Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[1936] [681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (*a*) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[1937] [682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[1938] [683]

[1936] [681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[1937] [682] *Mavrommatis* (footnote [800] 236 above), p. 12.

[1938] [683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1. [Editor's Note: the Commission subsequently adopted the draft articles on diplomatic protection, in 2006; see *Yearbook … 2006*, vol. II (Part Two), para. 49.]

(3) Subparagraph (*b*) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[1939] [684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[1940] [685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[1941] [686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[1942] [687]

[1939] [684] *ELSI* (footnote [144] 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959,* p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, *e.g.*, C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote [1085] 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, *e.g.*, A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[1940] [685] *ELSI* (footnote [144] 85 above), p. 46, para. 59.

[1941] [686] *Ibid*., p. 48, para. 63.

[1942] [687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514. (See footnote [1938] 683 above.)

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France

In its 1978 award, the arbitral tribunal established to hear the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, to decide on France's allegation according to which the United States was required, before resorting to arbitration, to wait until the United States company (Pan American World Airways) that considered itself injured had exhausted the local remedies available under French law, referred to the principles appearing in draft article 22, as provisionally adopted by the International Law Commission.[1943] [212] It considered that it was "significant" that the said provision:

> establishes the requirement of exhaustion of local remedies only in relation to an obligation of "result", which obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State", and which is an obligation "concerning the treatment of aliens". Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of "procedure" or one of "substance"—a matter which the Tribunal considers irrelevant for the present case—it is clear that the juridical character of the *rules* of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under article I of the Air Service Agreement, "[t]he Contracting Parties grant *to each other* the rights specified in the Annex hereto … " (emphasis added), and sections I and II of the annex both mention "the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country … " as a right granted by one *Government* to the other *Government*. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a "result" to be achieved, let alone one allowing an "equivalent result" to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an "equivalent result".[1944] [213]

[1943] [212] This provision was amended and incorporated in article 44(*b*) finally adopted by the ILC in 2001. The text of draft article 22 provisionally adopted was as follows:

> Article 22
> Exhaustion of local remedies
>
> When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[1944] [213] Award, 9 December 1978, para. 31, reproduced in UNRIAA, vol. XVIII [(Sales No. E/F.80.V.7), pp. 431–432.

On this basis, the arbitral tribunal thus found that its decision should not be postponed until such time as the company had exhausted local remedies.

[A/62/62, para. 119]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal invoked draft article 22, as adopted by the International Law Commission on first reading,[1945] [214] in the context of determining whether the rule that local remedies must be exhausted was applicable in the said case:

As stated in article 22 of the draft articles on State responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens … ". None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.[1946] [215]

[A/62/62, para. 120]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in support of its finding that

where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding … because the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations … that are in dispute,

referred to draft article 22 adopted by the International Law Commission on first reading and the commentary thereto.[1947] [216]

[A/62/62, para. 121]

[1945] [214] The text of that draft article was identical to that of draft article 22 provisionally adopted by the International Law Commission. (See footnote [1943] 212 above.)

[1946] [215] See footnote [1096] 159 above, para. 98.

[1947] [216] ICSID, *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 29 and footnote 5, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 12.

International arbitral tribunal (under the ICSID Additional Facility Rules)

The Loewen Group, Inc. and Raymond L. Loewen v. *United States*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 NAFTA to hear *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States* case, in examining the argument of the respondent that "State responsibility only arises when there is final action by the State's judicial system as a whole", referred to article 44 finally adopted by the International Law Commission in 2001:

> The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law … Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Elettronica Sicula Spa (ELSI) United States* v. *Italy* (1989) ICJ 15 at para. 50.[1948] [217]

[A/62/62, para. 122]

International arbitral tribunal (under the ICSID Convention)

Philip Morris Brands Sàrl, and others v. *Uruguay*

The arbitral tribunal in *Philip Morris Brands Sàrl, and others* v. *Uruguay* noted that "[t]he reference [by the claimants] to Art. 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[1949] [231]

[A/71/80, para. 155]

Permanent Court of Arbitration (under UNCITRAL Rules)

ST-AD GmbH v. *Republic of Bulgaria*

In *ST-AD GmbH* v. *Republic of Bulgaria*, the arbitral tribunal relied on, *inter alia*, article 44, subparagraph (*b*), in support of the view that "the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the ICJ".[1950] [232] Specifically, the tribunal noted that the article "refers to the exhaustion of any 'available and effective local remedy'".[1951] [233]

[A/71/80, para. 156]

[1948] [217] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 149, footnote 12, reproduced in *ILM*, vol. 42, 2003, p. 835 (citing *ELSI*, see footnote [144] 85 above.).

[1949] [231] ICSID, Case No. ARB/10/7 (formerly *FTR Holding S.A., Philip Morris Products S.A., and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*), Decision on Jurisdiction, 2 July 2013, para. 135.

[1950] [232] PCA, Case No. 2011–06, Award on Jurisdiction, 18 July 2013, para. 365.

[1951] [233] *Ibid*., footnote 395.

[International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to "reject the [respondent's] view that notice or prior negotiations are required" in accordance with article 43 of the State responsibility articles …[1952] 241

[A/74/83, p. 41]]

International arbitral tribunal (under the ICSID Convention)

Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. *Oriental Republic of Uruguay*

The arbitral tribunal in *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay* noted that "[t]he reference [by the claimants] to article 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[1953] 243

[A/74/83, p. 41]

Permanent Court of Arbitration (under UNCITRAL Rules)

Bank Melli Iran and Bank Saderat Iran v. *Kingdom of Bahrain*

The arbitral tribunal in *Bank Melli Iran and Bank Saderat Iran* v. *Kingdom of Bahrain* cited article 44, subparagraph (*b*), and the commentary thereto, and indicted that the exhaustion of local remedies was not a requirement to bring arbitral claims. The tribunal noted the explanation in the commentary that the provision is

> not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the condition for the admissibility of cases brought before such courts or tribunals. Rather, [it] define[s] the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States.[1954] 227

[A/77/74, p. 37]

[1952] [241 ICJ, Judgment, 5 October 2016, para. 42.]

[1953] 243 ICSID, Case No. ARB/10/7, Award, 8 July 2016, para. 135.

[1954] 227 See footnote [1407] 157 above, paras. 516–518 and 526.