherwise devolve upon such an individual would be too heavy to be justified.** However, even without expressly providing for an exception which might compromise the soundness of the principle, would it not be possible to regard these few extreme cases as covered by the general requirement that local remedies should be *effective*, that requirement being understood to include the further requirement that such remedies should also be effectively usable, in the cases submitted, by the individuals concerned?”

¹⁷¹ *Loc. cit.*, pp. 614–615. See also Geck, *loc. cit.*, p. 1056.

those cases may be to make the use of local remedies optional instead of obligatory, at the choice of the injured person.¹⁷²

87. A general principle of law that would make the local remedies rule inapplicable in such cases is that of *ex injuria jus non oritur*. As Meron observes: “[A]ccording to general principles of law, it would be very strange indeed if a State which interfered illegally with an alien, who did not—except for that interference—have any connexion with it, should be allowed to derive any advantage from its illegal acts.”¹⁷³

88. Jurisdictional rules may also preclude the application of the local remedies rule in the hardship cases mentioned above. Although a State has wide extraterritorial jurisdiction, there are circumstances in which the exercise of jurisdiction will constitute an abuse or excess of jurisdiction rendering the rule inapplicable. This is emphasized by O’Connell:

The point is better put by emphasising that the issue for trial when the injury occurs extraterritorially is whether or not the State is guilty of excess jurisdiction, and this is a question of international law best left to an international tribunal, whereas the issue for trial when the injury occurs intraterritorially is the nature of the injury done and whether any wrong has in fact been occasioned which international law requires municipal law to remedy. In other words, in the case of extraterritorial injury the question before an international tribunal is whether the State, by its actions, has breached international law, but in the case of intraterritorial injury it is whether the State has done so by its failure to remedy the injury. The difference between the two cases is that in the one the event has occurred outside the jurisdiction of the municipal courts, which are thus incompetent to compel evidence and proceed to adjudication.¹⁷⁴

89. It is clearly necessary to give special consideration to the applicability of the local remedies rules in cases where there is no voluntary link or territorial connection between the injured alien and the respondent State. Whether there is a need for a special exception in the present draft articles is uncertain. The existing exceptions to the local remedies rule *may* cover most of the “hardship cases” described in paragraph 83 above, but the Commission may decide that stronger and more explicit protection

¹⁷² “International law ...”, pp. 296–297. See also Schachter, *loc. cit.*, p. 203; Law, *op. cit.*, p. 104; and Lefeber, *op. cit.*, pp. 123 and 154. This approach was supported, among others, by the Commission’s Working Group on international liability for injurious consequences arising out of acts not prohibited by international law in 1978 in the following terms:

“It may be noted that obligations of the kind now being considered are different from those that a State owes in respect of aliens who have chosen to place themselves or their property within that State’s territory. In the situations that fall within the present topic, there is no presumption of willingness to accept risks or harmful consequences because they are tolerated within the territory or control of the State in which those risks or harmful consequences arise. There is also no requirement to seek an effective remedy offered by municipal law—unless, indeed, there is an applicable régime, accepted by the States concerned, that does impose such a requirement.”

(*Yearbook ... 1978*, vol. II (Part Two), p. 151, para. 15)

See also ECE, Guidelines on responsibility and liability regarding transboundary water pollution (ENVWA/R.45), annex, para. 22.

¹⁷³ *Loc. cit.*, p. 96. To the same effect, see Jiménez de Aréchaga, “International law ...”, p. 296; Head, *loc. cit.*, p. 153; and Amerasinghe, *Local Remedies ...*, p. 146.

¹⁷⁴ O’Connell, *op. cit.*, p. 951. See also Herdegen, *loc. cit.*, pp. 66–67; the *Interhandel* case (footnote 25 above), p. 27; and Amerasinghe, *Local Remedies ...*, pp. 144–145. *Sed contra* Jennings, “General course on principles of international law”, p. 485.

is needed. The Special Rapporteur’s tentative conclusion is that such a provision is unnecessary, but he would certainly not oppose such a provision if the Commission so decided.

D. Undue delay (art. 14 (e))

“Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(e) The respondent State is responsible for undue delay in providing a local remedy.”

90. 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 providing a local remedy is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion.

1. CODIFICATION

91. The bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law contained a rule in basis of discussion No. 27 on the exhaustion of local remedies. According to that proposal, the local remedies rule could not preclude the application of basis of discussion No. 5, which provided, *inter alia*, that:

A State is responsible for damage suffered by a foreigner as the result of the fact that:

...

3. There has been *unconscionable delay** on the part of the courts.¹⁷⁵

92. A similar provision was adopted by the Third Committee of the Conference for the Codification of International Law. This rule excused compliance with the exhaustion of local remedies rule in cases of denial of justice, and cited “unjustifiable ... delays implying a refusal to do justice” as an example.¹⁷⁶ The text of the draft convention prepared by Harvard Law School established the responsibility of a State, without the requirement of exhausting local remedies, for denial of justice, including “unwarranted delay”.¹⁷⁷

93. In 1933, the Seventh International Conference of American States, held in Montevideo, considered “unreasonable delay” as an exception to the local remedies rule, but stated that this should be “interpreted restrictively, that is, in favor of the sovereignty of the State in which the difference may have arisen”.¹⁷⁸

¹⁷⁵ *Yearbook ... 1956* (see footnote 14 above), p. 223, annex 2.

¹⁷⁶ *Ibid.*, p. 226, annex 3 (art. 9, para. (2)).

¹⁷⁷ *Ibid.*, p. 229, annex 9 (art. 9). To be compared to articles 7–8 and 10–12, all of which require the exhaustion of local remedies, as a precondition to the establishment of State responsibility.

¹⁷⁸ *Ibid.*, p. 226, annex 6, para. 3 of the resolution on international

94. The 1961 draft convention on the international responsibility of States for injuries to aliens prepared by Harvard Law School contained the following proposal:

Local remedies shall be considered as not available for the purposes of this Convention:

...

(c) if only excessively slow remedies are available or justice is unreasonably delayed.¹⁷⁹

95. Mr. García Amador did not include undue delay as an exception to the local remedies rule, even in the context of denial of justice.¹⁸⁰ Mr. Ago acknowledged that undue delay might lead to the conclusion that local remedies were ineffective,¹⁸¹ but failed to propose this as a special exception in the local remedies rule in article 22. In her report on the exhaustion of local remedies to the Committee on Diplomatic Protection of Persons and Property of the International Law Association, Kokott likewise considered “unreasonably prolonged proceedings”¹⁸² as an exception to the local remedies rule but did not suggest a separate provision on this exception in her proposed draft articles.

2. HUMAN RIGHTS INSTRUMENTS AND PRACTICE

96. Several human rights conventions expressly exclude the need for the exhaustion of local remedies where their application has been “unreasonably prolonged”.¹⁸³ The jurisprudence of the monitoring bodies of these conventions endorses this exception.¹⁸⁴

3. JUDICIAL DECISIONS

97. Judicial decisions give some support to “undue delay” as an exception to the local remedies rule. In the *El Oro Mining* case the British-Mexican Claims Commission held that “nine years by far exceeds the limit of the most liberal allowance that may be made”.¹⁸⁵ It therefore considered the remedies to be ineffective and their exhaustion excused. ICJ did not, however, consider 10 years of litigation sufficient to dispense with the need to exhaust

responsibility of the State.

¹⁷⁹ Art. 19, para. 2. Reproduced in Sohn and Baxter, *loc. cit.*, p. 577.

¹⁸⁰ *Yearbook ... 1961* (footnote 39 above), pp. 46–448, arts. 3 and 18, para. 2.

¹⁸¹ *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. (50), footnote 204.

¹⁸² *Loc. cit.*, p. 623.

¹⁸³ International Covenant on Civil and Political Rights (art. 41, para. 1 (c)); see also the American Convention on Human Rights: “Pact of San José, Costa Rica” (art. 46, para. 2 (c)).

¹⁸⁴ *Weinberger v. Uruguay*, communication 28/1978, Human Rights Committee, *Selected Decisions under the Optional Protocol* (United Nations publication, Sales No. E.84.XIV.2), p. 59, para. 11; *Las Palmeras* case, Preliminary Objections, Judgment of 4 February 2000, Inter-American Court of Human Rights, *Series C: Decisions and Judgments*, No. 67, p. 64, para. 38; *Erdoğan v. Turkey*, application No. 19807/92, decision of 16 January 1996, European Commission of Human Rights, *Decisions and Reports*, vol. 84–A, pp. 15–16; Amerasinghe, *Local Remedies ...*, pp. 203–206; Kokott, *loc. cit.*, p. 623.

¹⁸⁵ *El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States* (1931), UNRIAA, vol. V (Sales No. 1952.V.3), p. 198. See also *Prince von Pless Administration, Order of 4 February 1933*, P.C.I.J., *Series A/B*, No. 52, p. 16.

local remedies in the *Interhandel* case.¹⁸⁶ This aspect of the decision was criticized by Judge Armond-Ugon, who, in a dissenting opinion, held that, as a final decision was not in sight after 10 years of litigation, the available remedies were too slow and hence ineffective.¹⁸⁷ In this case the Court did not reject the possibility that undue delay might lead to the relaxation of the local remedies rule. It simply did not consider 10 years as sufficient time to dispense with the rule *in this specific case*, particularly as *Interhandel*’s failure to produce some of the necessary documentation had contributed to the delay.¹⁸⁸

4. ACADEMIC OPINION

98. While academic opinion is generally supportive of such an exception,¹⁸⁹ there is an awareness of the difficulty attached to giving an objective content or meaning to “undue delay”. Each case must be judged on its own facts. As Amerasinghe states:

The circumstances of each case would certainly be a determining factor. Much would depend on the judicial assessment of the situation in each case... Clearly such matters as the nature of the wrong would be relevant, it being easier, for instance, to prescribe shorter time-limits for violations of personal and civil rights than for injuries to property. The nature of the claimant may also be a pertinent factor, injuries to large corporations, which may give rise to more complicated cases than injuries to individuals, being subject to longer time-limits than injuries to individuals. In the ultimate analysis such considerations can only provide guidelines, there being no hard and fast rules defining undue delays.¹⁹⁰

99. This exception to the exhaustion of local remedies rule might be accommodated in the exception contained in article 14 (a), as a component of futility. There are, however, good reasons for recognizing this as a separate exception. Court proceedings are notoriously slow. Such an exception would serve notice on States that they stand to lose the advantages of the local remedies rule if they unduly prolong domestic proceedings in the hope that the day of reckoning before an international tribunal will be delayed.

E. Denial of access (art. 14 (f))

“Article 14

“Local remedies do not need to be exhausted where:

“...
 ...
 ...

¹⁸⁶ *I.C.J. Reports 1959* (see footnote 25 above), p. 6.

¹⁸⁷ *Ibid.*, p. 87.

¹⁸⁸ *Local Remedies ...*, p. 203.

¹⁸⁹ See, for example, Brownlie, *op. cit.*, pp. 505–506; Doehring, *loc. cit.*, p. 239; Schwarzenberger, *op. cit.*, pp. 620 and 622 (mentioned in the context of denial of justice); Cançado Trindade, *op. cit.*, p. 79; Jiménez de Aréchaga, “International law ...”, p. 294, and “International responsibility”, p. 589; and Mummery, *loc. cit.*, p. 403.

¹⁹⁰ Amerasinghe, *Local Remedies ...*, pp. 205–206. In the *El Oro Mining* case, the British-Mexican Claims Commission stated:

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

(UNRIAA (see footnote 185 above), p. 198)

“(f) The respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.”

100. A State may prevent an injured alien from gaining factual access to its tribunals by, for instance, denying the alien entry to its territory or by exposing the alien to dangers that make it unsafe for the latter to seek entry to its territory. Foreigners determined to assert their rights against a State are seldom welcome visitors. It is not uncommon, therefore, for such a State to exercise its undoubted right to deny entry to foreigners or to make it clear to them that if they enter the State’s territory their safety cannot be guaranteed. Factual denial of access to local remedies may possibly be covered by article 14 (a), but it is probably better to recognize this type of case as a special exception to the local remedies rule, as the remedy may in theory be both available and effective, but will in practice be inaccessible.

101. There is no clear support in State practice, jurisprudence or doctrine for treating this type of situation as a separate exception to the local remedies rule. In her report to the Committee on Diplomatic Protection of Persons and Property of the International Law Association,

Kokott had, however, proposed an exception to the local remedies rule where “the claimant is factually prevented from access to existing remedies”.¹⁹¹ In support of this proposal she states:

Futility for factual reasons particularly includes the case of danger for life or limb to the applicant in the country where he would have to pursue the remedy. This can be due to a “general atmosphere of hostility” towards the nationals of other countries or it can be based on dangers regarding the alien in particular or a group of persons, provided those dangers are satisfactorily established. Other examples of factual futility are cases of obstructions and hindrances, denials of justice to the effect that the alien is denied access to courts, due to a practice or policy ordered or tolerated by the state.¹⁹²

Kokott’s proposal has its source in human rights jurisprudence,¹⁹³ but there is no good reason why it should not be extended, by way of progressive development, to the general principles of law governing the exhaustion of local remedies.

¹⁹¹ *Loc. cit.*, p. 630.

¹⁹² *Ibid.*, pp. 624–625. See also Doehring, *loc. cit.*, pp. 239–240.

¹⁹³ *Loc. cit.*, pp. 624–625, footnotes 86–91; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, European Court of Human Rights, *Reports of Judgments and Decisions* 1996-IV, p. 1213, para. 73.

CHAPTER II

Burden of proof

“Article 15

“1. The claimant and respondent States share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.

“2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:

“(a) The burden of proof is on the respondent State to prove that the international claim is one to which the exhaustion of local remedies rule applies and that the available local remedies have not been exhausted;

“(b) The burden of proof is on the claimant State to prove any of the exceptions referred to in article 14 or to prove that the claim concerns direct injury to the State itself.”

102. The burden of proof in international litigation relates to what must be proved and which party must prove it. There are no clear and detailed rules on the burden of proof in international law of the kind found in many national legal systems.¹⁹⁴ It is, however, generally accepted that the burden of proof is on the party which makes an assertion: *onus probandi incumbit ei qui dicit*. This may be either the plaintiff (*onus probandi actori incumbit*) or the defendant (*reus in exceptione fit actor*),

as the burden of proof may shift during the course of the proceedings, depending on how parties formulate their assertions or propositions of law.¹⁹⁵ This practical,¹⁹⁶ rather than technical or formalistic, approach to the burden of proof applies to litigation involving the exhaustion of local remedies.

103. Previous attempts at codification of the local remedies rule have not sought to formulate a rule on this subject. However, in her report to the Committee on Diplomatic Protection of Persons and Property of the International Law Association, Kokott had suggested the following rule on burden of proof:

¹⁹⁵ Ripert, “Les règles du droit civil applicables aux rapports internationaux”, p. 646. See also Guggenheim, *Traité de droit international public*, p. 81; Cheng, “Burden of proof before the I.C.J.”, p. 596; Law, *op. cit.*, p. 55; Fawcett, *The Application of the European Convention on Human Rights*, p. 289; Sereni, *Principi generali di diritto e processo internazionale*, pp. 30, 40, 76 and 90; Chappetz, *La règle de l’épuisement des voies de recours internes*, pp. 234–237; Amerasinghe, *Local Remedies ...*, pp. 277–283; Cançado Trindade, *op. cit.*, pp. 134–136 and 169; *Yearbook ... 1958*, vol. II, p. 1, document A/CN.4/113, draft on arbitral procedure adopted by the Commission at its fifth session: report by Georges Scelle, Special Rapporteur (see especially article 21, pp. 9 and 14); *I.C.J. Pleadings, Interhandel* (Switzerland v. United States of America), submission by Switzerland (1958), pp. 562–563. *Sed contra* Robertson, “Exhaustion of local remedies in international human rights litigation: the burden of proof reconsidered”, pp. 191–193 and 196, who distinguishes between legal burden of proof and evidential burden of proof and claims that, with regard to the first, the burden remains with one party (i.e. the claimant).

¹⁹⁶ Gaja, *op. cit.*, pp. 227–231.

¹⁹⁴ See *William A. Parker (U.S.A.) v. United Mexican States* (1926), UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 39–40.

1. The claimant has to prove that he exhausted the local remedies, or
2. that he was exempted from doing so.
3. The host state has to prove that (further) remedies existed which were not exhausted.¹⁹⁷

104. There is a substantial body of jurisprudence on burden of proof to be found in the practice of human rights monitoring bodies.¹⁹⁸ Decisions of the European Court of Human Rights indicate that the initial burden is on the applicant to demonstrate in his application with a reasonable degree of certainty that he has exhausted the local remedies provided by the host State. If the respondent State then claims that local remedies have not been exhausted, the burden of proof shifts to the respondent to satisfy the Court that there was an effective remedy available to the applicant which was capable of providing redress. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or that there were exceptional circumstances that absolved him from exhausting such remedies.¹⁹⁹

105. The applicability of these principles to general international law is limited, as the sequence in which the allegations need to be proved is influenced by the fact that “human rights conventions normally stipulate that an application is considered in substance by the relevant supervisory organ only if the latter is satisfied that the local remedies have been exhausted the way the convention requires”.²⁰⁰ Moreover, human rights bodies may examine compliance with the rule of exhaustion of local remedies *ex officio/proprío motu*, even in the absence of any objection by the respondent.²⁰¹

106. Arbitral and judicial decisions do not offer much clarity on the issue. While some arbitral tribunals have held that the burden should be on the claimant to prove that it has exhausted local remedies or that one of the exceptions to the rule applies,²⁰² others, assuming the ineffectiveness of the remedies from the circumstances of the case, have placed the burden on the respondent to prove the existence of local remedies which have not been exhausted.²⁰³ The issue was addressed in the *Panevezys-*

Saldutiskis Railway case, the *Finnish Ships Arbitration*, the *Ambatielos* claim and the *ELSI* case and was raised in the pleadings in the *Aerial Incident of 27 July 1955* (Israel v. Bulgaria) case and the *Certain Norwegian Loans* case (in which Sir Hersch Lauterpacht delivered an important separate opinion on the subject).

107. In the *Panevezys-Saldutiskis Railway* case, the applicant, Estonia, claimed that the rule of exhaustion of local remedies did not apply on the ground that the Lithuanian courts could not entertain the suit because the highest court of Lithuania had already given a decision on the subject unfavourable to the applicant. Referring to these issues, PCIJ stated:

If either of these points could be substantiated, the Court would be bound to overrule the second Lithuanian objection [concerning non-exhaustion of local remedies].

...

Until it has been clearly shown that the Lithuanian courts have no jurisdiction to entertain a suit by the Esimene Company as to its title to the Panevezys-Saldutiskis railway, the Court cannot accept the contention of the Estonian Agent that the rule as to the exhaustion of local remedies does not apply in this case because Lithuanian law affords no means of redress.²⁰⁴

These passages suggest that once the respondent has raised the objection that local remedies have not been exhausted, the burden lies on the applicant to prove that an exception to the local remedies rule is applicable.

108. In the *Finnish Ships Arbitration*, Arbitrator Bagge held that the local remedies rule “can bear only on the contentions of fact and propositions of law put forward by the claimant Government in the international procedure and that the opportunity of ‘doing justice in its own way’ ought to refer only to a claim based upon these contentions”.²⁰⁵ This unclear reasoning has been liberally interpreted by Law as placing “the burden of proof on the state bringing the case to the tribunal, for it refers to the exclusive reliance on the contentions brought by that state, which, if justified, would mean that local remedies are either non-existent or already exhausted”.²⁰⁶

109. The *Ambatielos* case takes a different approach in suggesting that the initial burden of proof is on the respondent State to prove that there were effective remedies that were available which had not been exhausted.²⁰⁷

In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule.²⁰⁸

¹⁹⁷ Kokott, *loc. cit.*, p. 630.

¹⁹⁸ Kokott, *The Burden of Proof in Comparative and International Human Rights Law*; Amerasinghe, *Local Remedies* ..., pp. 291–297; Cançado Trindade, *op. cit.*, pp. 143–171; Robertson, *loc. cit.*; *Velásquez Rodríguez* case (see footnote 71 above), p. 305, paras. 59–60; *Akdivar and Others v. Turkey* (see footnote 193 above), p. 1211, para. 68.

¹⁹⁹ See *Foti and Others* (footnote 122 above), pp. 380–382; and *Selmouni v. France*, application No. 25803/94, judgment of 28 July 1999 (the Netherlands intervening), European Court of Human Rights, *Reports of Judgments and Decisions* 1999–V pp. 175–176, para. 76.

²⁰⁰ Kokott, *loc. cit.*, p. 628.

²⁰¹ Cançado Trindade, *op. cit.*, pp. 153–157.

²⁰² *Adolph G. Studer (United States) v. Great Britain* (1925), UNRIAA, vol. VI (Sales No. 1955.V.3), p. 153; *La Guaira Electric Light and Power Co. case* (1903–1905), *ibid.*, vol. IX (Sales No. 1959.V.5), p. 243; *Napier* case, Moore, *History and Digest* ..., vol. III, p. 3154.

²⁰³ See *John Gill (Great Britain) v. United Mexican States* (1931), UNRIAA, vol. V (Sales No. 1952.V.3), p. 157; also in Lauterpacht, ed., *Annual Digest* ..., pp. 203–204; *Affaire des Forêts du Rhodope* (footnote 65 above); *Arbitration under article 181 of the Treaty of*

Neuilly in Lauterpacht, ed., *Annual Digest* ..., p. 94, and *American Journal of International Law* (footnote 65 above); and the *Brown* claim (footnote 24 above). See also Judge Tanaka’s separate opinion in *Barcelona Traction* (footnote 39 above), pp. 145–147.

²⁰⁴ *P.C.I.J.* (see footnote 25 above), pp. 18–19.

²⁰⁵ UNRIAA (see footnote 24 above), p. 1502.

²⁰⁶ Law, *op. cit.*, p. 56.

²⁰⁷ *Ibid.*, pp. 56–57.

²⁰⁸ UNRIAA (see footnote 25 above), p. 119.

110. The *ELSI* case likewise provides authority for the proposition that the burden of proof is on the respondent State to prove the existence of an available remedy that had not been exhausted:

With such a deal of litigation in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted. This burden Italy never sought to deny.

...

In the present case, however, it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.

It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been “exhausted”. But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of *ELSI*, and of *ELSI*’s trustee in bankruptcy, ought to have pursued and exhausted.²⁰⁹

111. In the *Aerial Incident of 27 July 1955* case, counsel for the respondent, Bulgaria, argued that once the respondent had shown that its courts were open and available to foreigners, it was incumbent on the applicant, Israel, to prove that these remedies were non-existent or ineffective.²¹⁰

112. The burden of proof featured prominently in the pleadings of the *Certain Norwegian Loans* case, but ICJ was not required to decide on this subject. France argued that it was not incumbent on the French Government, as applicant/claimant, to prove the futility of Norwegian local remedies. On the contrary, it was for Norway to prove “the utility of recourse to its judicial organization”.²¹¹ In reply, Norway argued that there was a rule of international law obliging the claimant to exhaust local remedies before submitting the case to the Court:

If the French Government maintains that the principle is not applicable, it has the onus of establishing the reason why that is the case.²¹²

Accordingly, it is not for the Norwegian Government to prove that the means of recourse open to the French title holders under its domestic law offer the latter sufficient possibilities to ensure that the rule of prior exhaustion may not be set aside. The Government of the Republic has the onus of proving the opposite.²¹³

Subsequently, Norway conceded that the respondent was required to prove the existence of domestic remedies, but claimed that the ineffectiveness of such remedies was to be proved by the applicant:

Once the *existence* of local remedies has been established, the rule of prior exhaustion comes into play. And if the applicant State wishes to avoid the consequences of that rule, it has the onus of proving that the rule does not apply *by reason of the ineffectiveness of existing remedies*.²¹⁴

²⁰⁹ *I.C.J. Reports 1989* (see footnote 46 above), pp. 46–48, paras. 59 and 62–63.

²¹⁰ *I.C.J. Pleadings* (see footnote 121 above), pp. 559 and 565–566.

²¹¹ *I.C.J. Pleadings, Certain Norwegian Loans* (see footnote 137 above), p. 184.

²¹² *Ibid.*, p. 280, para. 110.

²¹³ *Ibid.*, p. 281, para. 114.

²¹⁴ *Ibid.*, Vol. II, p. 162. See also page 161.

In response, France argued that there was an obligation on parties to collaborate in the presentation of evidence and that Norway could not simply allege that its courts were impartial. In addition, it was required to prove, in the light of the legislation that had led to the dispute, and which appeared to exclude the competence of local courts, that there was a reasonable prospect of redress before Norway’s courts.²¹⁵

113. In his separate opinion in the *Certain Norwegian Loans* case, Sir Hersch Lauterpacht proposed the following scheme:

(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting.²¹⁶

While some authors have given uncritical support to Lauterpacht’s formulation,²¹⁷ it must not be forgotten that it was intended to apply to the facts before ICJ—that is, Norwegian legislation that *ex facie* seemed to render recourse to local remedies a futile exercise. Lauterpacht’s exposition therefore “does not seem to be open to generalisation”.²¹⁸

114. The burden of proving the effectiveness or ineffectiveness of local remedies has featured prominently in the literature, but the circumstances giving rise to the claim of ineffectiveness will differ from case to case. In one case, the ineffectiveness of the local remedy may be apparent—as when there is legislation depriving the local courts of competence to hear the matter in question. In another case, the ineffectiveness of the local remedy may be less obvious—where, for instance, it is alleged that the courts are biased or under the control of the executive. In the former case, ineffectiveness may be presumed until rebutted by the respondent State, whereas in the latter it will be incumbent on the claimant State to prove its assertion.²¹⁹ This all points in the direction of a need for flexibility in the approach to the burden of proof.

115. Writers on the subject of burden of proof have generally been careful not to expound a detailed set of rules and sub-rules that will cover all situations.²²⁰ While scholars have thoroughly analysed the available author-

²¹⁵ *Ibid.*, pp. 187–188.

²¹⁶ *I.C.J. Reports 1957* (see footnote 55 above), p. 39.

²¹⁷ Head, *loc. cit.*, p. 155; O’Connell, *op. cit.*, p. 1058.

²¹⁸ Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals*, p. 57.

²¹⁹ Brownlie, *op. cit.*, p. 500; Law, *op. cit.*, pp. 57–58.

²²⁰ Amerasinghe writes:

“The subject is, however, nebulous at present in certain of its aspects, because it has not been considered judicially with any completeness. Since the burden of proof is a matter pertaining to litigation, the importance of judicial precedent relating to it cannot be underestimated. Significantly, therefore, although text writers agree that there is a distribution of the burden of proof, it is neither possible nor desirable to lay down any specific rules for such distribution beyond those already established and referred to above.”

(*Local Remedies ...*, pp. 287–288)

ities, few venture beyond the generalization of Jiménez de Aréchaga that:

The State which objects to a claim by invoking the local remedies rule has to prove the existence of a remedy which has not been used. If the claimant State replies that an existing remedy is ineffectual or inadequate in the circumstances of the case, this State has to prove the correctness of such an allegation.²²¹

116. The burden of proof is largely dependent on the division of roles in the litigation (i.e. which party raises what issue), which, in turn, is largely dependent on the circumstances of the case. For instance, if the case is brought to an arbitral tribunal by both parties together, based on a *compromis* which implies a waiver of the rule, the claimant would be unlikely to present proof in its original submission to the effect that it has exhausted all available and effective remedies. In this case, the issue will be raised first by the respondent, and the burden of proof will be on this party to demonstrate the existence of local remedies and the applicability of the rule to the case. In contrast, if, in the same situation, the original injury in the specific case relates to a contract between the alien and the respondent State containing a Calvo clause stipulating that the alien waives his rights to diplomatic protection, the respondent State will arguably be able to shift the burden of proof by merely referring to the clause.²²² Moreover, if the claim is

brought under an instrument which expressly requires the exhaustion of local remedies, the division of the burden of proof will be completely different. The claimant State will be obliged to show in its submission that it has exhausted existing local remedies, or to show why this was not necessary. In response, the respondent Government will be required to point to further remedies and to demonstrate their effectiveness to support its objection concerning the non-exhaustion of local remedies.

117. For the above reasons, the only conclusion that can be drawn from the examination of cases and the literature is that it is difficult—and unwise—to state any concrete rule other than that the burden of proof should be shared by the parties, shifting between them continuously throughout the case, and that the burden lies on the party which makes a positive claim to prove it: *onus probandi incumbit ei qui dicit*. Article 15 seeks to give effect to this.

118. The Commission may take the position that article 15, paragraph 1, is a general principle that is not subject to codification. In this case it may prefer simply to codify article 15, paragraph 2. Alternatively, it may prefer to adopt the short, but not inaccurate, proposal made by Kokott to the International Law Association, referred to in paragraph 103 above.

²²¹ “International law . . .”, p. 295. See also Jiménez de Aréchaga, “International responsibility”, p. 590; and Jennings and Watt, *op. cit.*, p. 526.

²²² See *North American Dredging Company of Texas (U.S.A.) v. United Mexican States* (31 March 1926), UNRIAA, vol. IV (Sales No.

1951.V.1), p. 32, paras. 20–21; also reproduced in *American Journal of International Law*, vol. 20 (1926), p. 807.

CHAPTER III

The Calvo clause

“Article 16

“1. A contractual stipulation between an alien and the State in which he carries on business to the effect that:

“(a) The alien will be satisfied with local remedies; or

“(b) No dispute arising out of the contract will be settled by means of an international claim; or

“(c) The alien will be treated as a national of the contracting State for the purposes of the contract,

shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection in respect of matters pertaining to the contract. Such a contractual stipulation shall not, however, affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien.

“2. A contractual stipulation referred to in paragraph 1 shall be construed as a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement.”

A. Introduction

119. The Calvo clause is a contractual undertaking by an alien in which he agrees to waive any right which he may have to diplomatic protection by his State of nationality in matters arising out of the contract and to confine himself exclusively to local judicial remedies for any grievances he may have relating to the contract.²²³ Named after a distinguished Argentine jurist, Carlos Calvo (1824–1906), the clause has featured prominently in legal discourse on the local remedies rule and as late as 1955 was described as “one of the most controversial questions of contemporary international diplomacy and jurisprudence”.²²⁴ Although it has largely disappeared from the limelight

²²³ Freeman, “Recent aspects of the Calvo doctrine and the challenge to international law”, p. 130. See also García Amador, “Calvo doctrine, Calvo clause”, p. 522; Schwarzenberger, *op. cit.*, p. 150; and Shea, *The Calvo Clause: a Problem of Inter-American and International Law and Diplomacy*, p. 6.

²²⁴ Shea, *op. cit.*, p. 6.

today, no codification of the local remedies rule would be complete without recognition of this clause. Moreover, to ignore it would be to overlook a component of the local remedies rule that has been hailed as a regional custom in Latin America,²²⁵ forming part of the national identity of many States.²²⁶

B. History

120. Revolutions, civil wars and internal disturbances were a common feature of Latin American history in the late nineteenth and early twentieth centuries. Nationals of European States and of the United States caught up in these civil disruptions often suffered injury to person and property. When the host State denied responsibility for such injuries, aliens frequently sought the protection of their State of nationality and requested it to claim compensation on their behalf in international proceedings. Inevitably aliens abused their privileged position. As Shea states in *The Calvo Clause: a Problem of Inter-American and International Law and Diplomacy*:

Nationals often felt entitled to complete security of their persons and property, and appealed to their governments on rather flimsy evidence and without any real effort to obtain local redress. The petitioned government, acting on limited, one-sided evidence, and often under domestic political pressure, sponsored claims that frequently were not based upon strict justice. Utilization of armed force to compel the weaker nations to honor these dubious claims was not infrequent, and it sometimes happened that the severity of the measures adopted in seeking compensation for the alleged injuries was far out of proportion to the extent of the initial damages suffered.²²⁷

Mixed claims commissions established to settle these disputes appeared to Latin American States to be biased in favour of the protecting State.

121. As a consequence Latin American States sought to undermine the institution of diplomatic protection by advancing theories that challenged its very foundation. First, the Drago doctrine, codified in the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Porter Convention), declared forcible intervention to collect public debts to be illegal—a doctrine inspired mainly by the British, German and Italian intervention in Venezuela in 1902–1903. Secondly, the Calvo doctrine sought to outlaw all forms of diplomatic protection by the invocation of two principles: the sovereign equality of States, which prohibited foreign intervention, and the equality of nationals and aliens, which deprived aliens of their claim to privileged treatment.²²⁸ On this latter principle, Calvo declared:

It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended.

...

The responsibility of governments toward foreigners cannot be greater than that which these governments have toward their own citizens.²²⁹

²²⁵ *Ibid.*, pp. 260–279.

²²⁶ Oschmann, *Calvo-Doktrin und Calvo Klauseln*, p. 381.

²²⁷ *Op. cit.*, p. 12.

²²⁸ See Hershey, “The Calvo and Drago doctrines”, p. 26.

²²⁹ Shea, *op. cit.*, pp. 18–19. Translation from Calvo, *Le droit*

122. Attempts to implement the Calvo doctrine by treaty and constitutional or legislative provisions were largely unsuccessful.²³⁰ It was the Calvo clause, a clause inserted in a contract between an alien and the host State in which the alien agreed to forgo his right to request diplomatic protection in any dispute arising out of the contract, that ensured some measure of success for the Calvo doctrine. It is in this form that the Calvo doctrine is remembered today.

C. Scope

123. That the Calvo clause may take several forms is evidenced by the diverging formulations presented by writers.²³¹ The clearest exposition is that given by García Amador:

Sometimes, it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, the Clause embodies a more direct and broader waiver of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for the purposes of the contract or concession.²³²

124. The Calvo clause relates to the contractual relationship between alien and host State and only operates in respect of disputes concerning the interpretation, application or performance of the contract.²³³ It does not extend the waiver to a denial of justice that may occur in proceedings relating to the contract before a municipal court.²³⁴

D. Codification in the Americas

125. Attempts to codify the Calvo clause among Latin American States have been largely successful.

126. In 1902, the Second International Conference of American States held in Mexico City adopted the Convention relative to the Rights of Aliens, which, after recognizing the equality of nationals and aliens (with no special privileges for the latter), provided that:

Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made, through diplomatic channels, except in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law.²³⁵

internationale théorique et pratique, vol. VI, p. 231; and *ibid.*, vol. III, p. 138.

²³⁰ Shea, *op. cit.*, pp. 21–27.

²³¹ See O’Connell, *op. cit.*, pp. 1059–1060; Eagleton, *op. cit.*, p. 168; Geck, *loc. cit.*, p. 1058; Dunn, *The Protection of Nationals: a Study in the Application of International Law*, p. 169; and Lipstein, “The place of the Calvo clause in international law”, pp. 131–134.

²³² “State responsibility ...”, p. 455; see also *Yearbook ... 1958* (footnote 88 above), p. 58.

²³³ See García Amador, “State responsibility ...”, p. 456.

²³⁴ This subject is dealt with more fully in paragraph 149 (d) below. The views of García Amador cited in paragraph 149 (e) below (see footnote 285) seem to contradict this proposition.

²³⁵ *Yearbook ... 1956* (see footnote 14 above), p. 226, annex 5. See also on this Convention, and subsequent attempts to confirm it, Shea, *op. cit.*, pp. 77–79.

The United States was present at the Conference but abstained from voting on the Convention.

127. In 1933, the Seventh International Conference of American States was held in Montevideo. At the outset it adopted a resolution, supported by the United States, which:

Reaffirms equally that diplomatic protection cannot be initiated in favor of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favor of the sovereignty of the State in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration.²³⁶

128. The Seventh International Conference of American States proceeded to adopt the Convention on Rights and Duties of States, which provided that: "Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals."²³⁷

129. Although the United States became a party to the Convention on Rights and Duties of States, it reserved its rights under international law, which raised doubts about its acceptance of this provision as it did not accord with the United States understanding of the rights of aliens under international law.²³⁸

130. At the Ninth International Conference of American States in Bogotá in 1948, the following provision was adopted as article VII of the American Treaty on Pacific Settlement (Pact of Bogotá):

The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.²³⁹

131. Although the United States ratified the treaty, it added the following reservation:

The Government of the United States can not accept Article VII relating to diplomatic protection and the exhaustion of remedies. For its part, the Government of the United States maintains the rules of diplomatic protection, including the rule of exhaustion of local remedies by aliens, as provided by international law.²⁴⁰

E. Codification: the international perspective

132. Attempts to codify the Calvo clause at the international level have proved less successful.

133. The Conference for the Codification of International Law (The Hague, 1930) was briefed with the Guerrero report,²⁴¹ the draft convention prepared by the Har-

vard Law School²⁴² and the bases of discussion drawn up by the Preparatory Committee of the Conference,²⁴³ all of which contained proposals relating to the Calvo clause. The clause was not, however, considered at the Conference, largely due to disagreement over the issue of denial of justice. The Conference adjourned without agreeing on a convention.²⁴⁴

134. In 1961, the Harvard Law School prepared another draft convention, on the international responsibility of States for injuries to aliens, which provided in article 22:

4. No claim may be presented by a claimant if, *after the injury** and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.

5. No claim under this Convention may be presented by a claimant with respect to any injury listed in sub-paragraphs 2 (e), 2 (f), 2 (g), or 2 (h) of Article 14 [destruction of, damage to, or loss of property; deprivation of use or enjoyment of property; deprivation of means of livelihood; and loss or deprivation of enjoyment of rights under a contract or concession]:

²⁴² Draft convention on responsibility of States for damage done in their territory to the person or property of foreigners (see footnote 162 above). Article 17 of the draft provided:

"A State is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the State of which he is a national." (*Yearbook ... 1956* (footnote 14 above), annex 9, p. 230; see also Supplement to the *American Journal of International Law*, vol. 23 (April 1929), p. 135)

²⁴³ *Yearbook ... 1956* (see footnote 162 above), pp. 223–225. The relevant bases for discussions are Nos. 26–27 and 5–6, which provide:

"Basis of discussion No. 26

"An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

"If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in bases of discussion Nos. 5 and 6.

"Basis of discussion No. 27

"Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in bases of discussion Nos. 5 and 6."

(*Ibid.*, p. 224–225)

"Basis of discussion No. 5

"A State is responsible for damage suffered by a foreigner as the result of the fact that:

"1. He is refused access to the courts to defend his rights;

"2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;

"3. There has been unconscionable delay on the part of the courts;

"4. The substance of judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

"Basis of discussion No. 6

"A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgement vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice."

(*Ibid.*, p. 223)

²⁴⁴ Borchard, "Responsibility of States", at the Hague Codification Conference", p. 539.

²³⁶ *Yearbook ... 1956* (see footnote 14 above), p. 226, annex 6.

²³⁷ Art. 9.

²³⁸ See Shea, *op. cit.*, pp. 81–83.

²³⁹ *Ibid.*, p. 102.

²⁴⁰ *Ibid.*, p. 103.

²⁴¹ See footnote 28 above.

(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement, and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

6. No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of Article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. *Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in question and not as to injuries caused by a wilful act or omission attributable to the State.*²⁴⁵

Article 24, paragraph 1, furthermore provided:

A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraphs 4, 5 or 6 of Article 22.²⁴⁶

135. Between 1956 and 1961, the Special Rapporteur on State responsibility, Mr. García Amador, presented a number of reports to the Commission which touched on the Calvo clause. In his first report of 1956, he suggested the following basis for discussion:

Renunciation of diplomatic protection, either by the State or by foreign private individuals. Renunciation of diplomatic protection by a private person constitutes an exonerating circumstance in so far as the *Calvo clause* does not refer to rights which, by their nature, are not capable of being renounced, or to questions in which the private person is not the only interested party.²⁴⁷

In 1961, in his sixth and final report, he proposed:

2. ... in the case of the non-performance of obligations stipulated in a contract or concession, the international claim shall not be admissible if the alien concerned has waived the diplomatic protection of the State of his nationality and the circumstances are in conformity with the terms of the waiver.

...

4. The waiver of diplomatic protection ... shall not deprive the State of nationality of the right to bring an international claim in the circumstances and for the purposes [of preventing the repetition of the injurious act].²⁴⁸

²⁴⁵ *Yearbook ... 1969*, vol. II, document A/CN.4/217 and Add.1, annex VII, pp. 146–147. Also reproduced in *American Journal of International Law*, vol. 55 (1961), pp. 578–579. According to article 20, paragraph 1, the word “claimant” refers to the injured alien.

²⁴⁶ *Ibid.*, pp. 147 and 579, respectively.

²⁴⁷ *Yearbook ... 1956* (see footnote 14 above), p. 220, basis of discussion No. V, paragraph (2) (b).

²⁴⁸ *Yearbook ... 1961* (see footnote 39 above), revised draft on the responsibility of the State for injuries caused in its territory to the person or property of aliens, p. 48, art. 19. See also on the history of this subject before the Commission, Graham, “The Calvo clause: its current status as a contractual renunciation of diplomatic protection”, pp. 297–300.

F. State practice

136. Shea’s comprehensive study on the Calvo clause, published in 1955, shows that at that time the Calvo clause was recognized in the practice, laws or constitutions of most Latin American States²⁴⁹ and could be described as a Latin American regional custom.²⁵⁰ State practice outside Latin America was very different. The United States has long claimed that the clause did not and could not waive the right of the State of nationality to provide diplomatic protection and that the individual’s waiver did not cover cases of denial of justice.²⁵¹ Other Governments were divided on the issue. According to their replies to a questionnaire on the subject circulated to States prior to the Codification Conference for the Codification of International Law (The Hague, 1930), Australia, Austria and South Africa considered such clauses as having no effect. Finland, Germany and the Netherlands recognized the validity of the clause, whereas Belgium, Czechoslovakia, Denmark, Hungary, India, Japan, New Zealand, Norway, Poland, Switzerland and the United Kingdom did so only as far as the rights of the individual were concerned, but not in respect of the waiver of the right of the State to diplomatic interposition in cases of violations of international law. Canada, in turn, took the position that the clause was valid if the State of nationality of the injured individual permitted the individual to enter into such contract.²⁵² The reply of the United Kingdom²⁵³ was particularly illuminating as it gave full support to the decision in the *North American Dredging Company* case²⁵⁴ (discussed below) upholding the limited validity of the Calvo clause.

G. Judicial decisions

137. Jurisprudence on the Calvo clause is commonly divided into two periods: those before the *North American Dredging Company* case²⁵⁵ of 1926 and those afterwards.

138. Decisions handed down by mixed claims commissions before 1926 were characterized by a lack of clarity and determinacy in their attitude towards the validity of the clause. This is illustrated by the differing interpretations placed on those decisions by Borchard and Shea. While Borchard claimed that in the 19 cases decided only 8 recognized the validity of the clause,²⁵⁶ Shea maintained that in none of those cases was the validity of the Calvo clause in the contract decisive.²⁵⁷ Perhaps the main interest of Borchard’s study is his conclusion that in cases

²⁴⁹ Ironically, perhaps, Calvo’s own State, Argentina, was one of the few not to engage in this practice.

²⁵⁰ *Op. cit.*, pp. 269–279.

²⁵¹ *Ibid.*, pp. 37–45.

²⁵² *Ibid.*, pp. 46–55. See also *Bases of discussion* (League of Nations publication, Sales No. 1929.V.3) (C.75.M.69.1929.V), vol. III, “Responsibility of States for damage caused in their territory to the person or property of foreigners”, point XI (d), pp. 133–135.

²⁵³ Shea, *op. cit.*, p. 50; *Bases of discussion* (see footnote 252 above), p. 134.

²⁵⁴ UNRIAA, p. 26, and *American Journal of International Law*, p. 800 (see footnote 222 above).

²⁵⁵ *Ibid.*

²⁵⁶ *The Diplomatic Protection ...*, pp. 800–801.

²⁵⁷ *Op. cit.*, pp. 121–193.

in which the validity of the clause was denied, the decision was based on one of three grounds:

[F]irst, that it is beyond the competence of an individual to contract away the superior right of his government to protect him ...; secondly, in cases where the government had annulled the contract without first appealing to the local courts, that such action relieves the claimant from the stipulation not to make the contract a subject of international claim ...; thirdly, wherever possible, the courts try to find that the claim arises not out of the contract itself, but out of some violation of property rights, thus basing the claim on tort.²⁵⁸

139. The nature and scope of the Calvo clause were authoritatively expounded by the Mexico–United States General Claims Commission, presided over by Mr. van Vollenhoven, in 1926 in the *North American Dredging Company* case.²⁵⁹ In that case the claimant company entered into a contract with Mexico for the dredging of the port of Santa Cruz. In order to secure the award of the contract, the claimant agreed to the inclusion in the contract of article 18, which read:

The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.²⁶⁰

140. When an alleged breach of the contract occurred, the claimant made no attempt to exhaust local remedies but instead, relying on article V of the treaty establishing the Claims Commission, which dispensed with the need to exhaust the local remedies rule, requested the United States to bring a claim on its behalf before the Commission. In upholding the motion of Mexico to dismiss the claim, the Commission embarked upon a thorough examination of the validity and scope of the Calvo clause contained in article 18.

141. First, the Claims Commission rejected arguments in favour of upholding or rejecting the validity of the clause “in so far as these arguments go to extremes”.²⁶¹ It then stated:

The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature, nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other ...

It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.²⁶²

142. Secondly, the Claims Commission dismissed the argument that the clause was repugnant to any recognized rule of international law and held that there was no rule of international law prohibiting all limitations on the right of diplomatic protection.²⁶³ The Calvo clause was permissible as it was simply an undertaking on the part of the individual not to ignore local remedies.

143. Thirdly, the Claims Commission held that although an alien might promise to exhaust local remedies he could not

deprive the Government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such Government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his Government. But while any attempt to so bind his Government is void, the Commission has not found any generally recognized rule of positive international law which would give to his Government the right to intervene to strike down a lawful contract ... entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction.²⁶⁴

144. With regard to the Calvo clause in article 18 of the contract, the Claims Commission stated that

its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws ... But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.²⁶⁵

The Commission stressed that the alien

did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfilment, execution, or enforcement of this contract as such ... He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations ... He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of his contract and the execution of his work thereunder.²⁶⁶

145. Finally, the Claims Commission held that article V of the treaty establishing the Commission, which provided that a claim might not be rejected on the ground that local remedies had not been exhausted, did not “entitle either Government to set aside an express valid contract between

²⁵⁸ *The Diplomatic Protection* ..., p. 805.

²⁵⁹ UNRIAA (see footnote 222 above).

²⁶⁰ *Ibid.*, pp. 26–27.

²⁶¹ *Ibid.*, p. 27, para. 4.

²⁶² *Ibid.*, pp. 27–28, paras. 4–5.

²⁶³ *Ibid.*, pp. 28–29, paras. 8–9.

²⁶⁴ *Ibid.*, p. 29, para 11.

²⁶⁵ *Ibid.*, p. 30, para. 14.

²⁶⁶ *Ibid.*, pp. 30–31, para. 15.

one of its citizens and the other Government".²⁶⁷ The Commission stated that article V was limited in its application to claims that had been "rightfully presented",²⁶⁸ and that that claim could not be considered to have been "rightfully presented" because the claimant had made no attempt to comply with a fundamental condition of his contract.

146. In summary, the Claims Commission held the Calvo clause to be a promise by the alien to exhaust local remedies. He thereby waived his right to request diplomatic protection in a claim for damages arising out of the contract, or any matter relating to the contract. This did not, however, deprive him of his right to request diplomatic protection in respect of a denial of justice or other violation of international law experienced in the process of exhausting his local remedies or trying to enforce his contract.

147. The decision in the *North American Dredging Company* case has not gone unchallenged. However, most of the criticism has been directed at the refusal of the Claims Commission to give full effect to article V of the treaty establishing the Commission²⁶⁹ rather than to the formulation of the scope and effect of the Calvo clause itself. There has been considerable effort expended on a precise formulation of the rule in the *North American Dredging Company* case. Probably the most successful such formulation is that to be found in the headnote to the case in UNRIAA:

²⁶⁷ *Ibid.*, p. 32, para. 21.

²⁶⁸ *Ibid.*, para. 20.

²⁶⁹ See, for instance, Borchard, "Decisions of the Claims Commissions, United States and Mexico", p. 540; Feller, "Some observations on the Calvo clause", pp. 462-463; Lipstein, *loc. cit.*, pp. 144-145; Freeman, *op. cit.*, pp. 481-482; and Shea, *op. cit.*, pp. 226-228.

"The *North American Dredging Company Case* was later reheard by the domestic American Mexican Claims Commission, composed of three American nationals, established pursuant to an Act of Congress approved December 18, 1943 (56 Stat. 1058), which passed upon claims not completed by the international commission or for which rehearing had been requested (Mexico making en bloc settlement and the domestic Commission adjudicating the claims). (Whiteman, *op. cit.*, p. 923)

In making an award of US\$ 128,627.77 in favour of the company, the domestic Commission was particularly critical of the decisions of the Mexican-United States General Claims Commission on article V:

"The effect of the decision of the General Claims Commission is to hold that provision 18 of the contract between the claimant and the Government of Mexico prevails despite Article I and Article V of the Convention. With all due deference to the learned members of said Commission, we are unable to agree with the position thus taken. In our view, Article V of the Convention of September 8, 1923 is controlling as to the right of the United States Government; that pursuant thereto said Government may present this claim on behalf of the claimant, and that this Commission has jurisdiction to decide the claim."

(*Ibid.*)

Shea rightly rejects this decision in the following terms:

"Although, from the purely financial viewpoint of the claimant, this might be considered a reversal of the previous ruling on the claim, it would be erroneous to assume that this action by a purely national commission could, in any manner whatsoever, overrule or even weaken the decision or rule of the *Dredging* case in international jurisprudence. From the viewpoint of this study, the action of the domestic commission is of interest but of no determinative import to our task of determining the rule of law on the Calvo Clause."

(*Op. cit.*, p. 230, footnote 89)

A Calvo clause *held* to bar claimant from presenting to his Government any claim connected with the contract in which it appeared and hence to place any such claim beyond the jurisdiction of the tribunal. The clause will not preclude his Government from espousing, or the tribunal from considering, other claims based on the violation of international law. Article V of the *compromis held* not to prevent the foregoing result.²⁷⁰

148. Mixed claims commissions concerning Mexico handed down a number of decisions after the *North American Dredging Company* case which approved the principles expounded in that case,²⁷¹ even though in several cases the commissions displayed a remarkable leniency towards Mexico in finding that there had been no denial of justice on the facts.²⁷² Moreover, in *Mexican Union Railway (Ltd.) (Great Britain) v. United Mexican States*,²⁷³ the British-Mexican Claims Commission seems to have limited the circumstances in which the Calvo clause did not apply to one species of internationally wrongful act only: denial of justice.

H. The opinions of scholars

149. There is a wealth of writing on the Calvo clause.²⁷⁴ Since the decision in the *North American Dredging Company* case, and subsequent decisions endorsing it, it has not been possible to argue seriously that the Calvo clause is contrary to international law. Consequently scholars have sought rather to examine its purpose and scope, largely in the context of the *Dredging* case. To say that there is no consensus on the part of writers as to the scope of the Calvo clause is to state the obvious. A number of common principles seem, however, to emerge from the literature:

(a) The Calvo clause is of limited validity only in the sense that it does not constitute a complete bar to diplomatic intervention. It applies only to disputes relating to the contract between alien and host State containing the clause and not to breaches of international law. This interpretation advanced in the *Dredging* case fails to give effect to the real purpose of the Calvo clause—to exclude diplomatic protection in all cases—and has been criticized by Latin American writers on this ground.²⁷⁵ The *Dredging* case interpretation has, however, been accepted

²⁷⁰ See footnote 254 above. See also Shea, *op. cit.*, pp. 215-223.

²⁷¹ *International Fisheries Company (U.S.A.) v. United Mexican States*, UNRIAA (Sales No. 1951.V.1), vol. IV, p. 691 (1931); and *Douglas G. Collie MacNeill (Great Britain) v. United Mexican States*, *ibid.*, (Sales No. 1952.V.3), p. 135 (1931). For a discussion of these cases, see Shea, *op. cit.*, pp. 231 *et seq.*; and Freeman, *op. cit.*, pp. 469-490.

²⁷² *Interoceanic Railway of Mexico Ltd. (Great Britain) v. United Mexican States*, UNRIAA (Sales No. 1952.V.3), vol. V, p. 178 (1931). Cf. *El Oro Mining* case (see footnote 185 above), p. 191.

²⁷³ UNRIAA, vol. V (Sales No. 1952.V.3), p. 115 (1930). Compare paragraphs 13 and 14 (d)-(e) (*ibid.*, p. 123).

²⁷⁴ See, in particular, Shea, *op. cit.*; Lipstein, *loc. cit.*; Feller, *loc. cit.*; Freeman, *loc. cit.*; García Amador, "Calvo doctrine ..."; Oschmann, *op. cit.*; and Graham, *loc. cit.*

²⁷⁵ García Robles, *La cláusula Calvo ante el derecho internacional*, p. 176; Sápúlveda Gutiérrez, *La responsabilidad internacional del Estado y la validez de la cláusula Calvo*, pp. 69-71; Beteta and Henríquez, "La protección diplomática de los intereses pecuniarios extranjeros en los Estados de América", pp. 44-45.

in State practice²⁷⁶ and is widely supported by juristic opinion;²⁷⁷

(b) The Calvo clause confirms the importance of the exhaustion of local remedies rule. Although some writers have suggested that the limited validity accorded to the clause in the *Dredging* case makes it nothing more than a reaffirmation of the local remedies rule,²⁷⁸ and thus a superfluous restatement of the obvious, most writers see it as going beyond such a reaffirmation. Opinions differ, however, as to what this extra dimension is.²⁷⁹ The best explanation is probably to be found in the ruling in the *Dredging* case that the Calvo clause may trump a provision in a *compromis* waiving the requirement that local remedies should be exhausted. Thus Shea states that this is “the very least” that can be accorded to the clause:

This much effectiveness cannot be denied, for the six recent arbitral rulings can be cited in support of it. Perhaps this is the full effectiveness of the Clause ... Consequently, if future conventions conform to what would appear to be the recent trend in international arbitration [of waiving the local remedies rule in the *compromis*] ... then the Calvo Clause, even if restricted in effectiveness to overcoming a general waiver of the local remedies rule contained in the *compromis*, will continue to have a determinative effect on the admissibility of international claims;²⁸⁰

(c) International law places no bar on the right of an alien to waive by contract his own power or right to request his State of nationality to exercise diplomatic protection on his behalf;²⁸¹

(d) An alien cannot by means of a Calvo clause waive rights that under international law belong to his Government. The Vattelien fiction, which provides the foundation for the law of diplomatic protection, is premised on the notion that an injury to a national arising from a breach of international law is an injury to the State of nationality itself. An individual cannot waive this right as it is not in his power to do so;²⁸²

(e) The waiver in a Calvo clause extends only to disputes arising out of the contract, or to breach of the contract, which does not, in any event, constitute a breach of international law.²⁸³ It does not extend to violations of international law, and, in particular, it does not extend to a denial of justice. While there is widespread support for

this proposition,²⁸⁴ there is some uncertainty about denial of justice associated with or arising from the contract containing the Calvo clause. This is apparent in the writings of García Amador. On the one hand, he acknowledges that, “whatever form it may take, the ‘Calvo Clause’ invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of the contract or concession”.²⁸⁵

On the other hand, in defiance of the decision in the *Dredging* case, he submits that:

[I]n principle, the “Clause” is valid as a bar to the exercise of diplomatic protection even in cases of “denial of justice”. It is not to be overlooked that it operates only with regard to disputes concerning the interpretation, application or performance of contracts or concessions. In this sense, *only a specific case of denial of justice would be involved, not all the cases where some other rights of the alien or interests of another kind could be affected.** At first sight, this exception to the principle which governs international responsibility for acts and omissions of this nature might appear unjustified. In reality, however, it is not unjustified. Contractual interests and rights are not, so to speak, in the same class as the other rights enjoyed by the alien in international law. Not only are they of an exclusively monetary character, but the alien acquires them by virtue of a contract or concession, the acceptance of which depends solely on his own volition. With this reasoning one does not seek to minimize the importance of this category of rights and interests, but to stress that, by their very nature, they can form the subject of an infinite variety of operations and transactions which can be effected merely by the consent of the contracting parties. In brief, these are rights and interests in respect of which the alien may waive diplomatic protection in whatever terms he considers most conducive to the acquisition of the benefits which he expects to derive from the contract or concession.²⁸⁶

Support for this view, he argues, is to be found in the *Inter-oceanic Railway* case.²⁸⁷ At least, he submits, drawing on the opinion of Shea,²⁸⁸ the Calvo clause requires proof of an aggravated (“more patent and flagrant”)²⁸⁹ form of denial of justice before an international claim may be brought.²⁹⁰

I. Recent developments

150. The Calvo clause was born out of the fear on the part of Latin American States of intervention in their domestic affairs by European States and the United States of America under the guise of diplomatic protection. Resistance to the Calvo clause, on the other hand, stemmed from the fear on the part of European States and the United States that their nationals would not receive fair treatment in countries whose judicial standards fell below the international minimum standard created by the latter States in their own image. Today the situation has changed. European States and the United States respect the sovereign equality of Latin American States and have confidence in their judicial systems, which, as in Europe, are subject to both regional and international monitor-

²⁷⁶ See footnotes 252–253 above.

²⁷⁷ Shea, *op. cit.*, pp. 217–218; Freeman, *op. cit.*, pp. 489–490; Brownlie, *op. cit.*, pp. 548–549; Jennings and Watts, *op. cit.*, p. 931.

²⁷⁸ Lipstein, *loc. cit.*, p. 145; Freeman, *op. cit.*, pp. 489–490; Daillier and Pellet, *op. cit.*, p. 778, para. 492; Feller, *The Mexican Claims Commissions 1923–1934: a Study in the Law and Procedure of International Tribunals*, p. 192.

²⁷⁹ O’Connell has suggested, but dismissed, the argument that this extra dimension is that an affirmative decision on the contractor’s rights of the alien is a precondition for an international claim (*op. cit.*, p. 1062).

²⁸⁰ *Op. cit.*, pp. 260–261 (see also pages 215, 217 and 257). This view is supported by Brownlie, *op. cit.*, p. 549. Cf. O’Connell, *op. cit.*, p. 1063; and Lipstein, *loc. cit.*, p. 145.

²⁸¹ Jimenez de Aréchaga, “International responsibility”, p. 591; García Amador, “State responsibility ...”, pp. 459–460; Jessup, *A Modern Law of Nations: an Introduction*, pp. 11 and 117; Shea, *op. cit.*, pp. 261–263.

²⁸² Eagleton, *op. cit.*, p. 170; Borchard, *The Diplomatic Protection ...*, p. 809; García Amador, “State responsibility ...”, p. 460; Daillier and Pellet, *op. cit.*, p. 778.

²⁸³ Brownlie, *op. cit.*, p. 549.

²⁸⁴ Jimenez de Aréchaga, “International responsibility”, pp. 591–592; Freeman, *op. cit.*, pp. 489–490; O’Connell, *op. cit.*, p. 1064; Shea, *op. cit.*, pp. 217–218.

²⁸⁵ “State responsibility ...”, p. 456.

²⁸⁶ *Ibid.*, p. 458.

²⁸⁷ See footnote 272 above.

²⁸⁸ *Op. cit.*, p. 265.

²⁸⁹ *Ibid.*

²⁹⁰ “State responsibility ...”, p. 459.

ing.²⁹¹ Consequently the aggressive assertions of diplomatic protection that once characterized relations between Europe and the United States, on the one hand, and Latin America, on the other, have come to an end. This does not mean that the debate over the Calvo clause has lost its relevance. While international legal opinion in Europe and the United States likes to see the Calvo clause as a relic of a past era of inequality in international relations,²⁹² Latin American States still cling to the clause as an important feature of their regional approach to international law. While they have demonstrated some flexibility in their attitude to new institutions creating dispute settlement procedures for foreign investors, there is no doubt that many of these institutions are still judged by their adherence to the Calvo clause. Moreover, key resolutions of the General Assembly on international economic law show the strong influence of Calvo.

151. The Charter of Economic Rights and Duties of States, contained in General Assembly resolution 3281 (XXIX) of 12 December 1974, proclaims that disputes over compensation arising from the expropriation of foreign property

shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.²⁹³

The moderate precursor of that resolution, the resolution on permanent sovereignty over natural resources of 14 December 1962, likewise declares that in the case of a dispute over compensation for expropriated property “the national jurisdiction of the State taking such measures shall be exhausted”.²⁹⁴ Rogers has rightly described these resolutions as a “classic restatement of Calvo”!²⁹⁵

152. The Agreement on Andean Subregional Integration (Andean Pact), establishing a common market between Bolivia, Colombia, Ecuador, Peru and Venezuela, likewise shows respect for the Calvo clause. Article 51 of the codified text of the Andean Foreign Investment Code provides that:

In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient

²⁹¹ By bodies established under the American Convention on Human Rights: “Pact of San José, Costa Rica” and the International Covenant on Civil and Political Rights.

²⁹² According to Dolzer:

“International practice confirming the Calvo Doctrine is nowhere visible, and the legal opinions of the Western capital-exporting nations definitely refute the argument that all major groups affected have consented to a change in customary law over to the Calvo Doctrine.”

(“New foundations of the law of expropriation of alien property”, p. 571)

That the Calvo clause has not been repudiated by legal opinion in the United States is illustrated by *Reavis v. Exxon Corporation* (28 June 1977), ILR, vol. 66, p. 317 (1984), in which the New York Supreme Court seriously considered, but did not apply the Calvo clause.

²⁹³ Chap. II, art. 2, para. 2 (c).

²⁹⁴ General Assembly resolution 1803 (XVII), para. 4.

²⁹⁵ “Of missionaries, fanatics, and lawyers: some thoughts on investment disputes in the Americas”, p. 5.

country or allow the subrogation by States to the rights and actions of their national investors.²⁹⁶

Article 34 of decision No. 220, in turn, lays down the rule that: “For the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of foreign technology, Member Countries shall apply the provisions established in their local legislation.”²⁹⁷

153. In 1991, the Andean Pact countries revised and liberalized their foreign investment code in decision No. 291, but left this element of the Calvo clause unchanged.²⁹⁸

154. The response of Latin American States towards the Convention on the settlement of investment disputes between States and nationals of other States, establishing ICSID, was initially lukewarm.²⁹⁹ However, article 27 incorporates an element of the Calvo clause by providing that:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

155. Latin American States initially responded in a similar fashion to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), which facilitates investment in developing countries by making political risk insurance available to investors wishing to do business in developing countries. But again, as with ICSID, MIGA does not necessarily run counter to the philosophy of the Calvo clause, as it permits arbitration only in cases in which the dispute cannot be resolved through negotiation or conciliation.³⁰⁰ Today most Latin American States are parties to MIGA.

156. The North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States has been hailed as evidence of a new flexibility on the part of the major Latin American proponent of the Calvo clause, as it permits a foreign investor in certain circumstances to resort to international arbitration.³⁰¹ This view³⁰² should not, however, be exaggerated as there are powerful voices within Mexico demanding that NAFTA

²⁹⁶ Decision No. 24 on the common regime of treatment of foreign capital and of trademarks, patents, licenses and royalties (amended 30 November 1976), ILM, vol. XVI, No. 1 (January 1977), p. 153.

²⁹⁷ Andean Group: Commission decision 220 replacing decision 24, the Common Foreign Investment and Technology Licensing Code (11 May 1987), ILM, vol. 27 (1988), p. 986.

²⁹⁸ *Ibid.*—Commission decision 291: Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties (21 March 1991), art. 10, ILM, vol. 30 (1991), p. 1291.

²⁹⁹ Rogers, *loc. cit.*, pp. 3–4; Manning-Cabrol, “The imminent death of the Calvo clause and the rebirth of the Calvo principle: equality of foreign and national investors”, p. 1185. Today most Latin American States are parties to ICSID.

³⁰⁰ Manning-Cabrol, *loc. cit.*, pp. 1185–1186; Dalrymple, “Politics and foreign direct investment: the Multilateral Investment Guarantee Agency and the Calvo clause”.

³⁰¹ Chaps. 11 and 20.

³⁰² Daly, “Has Mexico crossed the border on State responsibility for economic injury to aliens? Foreign investment and the Calvo clause in Mexico after the NAFTA”.

be implemented in a manner compatible with the Calvo clause.³⁰³

J. Conclusion

157. There are two options open to the Commission. The first is to decline to draft any provision on this subject on the ground that a Calvo clause is relevant and valid only insofar as it reaffirms the exhaustion of local remedies rule. To include such a provision would therefore be both unnecessary and superfluous. The second option is to draft a provision which limits the validity of the Calvo

clause to disputes arising out of the contract containing the clause and which recognizes that such a clause may give rise to a rebuttable presumption in favour of the exhaustion of local remedies even where the *compromis* referring disputes between the State of nationality of the injured alien and the host State to judicial settlement contains a clause excluding the need to exhaust local remedies. Such a provision would reflect jurisprudence, doctrine and, possibly, State practice on the Calvo clause.

158. While the Special Rapporteur accepts that there may be some merit in the first proposal, he prefers the second, as it would codify a customary rule of one of the major regions of the world and provide clarity on the limits of a mechanism that has featured prominently in the history of this branch of the law. It is in this spirit that article 16 is laid before the Commission.

³⁰³ Sepúlveda Amor, "International law and national sovereignty: the NAFTA and the claims of Mexican jurisdiction". Cf. Zamora, "Allocating legislative competence in the Americas: the early experience under NAFTA and the challenge of hemispheric integration".