

A Functional Approach to Local Exhaustion of Remedies in International Law

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ABSTRACT

Exhaustion of local remedies lies at the crossroads of customary international law, state sovereignty, and the individual rights protected under international law. Originally a customary international law doctrine with a foundation in diplomatic protection, the evolution of the local remedies rule has coincided with the progress of international law. Specialized branches of international law, whether human rights or investor-state arbitration, witness the principle's use. From the perspectives of general international law, human rights law, and foreign investment protection, this paper argues: first, the local remedies rule advances an interaction between the national and international orders guided by law, and second, it essentially envisages a balance between states' obligations and individuals' international standing and their right to seek redressal under the aegis of international law principles.

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I. INTRODUCTION

International law's specialized areas abundantly draw from the local remedies rule, including human rights practice and investor-state dispute settlement (ISDS). Originating within diplomatic protection, the local remedies rule has witnessed remarkable evolution. The local remedies rule is not rigid or absolute; it is subject to certain exceptions and waivers. International human rights protection and the ISDS system are not left untouched by the local remedies rule. Major international human rights instruments constitute the local remedies rule along with its exceptions. This paper makes a two-fold argument. First, the local remedies rule advances an interaction between the states' rights and duties at the domestic and international levels guided by law. Second, it envisages a balance between states' obligations, individuals' international standing, and their right to seek redressal under the aegis of international law principles.

This work deals with the theme of the exhaustion of local remedies in three parts. The first part details the essence of the exhaustion requirement in general international law and international human rights protection. Pursuant to a brief elucidation of the customary international background, this part discerns an interaction of national and international legal orders guided by law. It charts the use of the local remedies rule vis-à-vis international human rights protection. Furthermore, this part makes several inferences concerning the local remedies rule on national autonomy, inter-state relations, and interests of international jurisdictions.

The second part focuses on the exceptions and waivers of the local remedies rule. It discusses the exceptions and waivers to the rule in light of historical background and customary international law. The international law jurisprudence, codified legal texts, and jurists point to various exceptions to the local remedies rule. For instance, the International Law Commission (ILC) Articles on Diplomatic Protection exhibit several exceptions to the local remedies rule.¹ This part also discusses express waivers by states as an exception to the local remedies rule. States' consent to waivers to the local remedies rule is reflected in many international investment agreements (IIAs), state contracts, and *ad hoc* arbitration agreements. It also explains other aspects concerning the waiver, such as irrevocability and a treaty's silence. Furthermore, it explores whether there is a convergence or consensus amongst different specialized international practices concerning the waiver of the local remedies rule.

¹ See Int'l Law Comm'n (ILC) Draft Articles on Diplomatic Protection with commentaries (2006), at art. 15: Exceptions to the Local Remedies Rule, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

The third part discusses the local remedies rule in light of investor-state arbitration. Since the ISDS system finds its roots in international law, applying the local remedies rule is inevitable. Indeed, including provisions on the local remedies is widespread in the IIAs. However, the realm of IIAs indicates a divergence in applying this customary international law rule. In addition to the progressive codification of waivers in the ILC Articles on Diplomatic Protection, this part illustrates the viewpoint of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) on the local remedies, which somewhat reverses the local remedies rule as discerned under customary international law. It also discusses the application of the local remedies rule and the waiver thereof in light of the North American Free Trade Agreement (NAFTA) and other treaties.

II. THE SUBSTANCE OF THE EXHAUSTION REQUIREMENT IN GENERAL INTERNATIONAL LAW AND HUMAN RIGHTS LAW

In international law, establishing the international delict of the denial of justice is contingent on the exhaustion of local remedies.² The discussion on the exhaustion requirement rule in international law sheds light on several aspects. First, this part underlines that the local remedies rule finds itself at the interaction of national and international legal orders. Seen as a vital rule of law, this interaction is often sensitive since it impacts state sovereignty. The onus remains with the state to administer justice for a wrong before any action in international law arises. Second, the age-old principle of customary international law, which owes its relevance in connection with the principle of diplomatic protection, forms a component of a category of claims, particularly international claims of individuals. These are more widespread in international human rights law and the investor-state arbitration system. Third, the local remedies rule is vital to trigger state responsibility in international law. Fourth, besides the state's duty to provide justice and pursue the rule of law, the exhaustion requirement serves various purposes ranging from reducing inter-state friction to preserving national autonomy. Fifth, international human rights protection prioritizes individuals' rights before states. Hence, the local remedies rule is vital for international claims emanating from human rights violations.

The local remedies rule is a general rule of customary international law.³ The local remedies rule developed apropos diplomatic protection to maintain state sovereignty against inordinate undermining by state-to-state

² ALWYN FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 56, 404 (1970); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 108, 111(2005).

³ *See generally* CHITTHARANJAN AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 3 (2nd ed. 2004).

claims to remedy individuals' wrongs.⁴ The local remedies rule entails that a state should have the opportunity to redress an alleged wrong of an alien individual within its municipal legal system prior to invoking its international responsibility at the international level.⁵ The requirement of exhaustion of local remedies is an international law principle that emanates from respect for the state's independence and sovereignty and effectuates the operation of local jurisdictions while legally recognizing the states' primary territorial jurisdiction.⁶

There is a general premise approving of the local jurisdiction, which foreign states must comply with unless there is proof to the contrary.⁷ As a corollary, the local remedies rule is seen as a direct application of the Calvo Doctrine which emphasized the aliens' subjection to the host state's law with the highest court in the host state becoming the final forum before any diplomatic espousal of the alien's claim is to be made.⁸ However, the local

4 John Dugard (Special Rapporteur), *Second Report on Diplomatic Protection*, Document at 100, U.N. Doc. A/CN.4/514 (Feb. 28, 2001) [hereinafter Dugard, *Second Report on Diplomatic Protection*]; FREEMAN, *supra* note 2, at 417; A. A. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 8-9 (1983) [hereinafter TRINDADE, *EXHAUSTION OF LOCAL REMEDIES*]; *id.* at 3-12, 22-42 (The historical roots are traced to the practice of reprisals. Reprisals were permitted in the event of an alien suffering a denial of justice. By the end of the eighteenth century, diplomatic intervention and settlement by international arbitration started to replace the practice of reprisals. As the principle of diplomatic protection was unfolding in the eighteenth century and as visible in the writings of Vattel, the national state of the alien conceived the right of protection on his behalf. Injury to the alien was considered as a violation of an obligation of the host state to the alien's national state. Yet, the local remedies rule was retained; aliens seeking the intervention of their home state had to exhaust local remedies. The practice of international law gradually progressed toward a peaceful settlement of disputes and a detachment of reprisals from the requirement of exhausting local remedies was witnessed. By the nineteenth and twentieth centuries, the local remedies rule was firmly embedded in the practice of diplomatic protection. Early on the local remedies rule was shaped by the practice of diplomatic protection. Since and particularly the twentieth century onward, its imprints can be seen in judicial, quasi-judicial and administrative decision making); Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 *LAW & PRAC. OF INT'L CTS. & TRIBUNALS* 1, 1-3 (2005) [hereinafter Schreuer, *Calvo's Grandchildren*]; Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 *AM. J. INT'L L.* 1, 2-3 (2003); JAMES R. CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 710-11 (8th ed. 2012); CHRISTOPHER F. DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 347 (2008) (diplomatic espousal was subject to exhausting all effective domestic remedies of the host state); CASTOR H. P. LAW, *THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW* 11 (1961) (early on, Grotius and Vattel acknowledged the principle of exhaustion of local remedies).

5 OPPENHEIM'S *INTERNATIONAL LAW* 522-24 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992) (the rule does not apply in the event of a state causing injury to another state); TRINDADE, *EXHAUSTION OF LOCAL REMEDIES*, *supra* note 4, at 1; CRAWFORD, *supra* note 4, at 713-15.

6 LAW, *supra* note 4, at 15-19 (as it reconciles the states' autonomy with their international cooperation duties).

7 *Id.* at 16.

8 Udombana, *supra* note 4, at 4-5 (the diplomatic protection principle is based on two grounds: nationality of the claim and exhaustion of local remedies. The diplomatic protection principle restricts recourse to dispute settlement at the international level until local remedies

remedies rule does not imply that one legal system prevails over the other; it leads to a specific interaction between the national and international legal orders with the objective of judicial settlement of particular cases in a set procedural manner.⁹ The local remedies rule has two purposes: first, at the national level, it allows the host state to pursue its framework of justice with implications on state responsibility, and second, it clears the way to eventual dispute settlement at the international level.¹⁰ The ILC Articles on Responsibility of States for Internationally Wrongful Acts makes the invocation of state responsibility conditional to the exhaustion of local remedies.¹¹

Several jurists have attached importance to the local remedies rule. Edwin Borchard, in his 1919 treatise, detailed the justifications for the local remedies rule.¹² First, an alien in a foreign state is presumed to consider the recourse offered by local law for redressing a wrong.¹³ Second, the state's right of sovereignty entitles its local courts to independence from outside interference, given that they meet the ends of justice.¹⁴ Third, the aliens' state of origin must allow the offending host government a chance to serve justice to the injured claimant through its standard course and desist, if possible, from escalating the matter to an international forum.¹⁵ Fourth, in the event of an injury caused by an individual or minor official, the local remedies rule is needed to ascertain if the wrongful act or denial of justice is a deliberate act of a state.¹⁶ Fifth, if it is a state's deliberate act and the state is unwilling to remedy the wrong, it is rational to seek judicial remedy when available.¹⁷ The diplomatic espousal is conducted once the remedies are unsuccessful and a denial of justice is established.¹⁸

Alwyn Freeman illustrated several rationales in support of the exhaustion of local remedies requirement and the necessity of the alien's resort to

are exhausted); *see* The Mavrommatis Palestine Concessions (Greece v. U.K.) PCIJ judgment no. 2, 1924, P.C.I.J. (ser. B) No. 3 (Aug. 30) ¶21 (The PCIJ endorsed state's diplomatic espousal of its subjects by noting "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law").

⁹ LAW, *supra* note 4, at 19.

¹⁰ *Id.* at 18.

¹¹ Int'l. Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), at art. 44. Article 44 states, "[t]he responsibility of a State may not be invoked if . . . : (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted." *See id.*

¹² EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 817-18 (1919).

¹³ *Id.* at 817.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 817-18.

¹⁸ *Id.*

domestic remedies for redressing his grievances.¹⁹ First, adjudication by the local courts may grant the alien a favorable judgment and render international action unnecessary.²⁰ Second, it is fair for the delinquent state in whose territory the injury was suffered to have the first opportunity to carry out justice based on its rule of law and judicial apparatus.²¹ Third, the premise of uniformity between national institutions and the demands of international law is not unsettled “by a denial of justice against which there is no effective appeal.”²² Fourth, greater preservation of national autonomy consequently helps to lower interstate friction.²³ Fifth, national courts applying local remedy rules reduce the burden on international jurisdictions. Moreover, the nature of international responsibility requires international courts should deal with only cases worthy of consideration.²⁴ Ian Brownlie emphasized the local remedies rule includes more appropriateness and convenience of national courts as a forum for private parties’ claims and a desire to avoid the profusion of small claims based on diplomatic espousal due to practical and political considerations rather than legal factors.²⁵ Michael Reisman encapsulated the local remedies rule as “founded on principles of economy, localization of delict and remedy, and good faith.”²⁶

There are four essential conditions for the application of the local remedies rule.²⁷ First, individuals or entities being juristic persons are considered objects of protection for injuries they suffer.²⁸ Unlike an individual, a state, when it is a “direct object of protection” is not required to exhaust local remedies and can bring a case directly on the international level.²⁹ Second, there must be a breach of international law that has led to the commission

19 FREEMAN, *supra* note 2, at 416-17.

20 *Id.* at 416.

21 *Id.*

22 *Id.*

23 *Id.* at 417.

24 *Id.*

25 CRAWFORD, *supra* note 4, at 711.

26 W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 364 (1971) [hereinafter REISMAN, NULLITY AND REVISION] (Reisman noted about the respective elements of “economy,” “localization of delict and remedy,” and “good faith” stating: “Economy is expressed by resorting in the first instance to existing local decision makers rather than turning immediately to the cumbersome, expensive, and often escalating process of formal international claim. The principle of localization of delict and remedy recommends that decisions regarding acts contrary to public order be made at the place where the effects of the decision are most intensely felt. The principle of good faith presumes that national officials acting functionally as international decision makers will acquit themselves faithfully of the international aspect of their dual mandate”).

27 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 57-58.

28 *See id.* at 6-13; LAW, *supra* note 4, at 20.

29 LAW, *supra* note 4, at 20.

of a wrong against the foreign individual.³⁰ In contrast to this rule, where the wrong at issue is domestic, no diplomatic protection would arise upon exhausting the local remedies.³¹ Third, the local remedies rule involves imputing the responsibility of the state.³² Since it concerns the breach of international law, it is essential to find out who committed the breach and the way in which it was committed resulting in a wrong against an alien individual.³³ A breach of international law may be in two forms: “an initial breach of international law ... [i.e.] an act or omission that violates a rule of international law,” or “a denial of justice.”³⁴ A state is generally responsible if its agents or officials conduct an internationally illicit act or omission.³⁵ Fourth, the local remedies must be “practicable, accessible and available.”³⁶ These include judicial as well as administrative redresses.³⁷ A. A. Cançado Trindade indicated that such remedies “ought to be adequate for the object of the claim.”³⁸

The exhaustion of local remedies is one of the corollaries of the area of diplomatic protection and customary international law.³⁹ Several times the International Court of Justice (ICJ) has articulated the requirement of exhausting local remedies prior to instituting an international claim for a national’s injury.⁴⁰ For example, in *Interhandel Case*, the ICJ noted:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State

30 *Id.* at 21.

31 *Id.*

32 *Id.* at 27.

33 *Id.*

34 *Id.* at 21.

35 *See id.* at 27.

36 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 57-58.

37 *Id.* at 58.

38 *Id.* (noting the *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain)* (1934) (R.I.A.A., Vol. III pp. 1479-1550) [hereinafter *The Finnish Shipowners Arbitration*], *Marguerite de Joly Sabla* (1934)), and *Davy* (1903) cases).

39 Some argue that the customary and treaty laws have become so entwined with respect to the local remedies rule, it is difficult to tell if the rule in customary law is based on its extensive insertion in international treaties. *See Udombana, supra* note 4, at 3-4.

40 *Interhandel Case (Switzerland v. U.S.)*, ICJ Reports Preliminary Objections, 1959 I.C.J. Rep.6, at 27; (Mar. 21); *Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy)*, Judgment, 1989 I.C.J. Rep. 15, ¶¶ 51-52 (July 20) [hereinafter *ELSI*] (*ELSI* has affirmed the *Interhandel* affirmations). *See AMERASINGHE, supra* note 3, at 4 (the local remedies rule having been invoked in international litigation at ICJ and in arbitral tribunals illustrated that these organs “have conceded either expressly or implicitly that the rule exists”).

where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.⁴¹

The tribunal in the *Finnish Shipowners Arbitration*⁴² has also accepted the local remedies rule as a relevant rule of customary international law. Similarly, Dugard's Second Report on Diplomatic Protection has vocalized the rules on the exhaustion of local remedies.⁴³ The exhaustion of the local remedies rule applies where the claimant state is injured "indirectly," i.e. via its national.⁴⁴ The ILC report also noted that the requirement of exhaustion of the local remedies is a procedural condition that must be complied with before a state takes up an international claim based on its national's injury relying on a breach of local law and international law.⁴⁵

Various commentators have deliberated on whether the local remedies rule should be classified as substantive or procedural.⁴⁶ Nonetheless, the rule of exhaustion of local remedies may be waived if the act or omission violates international law and not domestic law, there is an absence of local remedies, undue delay in the remedial process, the individual is precluded

41 *Interhandel (Switzerland v. U.S.)*, *supra* note 40, at 27. See *ELSI (U.S. v. Italy)*, *supra* note 40, at 15, (applying the rule to a case of diplomatic protection).

42 The *Finnish Shipowners Arbitration*, *supra* note 38, at 1501.

43 See Dugard, *Second Report on Diplomatic Protection*, *supra* note 4, at ¶¶ 18-43.

44 *Id.* at ¶ 18 (In other words, this rule does not apply in the event of the claimant State being directly injured by another State's wrongful act).

45 *Id.* at ¶¶ 32-34.

46 *Id.* (Dugard notes three positions on classifying the rule as substantive or procedural. First, "the exhaustion of local remedies is a substantive condition on which the very existence of international responsibility depends." Second, "the exhaustion of local remedies rule is simply a procedural condition which must be met before an international claim may be brought." Third, "(a distinction is made) between an injury to an alien under domestic law and under international law. If the injury is caused by a violation of domestic law not constituting a violation of international law, international responsibility arises only from an act or omission constituting a denial of justice committed against the alien by the judicial organs of the respondent State in the course of his attempt to secure redress for the violation of domestic law. Here the exhaustion of local remedies is a substantive condition for the existence of international responsibility. In contrast, where the injury to the alien arises from a violation of international law, international responsibility occurs at the moment of injury and the requirement that local remedies must still be exhausted before an international claim is brought is merely a procedural precondition."); LAW, *supra* note 4, at 32-33 (the commentator stated, "[the local remedies rule] is a rule that affects the substantive rights and duties of states, or rather the international responsibility of states. In other words, to say that the rule is substantive is to say that the exhaustion of local remedies is the indispensable condition for the birth of international responsibility ... However, other authors claim that the rule is substantive only in case of breach of local law with the commission of a denial of justice. The rule is not substantive in case of an initial breach of international law. In such case, local remedies are to be exhausted merely as a matter of procedure"); see Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63:4 INT'L & COMPAR. L. Q. 867, 900 (2014) ("The essential basis of a denial of justice is that a foreign national has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right within an adjudicative procedure for which the State is responsible in international law").

from resorting to pursuing local remedies, and/or the respondent state has waived the local remedies requirement.⁴⁷ Denial of justice may raise international responsibility upon the state in whose domestic courts the foreign individual brought legal proceedings.⁴⁸

Finality is a substantive characteristic in matters of denial of justice for an international wrong.⁴⁹ Judicial action incurs state responsibility under international law if it is demonstrated that there were no reasonable national means at one's disposal to remedy the challenged action.⁵⁰ States are under the obligation to dispense "a fair and efficient *system* of justice;" such an obligation does not infer a commitment to ensure the absence of an occurrence of judicial misconduct.⁵¹ As a rapporteur on state responsibility, James Crawford observed in a report:

There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.⁵²

Freeman noted the correlation of the exhaustion rule with respect to the denial of justice, tracing it back to medieval times.⁵³ The foregone principle of private reprisals was a means through which state responsibility functioned.⁵⁴ Reprisals implied the use of force by an individual, consented to by his sovereign, to reverse the injustice caused to him in a foreign state, which failed to redress his injury by diplomatic, juridical or other comparable means.⁵⁵ Freeman noted the work of a medieval jurist, da Legnano, who sanctioned reprisals only after there was a failure of remedy, i.e., all means at the national level were to be exhausted.⁵⁶ Da Legnano stated, in the context of medieval times, remedy was required so that "justice may obtain its due effect, and its occasion is when there is a failure of remedy (*propter defectum remedii*) arising from the neglect of those who govern and rule

47 Dugard, *Second Report on Diplomatic Protection*, *supra* note 4, at ¶ 32; Int'l Law Comm'n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at art. 15.

48 Dugard, *Second Report on Diplomatic Protection*, *supra* note 4, at ¶¶ 32-34.

49 JAN PAULSSON, *supra* note 2, at 100.

50 *Id.*

51 *Id.*; James Crawford (Special Rapporteur), *Second Report on State Responsibility*, Document U.N. Doc. A/CN.4/498, at ¶ 75. (1999) [hereinafter Crawford, *Second Report on State Responsibility*].

52 Crawford, *Second Report on State Responsibility*, *supra* note 51, at ¶ 75 (emphasis original).

53 FREEMAN, *supra* note 2, at 53-58.

54 *Id.* at 53-54.

55 *Id.*

56 *Id.* at 55 (citing da Legnano, *Tractatus de Bello, de Repraesaliis et de Duello* (1360), ch. CXXXIII).

peoples.”⁵⁷ By the fourteenth century, the principle was well known that reprisals were not to be declared so long as local remedies were available to remedy the alien’s wrong, i.e., “local remedies must first be exhausted.”⁵⁸

Applying the local remedies rule entails ascertaining which remedies exist; the home state has the corresponding duty to provide those remedies.⁵⁹ In other words, more than the process of exhaustion, it is the actual redress for the alien’s wrong that comprises the fundamental element and purpose of the exhaustion of local remedies rule.⁶⁰

The “applicant’s duty to exhaust local remedies” and “the State’s duty to provide local remedies” are indispensable counterparts to each other.⁶¹ Trindade noted that the local remedies rule promotes international human rights protection and the state’s interests.⁶² Concerning the formulation of the local remedies rule, he stressed a subtle distinction between its application in its conception context and the human rights protection context, stating:

The traditional conception of the local remedies rule, found in such writers as Borchard and Eagleton, making international proceedings contingent upon exhaustion of local remedies until the occurrence of a denial of justice, if it was adequate in the context of diplomatic protection, is not necessarily an accurate statement of the function of the rule in human rights protection. In this latter context its function is hardly a preventive one, and a subsequent denial of justice need not be superadded to the original violation of human rights to warrant examination of the complaint at international level; what is stressed here is that the operation of local remedies should terminate in redress, and in this process of implementation of law a more active role is reserved to domestic courts.⁶³

The local remedies rule is traditionally considered a “pre-condition of international proceedings.” With respect to diplomatic protection and state responsibility for injuries to aliens, it has boasted “a ‘negative’ or preventive character” and hence underscored prior exhaustion of remedies before international intercession.⁶⁴

57 *Id.* (quoting da Legnano, *Tractatus de Bello, de Repraesaliis et de Duello* (1360), ch. CXXIII).

58 *Id.* at 55-56.

59 Udombana, *supra* note 4, at 5-6.

60 *Id.* at 6.

61 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 282.

62 *Id.* at 11-12.

63 *Id.* at 283-84.

64 *Id.* at 286-87.

Yet, this rule is deemed insufficient for human rights protection.⁶⁵ The international human rights protection system views domestic courts and local remedies as a constituent part of itself.⁶⁶ The role of domestic courts is important, whereby the complementary nature of rights and duties concerning the application of the local remedies rule is accomplished with objectivity.⁶⁷ Human rights protection envisages a framework whereby the rights of individuals, rather than of states, find primacy.⁶⁸ Viewing the rule through the human rights protection framework will engender more encouraging outcomes than the negative or formalistic approach to the dismissal of applications on account of the non-exhaustion of local remedies.⁶⁹

In addition to the conventional area of diplomatic protection, human rights protection has been one of the beneficiaries of the application of the local remedies rule in the past five decades.⁷⁰ Considered the “mirror image of existing customary and treaty law,”⁷¹ human rights protection has been stimulated by the experiments of recognizing non-state entities such as individuals as the subjects of international human rights law and providing them direct access to international organs and tribunals.⁷² International human rights law considers it vital for individuals deprived of their rights to have access to domestic remedies to remedy their harms rather than directly knocking on the door of an institution of international jurisdiction.⁷³ Leading global and regional human rights instruments reflect the general international law rule of exhaustion of local remedies in their provisions and entrust individuals as subjects of the international law on human rights.⁷⁴

For instance, Article 34 of the European Convention on Human Rights (ECHR) states the right of non-state entities, including individuals, to bring claims and enforce their rights under the Convention.⁷⁵ Article 35 of the ECHR illustrates the local remedies rule laying the admissibility criteria of

65 *Id.* at 287.

66 *Id.*

67 *Id.* at 285.

68 *Id.* at 287.

69 *Id.*

70 Udombana, *supra* note 4, at 7; AMERASINGHE, *supra* note 3, at 4-6.

71 Udombana, *supra* note 4, at 7.

72 See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27-45 (1968).

73 Udombana, *supra* note 4, at 9.

74 See A. O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT'L. L.J. 1 (1977).

75 Council of Europe, European Convention on Human Rights [hereinafter ECHR], art. 34, Nov. 4, 1950, 213 U.N.T.S. 221. Art. 34, ECHR states: “[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

exhausting “all domestic remedies.”⁷⁶ The American Convention on Human Rights (ACHR) endorses the local remedies rule under Article 46.⁷⁷ The United Nations’ International Covenant on Civil and Political Rights (UN ICCPR) involves the local remedies rule with respect to the Human Rights Committee taking cognizance of an individual’s petition once it ascertains that “all available domestic remedies have been invoked and exhausted in the matter.”⁷⁸ Similarly, the United Nations’ International Convention on the Elimination of All Forms of Racial Discrimination (UN ICERD) and the African Charter on Human and Peoples’ Rights reiterate the local remedies

⁷⁶ *Id.* at art. 35. Article 35(1) states “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.” *Id.* at art. 35(1).

⁷⁷ Article 46 Organization of the American States, American Convention on Human Rights [hereinafter ACHR], art. 46, Nov. 22, 1969, O.A.S.T.S. No. 17955, 1144 U.N.T.S. 123. Art. 46(1) reads, in part:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
 - a. That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
 - b. That the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.

Id. at art. 46(1).

⁷⁸ U.N. International Covenant on Civil and Political Rights art. 41(c), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter UN ICCPR]. Article 41(c) reads:

The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

Id. This provision on local remedies is supplemented by the Optional Protocol to the ICCPR whose two articles separately treat with the rule. U.N. Optional Protocol to the ICCPR, Dec. 17, 1966, 999 U.N.T.S. 171. Article 2 of the Optional Protocol reads: “[I]ndividuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.” Furthermore, the Optional Protocol in Article 5(2) reads: “The Committee shall not consider any communication from an individual unless it has ascertained that . . . (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.” *Id.* at art. 5(2).

rule.⁷⁹ Accordingly, the exhaustion of local remedies has become a standard provision of international instruments on human rights.⁸⁰

Chittharanjan Amerasinghe observed that both diplomatic and human rights protection share similar objectives, i.e., to authorize the respondent state to realize justice in a state of affairs which, by and large, it has reigned over and to do justice to an affected alien individual.⁸¹ Notwithstanding the argument that a human rights protection system may recognize individual rights more and be more flexible than diplomatic protection, both mechanisms aim to redress the individual while accounting for local remedies.⁸² In reference to the ECHR, the material content of the treaty rule (Article 26) invokes the generally recognized rules of international law. In that sense, the application of local remedies rule in human rights protection may be

⁷⁹ Article 11(3) of the U.N. International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter UN ICERD] art. 11(3), Dec. 21, 1965, 660 U.N.T.S. 195. Article 11(3) reads:

The Committee shall deal with a matter referred to it . . . after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

Id. Article 56(5) of the African Charter on Human and Peoples' Rights reads: "Communications relating to human and peoples' rights . . . received by the Commission, shall be considered if they . . . are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." See the Organization of African Unity, African Charter on Human and Peoples' Rights, 1986 art. 56(5), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Part I of the Charter lists an array of rights and duties). Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (available at <http://hrlibrary.umn.edu/instree/protocol-africancourt.pdf>). Per Article 34(6) of the Protocol to the African Charter, a state party to the declaration affects the standing of the individual before the Court. The African Charter on Human and Peoples' Rights lists an array of individual rights and Article 5(3) of the Protocol to the Charter notes that individuals may be entitled to institute proceeding directly before its governing Court. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 34(6), 5(3), June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

⁸⁰ Adede, *supra* note 74, at 4.

⁸¹ AMERASINGHE, *supra* note 3, at 73.

⁸² *Id.* at 73-83 (The author noted:

"that while the principle is clear that the material content of the rule is basically the same in the context of both institutions [diplomatic protection and human rights protection], the manner in which it is applied in respect of its material content to new situations in human rights protection which have not been faced before in diplomatic protection could conceivably reflect a certain 'flexibility' of approach which may result in a relaxation of the 'rigidity' of the rule even as it is applied to diplomatic protection."

Id. at 82. At the same time, he noted:

"[w]hat is at stake is the proper application of the rule in a given situation in relation to the policies behind it and to differences in the contextual background of human rights protection and diplomatic protection. This may result in preference being given to the interests sometimes of the individual and the international community, or sometimes of the defendant state, on the assumption that the rule is one which primarily favours the defendant state."

Id. at 82-83.

seen as compatible with the treaty rule as applicable to the practice of diplomatic protection.⁸³

Regarding the local remedies rule in investor-state arbitration, *Loewen Group, Inc. v. United States* sheds light on this principle, notwithstanding its outcome. The arbitral tribunal noted in its award that “[n]o instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State’s legal system.”⁸⁴ *Loewen* is further discussed in this work.

III. EXCEPTIONS AND WAIVER TO THE LOCAL REMEDIES RULE UNDER CUSTOMARY INTERNATIONAL LAW

Exceptions and waivers are an important part of the local remedies rule of customary international law. This part highlights that the local remedies rule is not absolute. It is subject to several waivers and exceptions based on the state’s capability to administer justice to an alien, remedy a wrong committed against an alien, or by the state’s consent. First, this section details the bases that may translate into exceptions to the local remedies rule. These exceptions and waivers are readily employed in international human rights protection, ISDS systems, and customary international law. Second, it discusses the exceptions and waivers to the rule in light of the ILC Articles on Diplomatic Protection, which has codified them. Additionally, there are attestations from commentators and international tribunals about the codified exceptions and waivers. Third, it specifies the practice of sovereign states to expressly grant waivers to the local remedies rule. The IIAs often constitute such waivers and are the foremost examples of this feature. Fourth, it stresses that, unlike any other contractual features, the express waivers to the local remedies rule are irrevocable. Moreover, it sheds light on the possibility of treaties being silent on the waiver.

Some earlier instances of waiving the local remedies rule have been observed in the “practice of Mixed Arbitral Tribunals and Mixed Claims Commissions in the inter-war period.”⁸⁵ The rule of exhaustion of local remedies is not absolute or rigid; it is a reasonable rule and is subject to several exceptions where “local remedies may be unobtainable, ineffective,

83 *Id.* at 79-80; see *Austria v. Italy*, Application 788/60, Report of the Plenary Commission at p. 44 (the European Commission noted in *Australia v. Italy* that “by including the words ‘according to the generally recognized rules of international law’ in Article 26 the authors of the Convention intended to limit the material content of the rule and not its field of application *ratione personae*”); see *Austria v. Italy*, App. No. 788/60, at 43 (Oct. 23, 1963).

84 *Loewen Group, Inc. and Raymond L. Loewen v. U.S.* [hereinafter *Loewen v. U.S.*], ICSID Case No. ARB(AF)/98/3, ¶ 154 (June 26, 2003).

85 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 127.

inadequate or obviously futile.”⁸⁶ John Dugard’s Third Report on Diplomatic Protection (2002) and the ILC Draft Articles on Diplomatic Protection (2006) reflect the codified exceptions to the customary international law rule: first, when the alien has “no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;”; second, “there is undue delay in the remedial process which is attributable to the State alleged to be responsible;”; third, “there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;”; fourth, “the injured person is manifestly precluded from pursuing local remedies;”; or fifth, “the State alleged to be responsible has waived the requirement that local remedies be exhausted.”⁸⁷

The first and important exception broadly concerns the “futility” or “ineffectiveness” of the local remedies.⁸⁸ Three possibilities demand consideration whereby the inadequacy of local administration of justice may allow the local remedies not to be exhausted, i.e., the “obvious futility” of the local remedies, “no reasonable prospect of success” of the local remedies, and where the local remedies offer “no reasonable possibility of effective

86 LAW, *supra* note 4, at 67, 147. *See id.* at 6 (noting the application under Article 26 of the European Convention of Human Rights where the local remedies rule is also considered in light of the generally recognized rules of international law); *see* Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Loewen v. US., and Chattin v. Mexico*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 669-700 (Todd Weiler ed., 2005) [hereinafter Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice*]; *see* OPPENHEIM, *supra* note 5, at 524-25 (“[F]ailure to exhaust local remedies will not constitute a bar to a claim if there are no available remedies which should have been pursued; or if available remedies are inappropriate for the subject matter of the claim or are in practice shown to be ineffective in relation to the matter complained of; or if it is clearly established that, in the circumstances of the case, an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject matter of the complaint, or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation, or, as a rule, when the injury to the alien is the result of an act of the government as such.” (footnotes omitted)).

87 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at art. 15; *see* John Dugard (Special Rapporteur), *Third Report on Diplomatic Protection*, Document U.N. Doc. A/CN.4/523 (2002), at art. 14 (the Report constituted comparable provisions of exception and included an additional one stating that “[t]he internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State”); *see generally* TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 110-12; LAW, *supra* note 4, at 63-73; OPPENHEIM, *supra* note 5, at 526 (e.g. “If pending proceedings have been unreasonably prolonged through no fault of the aggrieved person it may be concluded that no further domestic remedies remain to be exhausted”).

88 DUGAN ET AL., *supra* note 4, at 348-49 (“futility” and “waiver” being two main exceptions in investment treaty arbitration); David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT’L L. 389, 398-400 (1964); Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 47; *see* LAW, *supra* note 4, at 63-66.

redress.”⁸⁹ International law jurisprudence indicates support in favor of these options. In the *Finnish Shipowners Arbitration* award of 1934, the Arbitrator advanced the “obvious futility” test.⁹⁰ The European Commission of Human Rights has endorsed the test of “no reasonable prospect of success” in several decisions.⁹¹ The futility factors may vary in every case and should be determined on a case-by-case basis.⁹²

The third possibility of the local remedies, providing no reasonable prospect of effective redress, is traced to the separate opinion of Judge Hersch Lauterpacht in the *Certain Norwegian Loans* case.⁹³ Judge Lauterpacht, in discussing the effectiveness of possible remedies even if highly unlikely to be successful, noted, “[h]owever 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, any effective remedy* before the Norwegian courts.”⁹⁴ However, it is noted that this test, propounded by Lauterpacht, lacks the element of availability of such local remedies necessary to invoke state responsibility as elaborated by the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts.⁹⁵ The writing of eminent jurists and international human rights jurisprudence also supports this view.⁹⁶

89 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 47; *see* LAW, *supra* note 4, at 63-66.

90 The *Finnish Shipowners Arbitration*, *supra* note 38, at 1504; John Dugard, *Third Report on Diplomatic Protection*, *supra* note 87, at 58 (As noted by Dugard, the “obvious futility” test “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”).

91 *Retimag S.A. v. Fed. Republic of Germany*, App. No. 712/60, Y.B. Eur. Conv. on H.R., 385, 400 (1961) (Eur. Comm’n on H.R.); *see* X, Y, Z v. the U.K., App. Nos. 8022/77 and 8027/77, 18 Eur. Comm’n H.R. Dec. & Rep. 18 66, 76 (1979); John Dugard, *Third Report on Diplomatic Protection*, *supra* note 87, at 59 (Dugard cites the American Law Institute’s *Restatement of the Law Second: Foreign Relations Law of the United States*, which backs this test by using a similar expression of “reasonable possibility”).

92 Mummery, *supra* note 88, at 400-01.

93 *Certain Norwegian Loans* (Fr. v. Nor.), Judgment, 1957 I.C.J. 34, 39 (separate opinion by Lauterpacht, J.).

94 *Id.* at 39 (emphasis added); *see* Gerald Fitzmaurice, *Hersch Lauterpacht – The Scholar as Judge – Part I*, 37 BRIT. Y.B. INT’L L. 1, 60-61 (1961).

95 Article 44 of the Articles reads that “the responsibility of a State may not be invoked if... (b) the claim is one to which the rule of exhaustion of local remedies applies and any *available* and effective local remedy has not been exhausted.” G.A. Res. 56/83, art. 44, Articles on the Responsibility of States for Internationally Wrongful Acts, (Dec. 12, 2001) (emphasis added).

96 *See* AMERASINGHE, *supra* note 3, at 181-82, 203-04; *see* Nielsen v. Denmark, App. no. 10929/84, Eur. Ct. H.R., ¶ 62 (1988); *Englert v. Germany*, App. no. 10282/83, Eur. Ct. H.R., ¶ 32 (1987) (reading the requirements in Article 26 of the European Convention of Human Rights as discussing the exhaustion of remedies that are *available* and sufficient); *Schmidt v. Costa Rica*, Case 9178, Inter-Am. Comm’n H.R., Report No. 17/84, OEA/Ser.L/V/ II.63, doc.15 (1984) (the Commission held that the remedy of *amparo* did not

Availability also implies accessibility rather than just the theoretical prevalence of a remedy. To be considered available, the local remedy should be legally accessible to the claimant under the law of the host or respondent state.⁹⁷ The decisions of the Human Rights Committee illustrate that local remedies not lawfully available were not deemed exhaustible.⁹⁸ The arbitral award of *Loewen* reiterated the language of the ILC Articles, emphasizing the availability element and stating, “it is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.”⁹⁹

Pursuant to the abovementioned international jurisprudence, writings, and the ILC Report, the consensus leans towards the test in the first exception of “no reasonable available local remedies” to provide effective redress. The ILC Report on Diplomatic Protection (2006) incorporates Dugard’s Third Report on Diplomatic Protection and suggests that the grounds where local remedies need not be exhausted include:¹⁰⁰

- (i) [T]he local court has no jurisdiction over the dispute in question;
- (ii) the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;
- (iii) the local courts are notoriously lacking in independence;
- (iv) there is a consistent and well-established line of precedents adverse to the alien;
- (v) the local courts do not have the competence to grant an appropriate and adequate remedy to the alien; or
- (vi) the respondent State does not have an adequate system of judicial protection.

The ILC Report noted that it is insufficient for the claimant to show that the likelihood of success is low or that further appeals are costly or onerous.¹⁰¹ It qualified that the test is whether the municipal system of the host state is “reasonably capable” of providing effective relief.¹⁰² It stated that

apply and was not available to be tested since the Supreme Court of the country had already adjudicated. The remedy needed to be available as well as it needed to be a possible remedy in the stipulated reference).

⁹⁷ AMERASINGHE, *supra* note 3, at 181-82, 203-04.

⁹⁸ U.N. HUM. RTS. COMM., Selected Decisions under the Optional Protocol (SECOND TO SIXTEENTH SESSIONS), at 48 ¶ 13, 58-59 ¶ 3, ¶ 11, 77-79 ¶ 2.4, ¶ 12, U.N. Doc., CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985) (concerning the remedy of *habeas corpus* not applicable to persons detained under the “prompt security measures”).

⁹⁹ *Loewen v. U.S.*, *supra* note 84, at ¶ 168.

¹⁰⁰ Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 47; Dugard, *Third Report on Diplomatic Protection*, *supra* note 87, at ¶¶ 38-44.

¹⁰¹ Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 48.

¹⁰² *Id.*

this should be decided in reference to the local law and prevailing circumstances.¹⁰³

The second exception deals with the doing away of the local remedies rule in the event of an unreasonable delay on the part of the respondent state in implementing a local remedy. International instruments and jurisprudence support this ground.¹⁰⁴ It is suggested that it is difficult to “give an objective content or meaning to ‘undue delay’ or to attempt to prescribe a fixed limit within which local remedies are to be implemented.”¹⁰⁵ Hence, every case should be determined according to its unique circumstances.¹⁰⁶ For instance the *El Oro Mining* case of the British – Mexican Claims Commission states, “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.”¹⁰⁷

The third exception entails that the local remedies need not be exhausted where there is an absence of a voluntary link or territorial connection between the injured alien and the respondent state.¹⁰⁸ Concerning exhausting remedies in a particular state, scholars and state practice have endorsed an adequate jurisdictional connection between the injured person and the respondent state, whether by taking by residence, engaging in business, owning property, or effectuating contractual relations.¹⁰⁹ This remains the understanding vis-à-vis the traditional conception of the local remedies rule

103 *Id.*

104 UN ICCPR Article 41(c) reads: “The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.” UN ICCPR, *supra* note 78, at art. 41(c); The ACHR references pursuing and exhausting domestic remedies in exception to Article 46(2)(c): that “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.” ACHR, *supra* note 77, at art. 46(2)(c); *Las Palmeras v. Colombia*, Preliminary Objection, Inter-Am. Ct. H.R. (ser. B), ¶ 38 (February 4, 2000) (noting a procedural lapse which delayed justice and citing the *Genie Lacayo* case, where the Court held that a period of five years from the time of the order to the proceeding’s start exceeded the limits of reasonableness).

105 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 48.

106 *Id.*

107 *Id.* *El Oro Mining and Ry. Co. (Ltd.) v. Mex.*, 5 R.I.A.A., 191, 198 (Anglo-Mex. Special Claims Comm’n 1931).

108 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 48.

109 AMERASINGHE, *supra* note 3, at 168-69; BORCHARD, *supra* note 12, at 817 (noting the local remedies rule in international law whereby the “alien is deemed to tacitly submit and to be subject to the local law of the state of residence”); see *Salem Case (Egypt v. U.S.)*, 2 R.I.A.A. 1161, 1202 (Ad Hoc Tribunal 1932) (“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...”).

and diplomatic protection. However, in the case of the shooting of an aircraft that accidentally strayed into another state's airspace,¹¹⁰ it is noted that the grounds for such a voluntary link or territorial connection rule is the assumption of risk by the injured person in another state.¹¹¹ In several cases, tribunals have endorsed the local remedies rule even where there is no voluntary link between the respondent state and the alien.¹¹² In the exception, the language emphasizes the existence of a "relevant" connection and not a "voluntary" link since it highlights the "subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State."¹¹³ The norm, however, remains that of the exhaustion of local remedies where there is a jurisdictional connection and aliens have voluntarily made themselves the subject of the respondent state's jurisdiction.¹¹⁴

The fourth exception concerns cases when it is manifestly unreasonable for the injured alien to comply with the local remedies rule.¹¹⁵ The ILC Articles prescribe a narrow construing of this exception while placing the burden of proof on the injured person to show that not only were severe impediments and difficulties to exhausting exhaustion local remedies, but also that they were "manifestly precluded from pursuing such remedies."¹¹⁶ The determining factors may vary from case to case.¹¹⁷ An instance may include a claimant alien being averted by the respondent state from coming into its territory by legal or extra-legal means and hence refusing them the chance to engage the local courts and exhaust the local remedies.¹¹⁸ Another instance may be the respondent state imposing excessively high costs, which may "manifestly preclude" compliance with the local remedies rule.¹¹⁹ The discussion on the *Loewen* case¹²⁰ will further elaborate on this exception.

The fifth exception deals with the waiver of the local remedies rule. While the local remedies rule is formulated for the benefit of the state and its interests, the state itself may give its consent to waive the requirement of

110 Case Concerning the Aerial Incident of July 27th, 1955 (Isr. v. Bulg.), Preliminary Objections, 1959 I.C.J. 127, 134 (May 26).

111 Int'l Law Comm'n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 48.

112 See *id.* at 49; the *Finnish Shipowners* Arbitration, *supra* note 38, at 1497.

113 Int'l Law Comm'n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 49 (noting that the "relevant" connection implies that it must relate in some way to the injury suffered).

114 *Id.* at 48.

115 *Id.* at 49.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 See generally *Loewen v. U.S.*, *supra* note 84.

exhausting local remedies in its domestic jurisdiction.¹²¹ International human rights tribunals have noted this stand. For instance, the Inter-American Court of Human Rights in *Viviana Gallardo* noted in light of the waiver to local remedies rule that:

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 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. A waiver, once effected, is irrevocable.¹²²

A waiver to the local remedies rule may be effected via bilateral or multilateral treaties; state contracts; or *ad hoc* arbitration agreements as seen in the ICSID Convention, several bilateral investment treaties (BITs), and the Algiers Declaration of 1981 concerning the agreement between the US and Iran.¹²³ Such treaties or agreements may be entered into before or after the dispute surfaces.¹²⁴ An award of the Iran-US Claims Tribunal presents another instance where the local remedies rule is acknowledged despite the rule not applying in the circumstances owing to the implicit exclusion, holding that “the Algiers Declarations grant jurisdiction to this Tribunal notwithstanding that exhaustion of local remedies . . . doctrines might otherwise be applicable.”¹²⁵ Furthermore, the waiver may be implied, expressed, or inferred from the conduct of the respondent state in situations where the rule of estoppel so demands.¹²⁶

121 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 49; OPPENHEIM, *supra* note 5, at 525-26; LAW, *supra* note 4, at 93-121.

122 In the matter of *Viviana Gallardo et al.*, Advisory Opinion No. G 101/81, Inter-Am. Ct. H.R. (ser. A) ¶ 26 (1984); see *Cases of De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium*, App. No. 2832/66, 12 Eur. Comm’n H.R. Dec. & Rep. 1, ¶ 55 (1971) (“[T]here is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies, the essential aim of which is to protect their national legal order. . . . If there is such a waiver in the course of proceedings before the Commission . . . , it can scarcely be imagined that the Government concerned is entitled to withdraw the waiver at will after the case has been referred to the Court.”).

123 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 49-50; LAW, *supra* note 4, at 93-94; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 26, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.S.T. 159 [hereinafter ICSID Convention]; Algiers Accords, U.S.-Iran, art. II, Jan. 19, 1981, 20 ILM 223.

124 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 49.

125 *Am. Int’l Grp., Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 9 (1983).

126 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 49; OPPENHEIM, *supra* note 5, at 525-26 (“Nor do local remedies have to be exhausted . . . where the state . . . is estopped from invoking it.”).

Waivers are noted as a common element of present-day state practice, the clauses of which can be seen in arbitration agreements.¹²⁷ It is also acknowledged that express waivers, once effected, are irrevocable.¹²⁸ At the same time, the waiver of the local remedies rule must not be eagerly implied; if a treaty is silent, the waiver will not be implied.¹²⁹ As regards to the waiver of the exhaustion of local remedies, the ICJ in *ELSI* stated that it found itself “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.”¹³⁰ Nonetheless, the ILC Draft Articles on Diplomatic Protection noted instances that indicated effecting the waiver to local remedies where parties so clearly intended.¹³¹ These peculiarities suggest that instead of a general rule concerning the waiver of local remedies, every case must be decided alone, considering the governing agreement and the conditions behind its adoption.¹³²

In the event of an arbitration agreement amongst states concerning the submission of future disputes to arbitration, there is an endorsement of the prospect of not involving “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.”¹³³ In addition, the *ELSI* award indicates a view against implied or tacit waiver in such matters.¹³⁴ Notwithstanding that, the general rule in international law inclines toward the local remedies rule unless

127 See ICSID Convention, *supra* note 123, at art. 26; see Stephen M. Schwebel & J. Gillis Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 AM. J. INT’L L. 484, 499 (1966) (“It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.”)

128 In the matter of Viviana Gallardo et al., *supra* note 122, at ¶ 26. See Cases of De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium, *supra* note 122, at ¶ 55.

129 OPPENHEIM, *supra* note 5, at 526 n.16.

130 *ELSI (USA v. Italy)*, *supra* note 40, at ¶ 50 (reviewing the United States’ invocation of the Italy-United States FCN Treaty (1948) to argue the non-requirement of the local remedies rule). Article XXVI of this treaty stated that “Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty . . . shall be submitted to the International Court of Justice”; DUGAN ET AL., *supra* note 4, at 349. While the ICJ seemingly counted out implied waivers, implied waivers are usually enforceable today “so long as the intention of the parties to that effect is clear.”

131 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 50 (stating that the local remedies waiver may be “more easily implied from an arbitration agreement entered into after the dispute in question has arisen”). See ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 473 (Hersch Lauterpacht ed., 1st ed. 1931). See *Am. Int’l Grp., Inc. v. Iran*, *supra* note 125, at 9-10; STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS, 117-18 (1st ed. 1987).

132 Int’l Law Comm’n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 50; DUGAN ET AL., *supra* note 4, at 349 (“Whether a waiver can be implied is in essence a treaty interpretation exercise, which should be undertaken on a case-by-case basis.”).

133 F. A. Mann, *State Contracts and International Arbitration*, 42 BRIT. Y.B. INT’L L. 1, 32 (1967).

134 *ELSI*, *supra* note 40, at ¶ 50.

deliberately excluded by an act of the state involved in a dispute.¹³⁵ In other words, the local remedies rule is the norm in customary international law, and its waiver is an exception.¹³⁶

IV. LOCAL REMEDIES RULE IN INVESTOR-STATE ARBITRATION

Having discussed the exceptions and waivers to the local remedies rule under customary international law, this paper now discusses the application of the local remedies rule in the ISDS system. First, this part explains that as an important domain of international law, the local remedies rule has implications for the ISDS system. BITs do not follow a single pattern of the local remedies rule and display varying trends of constituting rules on exhausting remedies. Second, BITs also establish a practice of exceptions to the local remedies rule. The ILC Articles on Diplomatic Protection codify the local remedies rule and the exceptions or waivers thereof. Third, it discusses the features of the ICSID Convention and NAFTA concerning the local remedies rule in light of the practice of the arbitral tribunals. It also discusses how an arbitral tribunal decides if the governing treaty is silent on the rules of exhaustion of local remedies. Fourth, it reviews the yet inconclusive nature of the waiver rule in the ISDS context and notes the inclination of the international tribunals to decide on a case-to-case basis.

An investment agreement is an indispensable factor in determining the essence of the local remedies rule concerning an investor-state dispute.¹³⁷ It is noted that investment arbitration seldom deals with the local remedies rule since most treaties expressly depart from the exhaustion requirement as required under customary international law, and international tribunals allow the investor to take recourse to international arbitration without previous resort to domestic or local remedies.¹³⁸

Christoph Schreuer observed that one of the purposes of investment arbitration is to avoid local courts.¹³⁹ He stated “the exhaustion of local remedies is generally not a requirement of modern investment arbitration. This is one of several advantages it has over the traditional remedy of diplomatic protection.”¹⁴⁰ A report of the United Nations Conference on Trade and Development (UNCTAD) noted that with time, BITs have diverged from the

135 AMERASINGHE, *supra* note 3, at 6. ICSID Article 26 varies from this general rule. See ICSID Convention, *supra* note 123, at art. 26.

136 AMERASINGHE, *supra* note 3, at 6. See OPPENHEIM, *supra* note 5, at 522-26.

137 See DUGAN ET AL., *supra* note 4, at 357.

138 *Id.*

139 Christoph Schreuer, *The Relationship Between Local Courts and Investment Treaty Arbitration: The Co-Existence of Local and International Law Remedies*, TRANSNAT'L DISP. MGMT. at 1, 6 (2005).

140 *Id.* at 11.

general international rule on exhausting local remedies.¹⁴¹ Consequently, most investor-state agreements have dispensed with the rule of exhausting local remedies before taking recourse to international arbitration.¹⁴²

Several BITs no longer specify the local remedies requirement.¹⁴³ For instance, Article 10(5) of the Austria – United Arab Emirates BIT (2001) reads: “If the investor chooses to file for arbitration, the host Contracting Party agrees not to request the exhaustion of local settlement procedures.”¹⁴⁴ Some BITs, such as the Cambodia – Croatia BIT (2001), stipulate the waiver of local remedies rule by way of the host country’s consent to arbitration:

In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted.¹⁴⁵

Others have stipulated waiting or cooling-off periods ranging from three to six months or more before which a foreign investor may not initiate proceedings in an international arbitral tribunal.¹⁴⁶ These examples converge toward the trend of relieving the foreign investor in some way of the

141 Historically, local remedies rule was the norm before a dispute could be elevated to the international level. At first, international arbitration, which was a subsidiary way of conflict resolution for foreign investors, conceived foreign adjudication once they failed to redress their disputes in the respondent state’s local jurisdiction. Hence, various BITs of the earlier times (the 1970s) made moving international arbitral procedure conditional to the prior recourse in local courts. The Report noted that this trend gradually changed to make waiver to the local remedies rule as a norm rather than an exception. *See* U.N. Conference on Trade and Development [hereinafter UNCTAD], *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, U.N. Doc. A/UNCTAD/ITE/IIT/2006/5, at 108 (2007).

142 *Id.*

143 *Id.*; CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 391 (1st ed. 2001) [hereinafter CHRISTOPH SCHREUER, *THE ICSID CONVENTION*].

144 Agreement between the Republic of Austria and the United Arab Emirates for the Promotion and Protection of Investments, Austria-U.A.E., art. 10(5), June 17, 2001.

145 Agreement between the Government of the Republic of Croatia and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, Cambodia-Croat., art. 10(2)(b), May 18, 2001.

146 *E.g.*, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Czech-Neth., art. 8(2), Apr. 29, 1991, 2242 U.N.T.S. 205 [hereinafter Czech-Neth. BIT] *e.g.*, reads: “Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement”; DUGAN ET AL., *supra* note 4, at 357 n.28 (stating that even a period of two years or more does not often suffice to exhaust all local remedies); CHRISTOPH SCHREUER, *THE ICSID CONVENTION*, *supra* note 143, at 393 (citing the two-year exhaustion requirement of the French-Moroccan treaty of 1975 which was “probably the only remotely realistic time limit to achieve an exhaustion of local remedies.”).

obligation to exhaust local remedies rule before moving to an international arbitral tribunal.¹⁴⁷

In contrast, some investment agreements necessitate that the foreign investor must first exhaust the administrative procedures of the host country before pursuing international arbitration. For example, the BIT between China and Côte d'Ivoire reads:

If such dispute can not [sic.] settled [sic.] amicably through negotiations, any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall be [sic.] have exhausted the domestic administrative review procedure specified by the laws and regulations of that Contracting Party, before submission of the dispute [sic.] the aforementioned arbitration procedure.¹⁴⁸

The Sri Lanka – Switzerland BIT (1981) requires twelve months for parties to settle disputes “through pursuit of local remedies or otherwise.”¹⁴⁹ The French-Moroccan treaty (1975) stipulated two years.¹⁵⁰

In the same category of BITs requiring local procedures, some require engaging local remedies at least for a certain period; once having unsuccessfully engaged the local remedies for a certain time, the foreign investor can then move to an international arbitral tribunal. For instance, the BIT between Belgium-Luxembourg and Botswana (2003) specifies:

In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the notification, the dispute shall be submitted, at the first instance to a court [sic.] competent jurisdiction of the latter Contracting Party for a decision. Either party may, six months after the submission of the dispute to a court of competent jurisdiction, refer the dispute to international arbitration.¹⁵¹

The BIT between Morocco and the United States (1991) offers a hybrid provision whereby US nationals can move to ICSID if local remedies in Morocco are exhausted or one year has elapsed since the initiation of

147 UNCTAD, *supra* note 141, at 109.

148 Agreement between the Government of the People's Republic of China and the Government of the Republic of Côte D'Ivoire on the Promotion and Protection of Investments, China-Côte D'Ivoire, art. 9(3), Sept. 30, 2002.

149 Agreement for the Reciprocal Promotion and Protection of Investments, Sri Lanka-Switz., art. 9(2) Sept. 23, 1981, 1345 U.N.T.S. 27.

150 Agreement on the Reciprocal Protection, Encouragement and Guarantee of Investments, Fr.-Morocco, art. 10, July 15, 1975, 1036 U.N.T.S. 335.

151 Agreement on the Reciprocal Promotion and Protection of Investments, Belg.-Lux. Econ. Union-Bots., Article 12(2), June 7, 2006.

proceedings there.¹⁵² The Energy Charter Treaty, in reference to transit, stipulates that “the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute” before referring the dispute to the secretary-general.¹⁵³ Of the number of exceptions to the local remedy rule as specified in John Dugard’s Third Report on Diplomatic Protection and the ILC Draft Articles on Diplomatic Protection, commentators have noted that the two main exceptions are the “waiver” and “futility” of the available local remedies.¹⁵⁴

One of the central agreements concerning international investment protection, the ICSID Convention, says in Article 26:

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.¹⁵⁵

Article 26 is explained in two sentences.¹⁵⁶ It is noted that the first sentence contains two features.¹⁵⁷ First, once consent to ICSID arbitration is effected, parties lose the right to move to any other forum for relief, national or international, and are confined to only ICSID for seeking relief.¹⁵⁸ However, this “exclusive remedy” rule is subject to modification by the parties; the “unless otherwise stated” clause in the first sentence allows the parties to diverge from it through an agreement.¹⁵⁹ Second, it exhibits the self-contained and autonomous nature of the arbitration procedure under ICSID.¹⁶⁰ “Furthermore, the arbitration process is also insulated from inter-State claims by the exclusion of diplomatic protection (Art. 27).”¹⁶¹

The second sentence of the Article concerns the local remedies rule.¹⁶² Schreuer noted that the exclusive remedy rule of the first sentence would imply that “there is no need to exhaust” local remedies before moving to ICSID “unless otherwise stated.”¹⁶³ Nonetheless, the second sentence endorses and enumerates the host state’s right to assert the local remedies rule

152 Treaty concerning the Encouragement and Reciprocal Protection of Investments, Morocco-U.S., art. 6(3)(a), July 22, 1985, S. TREATY DOC. NO. 99-18. Article VI.

153 Energy Charter Treaty, art. 7(7) Dec. 17, 1994, 2080 U.N.T.S. 95. Article 77(7), (8) also specifies non-derogation from obligations under international law including customary law.

154 DUGAN ET AL., *supra* note 4, at 348.

155 ICSID Convention, *supra* note 123, at art. 26.

156 See CHRISTOPH SCHREUER, THE ICSID CONVENTION, *supra* note 143, at 345-96.

157 *Id.* at 347.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 348.

163 *Id.*

as a requirement for its consent to arbitration.¹⁶⁴ In other words, ICSID Article 26 “reverses” the local remedies rule under international law; it implies that the contracting states waive the local remedies rule unless otherwise stated.¹⁶⁵ In the absence of a mandate to make exhaustion of local remedies a condition of consent to arbitration, petitioners are not required to exhaust local remedies.¹⁶⁶ Indeed, the Report of the Executive Directors on the ICSID Convention specified, concerning Article 26, that “[i]n order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.”¹⁶⁷

Contracting parties may stipulate the exhaustion of local remedies as a condition of consent in the governing treaty text or through domestic ratification via legislation.¹⁶⁸ However, such a condition requiring exhaustion of local remedies may only be conveyed by a state party before consent to arbitration is effectuated, not after.¹⁶⁹ This local remedies requirement may be withdrawn at any time, thus leading to direct recourse of ICSID arbitration.¹⁷⁰

ICSID contracting states have sparingly used this requirement;¹⁷¹ the Ad Hoc Committee decision in *Amco v. Indonesia* on the application for annulment highlighted the residual rule in Article 26.¹⁷² Indonesia argued “that

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 388; TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 128, 132-33 (“In the settlement of investment disputes the matter is quite debatable, and is further complicated when intermingled with implied waiver of the local remedies rule, as in the construction of the local remedies requirement found in [the ICSID Convention Article 26], which can be interpreted as a non-mandatory or permissive rule which is excluded unless expressly invoked, or else as an implied renunciation of the requirement – the presumption operating to this effect.”). In contrast, human rights instruments provide an express inclusion of the local remedies rule and dismiss the possibility of its express waiver. *E.g.*, ECHR, *supra* note 75, at art. 35; UN ICERD, *supra* note 79, at arts. 11(3), 14(7)(a); ACHR, *supra* note 77, at art. 46(1)(a) (Article 46(1)(a), with the limitations contained in Article 46(2); UN ICCPR, *supra* note 78, at art. 41(1)(c); Optional Protocol to the UN ICCPR, *supra* note 78, at arts. 2 and 5.

¹⁶⁶ CHRISTOPH SCHREUER, THE ICSID CONVENTION, *supra* note 143, at 388-89; TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 128.

¹⁶⁷ *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, INT’L CTR. FOR SETTLEMENT OF INV. DISPS., art. 30 (Mar. 18, 1965); *see* CHRISTOPH SCHREUER, THE ICSID CONVENTION, *supra* note 143, at 389-90 (discussing the drafting history of Article 26, Mr. Broches noted that the provision simply established a rule of interpretation, i.e., a presumption of arbitration as the sole remedy. Yet, the provision allowed the contracting parties to require the exhaustion of local remedies).

¹⁶⁸ CHRISTOPH SCHREUER, THE ICSID CONVENTION, *supra* note 143, at 390.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 391.

¹⁷¹ *Id.* at 395.

¹⁷² *Id.*

the Tribunal manifestly exceeded its powers by holding that Amco could bring its claim for compensation of damages based on the acts of the army and police personnel involved directly to an ICSID Tribunal without previously seeking redress before the Indonesian courts in conformity with the general international law rule on exhaustion of local remedies.”¹⁷³ The Committee rejected this argument and stated that “[b]y acceptance of ICSID jurisdiction without reserving under Article 26 of the Convention a right to require prior exhaustion of local remedies as a condition for obtaining access to an ICSID tribunal, Indonesia must be deemed to have waived such right.”¹⁷⁴

The *Loewen* case also illustrates a substantive discussion on the local remedies rule in light of the ILC reports and international law. The dispute arose out of litigation in Mississippi State Court between claimants (a Canadian corporation Loewen Group et al.) and O’Keefe company (Jeremiah O’Keefe Sr., his son, and various companies owned by them), who were competitors in the funeral home and funeral insurance business in Mississippi.¹⁷⁵ Loewen lost to O’Keefe over a commercial matter for a contract, the value of which was below ten million US dollars.¹⁷⁶ Yet, the jury awarded O’Keefe US\$ 500 million in damages, which included \$75 million in damages for emotional distress and \$400 million as punitive damages.¹⁷⁷

Loewen claimed that O’Keefe’s attorneys employed prejudicial references to its nationality, race, and class-based distinction from O’Keefe, all of which could not be restrained by the trial judge and who also did not give an instruction to the jury about the impermissibility of such nationality-based, racial and class-based discrimination.¹⁷⁸ Consequently, it decided to appeal the \$500 million verdict but was met with an appellate bond requirement of Mississippi law requiring a 125% appeal bond of the judgment.¹⁷⁹ The trial court, as well as the Mississippi Supreme Court, refused to reduce the appeal bond.¹⁸⁰ The claimants argued that that bond requirement forestalled their appeal rights, forcing them to settle the case “under extreme duress.”¹⁸¹ Consequently, claimants entered a settlement with O’Keefe agreeing to pay \$175 million.¹⁸²

173 *Amco Asia Corp. v. Indon.*, ICSID Case No. ARB/81/1, Decision on the Application of Annulment, ¶ 62 (May 16, 1986) 1 ICSID Rep. 509.

174 *Id.*

175 *Loewen v. U.S.*, *supra* note 84, at ¶¶ 1, 3.

176 *Id.* at ¶¶ 3-4.

177 *Id.* at ¶ 4.

178 *Id.*

179 *Id.* at ¶ 5.

180 *Id.* at ¶ 6.

181 *Id.* at ¶¶ 6-7.

182 *Id.* at ¶ 7.

First, the tribunal recognized the local remedies rule as procedural regarding international law. Then it stated that, according to the ILC Draft Articles on State Responsibility (Article 44), the local remedies rule covers “the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law.”¹⁸³ Second, instead of an appealable court decision, the national judicial process is open to test for a failure to provide a fair and efficient system of justice sufficient to constitute an international denial of justice claim.¹⁸⁴ The *Loewen* opinion details precedents in international law generally requiring exhaustion of any reasonably available, adequate, and effective remedy, unless such options are to no avail or impossible to pursue.¹⁸⁵

The tribunal also considered Loewen’s appeal of the trial court’s decision under the local remedies rule. Mississippi state laws provided for preventing the judgment’s enforcement pending an appeal with the Mississippi Supreme Court of the lower court’s decision for “good cause shown” and in an “appropriate” case.¹⁸⁶ However, the judgment’s bond requirement included a surety of 125 percent of the judgment.¹⁸⁷ The motion to reduce the bond amount was dismissed.¹⁸⁸ The tribunal noted that such a “refusal to relax the bonding requirement was not a denial of the appeal.”¹⁸⁹ Concerning Loewen’s contention of the refusal equating to a procedural denial of justice, the tribunal asserted that the stipulated “decision does not transgress the minimum standard of treatment mandated by Article 1105. It was, at worst, an erroneous or mistaken decision.”¹⁹⁰

Consequently, Loewen announced the settlement with O’Keefe in a press release.¹⁹¹ Responding to the question of reasonability and adequacy of available local remedies to Loewen, the tribunal stated that Loewen had failed to present evidence for its reasons to settle instead of choosing another resolution alternative.¹⁹² The tribunal added that had the settlement agreement been the only reasonable recourse for Loewen, it could be implied that it had no reasonably available and adequate remedy.¹⁹³ However, the given case did not fit the description of “the only course which [one] could

183 *Id.* at ¶ 149.

184 *Id.* at ¶¶ 151-56.

185 *Id.* at ¶¶ 165-70.

186 *Id.* at ¶¶ 173-80.

187 *Id.* at ¶ 180.

188 *Id.* at ¶ 183.

189 *Id.* at ¶ 188.

190 *Id.* at ¶ 189.

191 *Id.* at ¶ 201.

192 *Id.* at ¶ 215.

193 *Id.*

reasonably be expected to take.”¹⁹⁴ Indeed, Loewen had at least three alternatives before it: “(1) securing funds to finance the bond; (2) negotiating a reasonable settlement; and (3) filing for Chapter Eleven bankruptcy protection without posting a bond.”¹⁹⁵ Accordingly, it held that Loewen “failed to pursue its domestic remedies.”¹⁹⁶

Generally, Trindade has noted that the discourse on waivers of local remedies is “highly inconclusive” and “quite debatable”.¹⁹⁷ Schreuer discussed some important considerations concerning the exhaustion principle while indicating support for the ICSID Convention’s basic rule of non-exhaustion.¹⁹⁸ First, recourse to all available local remedies before ICSID’s adjudication may be considered a waste of time and money to the investor.¹⁹⁹ Second, public proceedings in the host state’s court may aggravate the dispute with the foreign investor and may even upset the investment climate.²⁰⁰ Third, in the event of the ICSID tribunal overturning a decision of the host state’s highest court, severe awkwardness is bound to arise for the host state.²⁰¹

V. CONCLUSION

The principle of the exhaustion of local remedies is a longstanding rule emanating from customary international law. The rule initially developed with respect to diplomatic protection and had vital implications for state sovereignty. Pursuant to the right of territorial jurisdiction, states have an intrinsic prerogative to redress the wrong against a foreign individual in their territory. States must first be afforded a suitable opportunity to administer justice before their responsibility may be effected at the international level.

Yet, the local remedies rule does not translate into the international legal system succeeding over the national legal systems, nor international tribunals, particularly international investment tribunals, as (domestic) courts of appeal.²⁰² The local remedies rule rather implies an interaction between the national and international legal systems for lawful settlement of a wrong in which domestic courts have a more enterprising part. Hence, the local remedies rule has a twofold purpose: first, to allow the host state to perform its

194 *Id.* at ¶¶ 215-16.

195 *Id.* at ¶ 198.

196 *Id.* at ¶ 217.

197 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 127-28.

198 CHRISTOPH SCHREUER, THE ICSID CONVENTION, *supra* note 143, at 395-96.

199 *Id.* at 395.

200 *Id.*

201 *Id.* at 395-96; *see* Schreuer, *Calvo’s Grandchildren*, *supra* note 4, at 1-3.

202 *Lion Mexico Consolidated L.P. v. Mexico*, ICSID Case No. ARB(AF)/15/2, Award of 20 September 2021, ¶ 217 (Sept. 20, 2021).

foremost duty and right to operate its legal and judicial frameworks of justice for redressing a wrong without any outside interference, and second, to allow for state responsibility to be triggered upon the exhaustion of local remedies and afford the offending state a chance to redress the wrong at its level. It implies that a denial of justice claim is conditional to exhausting local remedies, with certain exceptions, including the futility, availability, practicability, or waiver of such remedies. Not to mention, a denial of justice claim lies against the state's obligation of dispensing fair and efficient justice; the state's legal system, as a whole, is at a test.

The local remedies rule entails several features. First, an aggrieved alien may obtain favorable judgment at the domestic level and hence may not find it wise to move to an international forum, notwithstanding the expenses. Second, it aims to preserve national autonomy while the respondent state gets the first opportunity to meet the ends of justice. Thereby, it reduces inter-state friction. Third, it reduces the burden of international jurisdictions, and judicial resources are used more efficiently. Reisman aptly captured the local remedies rule as "founded on principles of economy, localization of delict and remedy, and good faith."²⁰³

Even from an international human rights law perspective, which mirrors international law, the local remedies rule entails a rights-duties duality. The claimant's duty to exhaust local remedies and the state's duty to provide local remedies are counterparts. The local remedies rule is an important part of international human rights instruments, which place the rights of individuals at primacy. Some examples are the ECHR and the UN ICCPR.²⁰⁴

Similar to the local remedies rule, the practice of exceptions to and waiving the local remedies rule also goes far back. During the inter-war period, the Mixed Arbitral Tribunals and Mixed Claims Commissions are some of the earliest instances of such waivers to the customary international law rule.²⁰⁵ The (exceptions and) waiver rule is a reasonable rule and entails practical exceptions such as unavailability, ineffectiveness, inadequacy, undue delay, or futility of the local remedies.²⁰⁶ Earlier arbitration decisions, such as the *Finnish Ships Arbitration* award (1934), attest to the premise of waivers in the form of obvious futility.²⁰⁷

203 See REISMAN, NULLITY AND REVISION, *supra* note 26, at 364.

204 See ECHR, *supra* note 75, at art. 35(1); UN ICCPR, *supra* note 78, at art. 41(c).

205 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 127.

206 See *id.* at 6; LAW, *supra* note 4, at 67, 147; see generally Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice*, *supra* note 86, at 669-700; OPPENHEIM, *supra* note 5, at 524-25.

207 See the *Finnish Shipowners Arbitration*, *supra* note 38, at 1504.

The ILC Articles on Diplomatic Protection endorse and reflect the codification of the waivers to the local remedies rule.²⁰⁸ The ILC Report on Diplomatic Protection (2006) summarized several grounds where exhausting local remedies are not required: where the local court lacks jurisdiction or competence over the dispute and offers an appropriate or adequate remedy; national laws validating the wrong against which the alien complains and which are not reviewed by the local judiciary; lack of independence of local courts; established lines of precedents favors the wrong; and inadequacy in the system of judicial protection.²⁰⁹ Establishing a successful outcome through the domestic system is contingent on the host state being reasonably capable of providing effective relief.²¹⁰

An essential form of waiver to the local remedies rule is by 'the state's voluntary waiver. Instruments such as IIAs, state contracts, and *ad hoc* arbitration agreements often act as the state's waiver.²¹¹ Effecting an express waiver to the local remedies rule is considered irrevocable thereupon. If a treaty is silent on the matter, the waiver is not implied.²¹² Yet, commentators indicate that despite a general rule concerning the waiver of local remedies, every case must be decided upon its facts and other factors including the governing law.²¹³

Being a specialized field of international law, ISDS is not left untouched by the local remedies rule of customary international law. The IIAs generally contain clauses to define the local remedies rule in reference to an investor's claim; as a divergence from customary international law, local remedies clauses have mostly been dispensed with in investment treaties.²¹⁴ Hence, a foreign investor may not exhaust the local remedies before moving to an international tribunal.

The ICSID Convention reverses the local remedies rule as understood under customary international law.²¹⁵ ICSID Article 26 implies that local remedies are not required to be exhausted unless otherwise stated or asserted by a state.²¹⁶ Some BITs have a stipulated cooling-off period within which the foreign investor may engage in local remedies.²¹⁷

208 Int'l Law Comm'n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at art. 15.

209 *Id.* at 47.

210 *Id.* at 48.

211 *Id.* at 49-50; LAW, *supra* note 4, at 93-94.

212 OPPENHEIM, *supra* note 5, at 526 n.16.

213 Int'l Law Comm'n Draft Articles on Diplomatic Protection (2006), *supra* note 1, at 50; DUGAN ET AL., *supra* note 4, at 349.

214 See DUGAN ET AL., *supra* note 4, at 357.

215 CHRISTOPH SCHREUER, THE ICSID CONVENTION, *supra* note 143, at 388; TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 128, 132-33.

216 *Id.*

217 *E.g.*, Czech-Neth. BIT, *supra* note 146, at art. 8(2).

Nevertheless, in comparison to customary international law, the practice of the waiver rule in ISDS is not as established. For several reasons, Judge Trindade deemed the local remedies requirement as “debatable” and “highly inconclusive”.²¹⁸ Hence, the determination of local remedies and the waiver thereof are better decided on a case-to-case basis, as every dispute has differing situations and governing laws.

218 TRINDADE, EXHAUSTION OF LOCAL REMEDIES, *supra* note 4, at 127-28.