

The Rule of Exhausting Local Remedies within the Framework of Diplomatic Protection

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Abstract

The general rule is that, where there has been a violation of international law in the treatment of an alien by a State, local remedies must be exhausted by the alien before his claim may be espoused by his national State.

While on the one hand a sovereign State is given every opportunity of settling such disputes equitably through its own organs, and it is in the interest of all concerned that such disputes should be settled at the earliest possible opportunity at a local level, on the other hand it is logical that some recognition should also be given to the countervailing interests of all parties concerned in efficient justice without, inter alia, financial waste (Amerasinghe C.F., 2008: p. 143).

The foundation of the rule that local remedies must be exhausted is represented by the respect for the sovereignty of the respondent or host State. The essence of the claim should be brought before the local judicial bodies and all available and accessible remedies must be exhausted in that they have been pursued as far as is permitted or required by local law so that a final decision is given. This also means that the alien must use the procedures, evidentiary ones especially, which are available to him to support his claim in the process of exhausting remedies and that he fails to exhaust remedies, if the preparation or presentation of his claim at the local level is faulty and results in a wholly or partially unsuccessful resort to remedies.

The exhaustion of local remedies represents a general rule of the international law, without having the same character as an absolute and imperative juridical norm. This core rule could be avoided or derogated from it by states through treaties or, in their absence, in accordance with every concrete situation.

Key words: Exhausting local remedies, scope of the rule, exceptions or limitations on the rule, waiver of rule, inapplicability of the rule, ineffective remedies, undue delay, circumstances not limiting the operation of the rule, repetition of injury or likelihood of further damage, circumstances rendering the requirement of exhaustion of remedies unreasonable

Introduction

The exhaustion of local remedies is a rule of customary international law. It has been affirmed by the decisions of court at national and international level, in bilateral and multilateral treaties, state practice, in some codification attempts by governmental and non-governmental bodies and in the scholars' writings.

The fact that treaties, for example bilateral investment treaties (BITs), may on different occasions exclude the operation of this rule in no way detracts from the generality of the rule or the universality of its acceptance (*Amerasinghe C.F., 1990: p.292*).

According to general international law, diplomatic protection cannot be exerted, in favor of the person who was injured in her/his rights by the wrongdoing state, before the exhaustion of internal remedies of jurisdiction.

International customary law, attested by the same opinions of authorities and by many decisions from the case-law, confer to diplomatic protection a special and subsidiary character. Therefore, before injured alien to request the intervention of his state of citizenship/nationality, it is mandatory that all local remedies in the respondent state to be exhausted. In other words, alien must have tried to obtain his justice from the local sovereign and this demarche must have failed.

The state has the obligation to permit and assure free access for aliens to its courts and tribunals. In case of delay or denial of justice, the state in question will become responsible if its organs had not ensure this right. In such a case, it can be a violation of an obligation which can be attributable to the wrongdoing state and which was committed against another subject of international law, against its citizen.

To the extent that the possibility of having eliminate the violation of the international obligation depends on the superior organs of the respondent state, the alien must exhaust such local remedies before his state to raise his claim at international level.

Thus, the meaning and the purpose of exhaustion local remedies rule is to establish clearly if it touched the point from where his state of citizenship/nationality can interfer actively and can raise the claim at international level.

It is necessary local remedies to exist not only legally, but also *de facto*. If there are no local remedies available in the system of the responsible state or if these local remedies are exhausted, the damage is complete and the state will bear the responsibility according to international law.

For the rule of exhaustion local remedies not to become an impediment in solving the cause, it must meet the idea of a useful and practical effect. The obligation of exhaustion local remedies will not apply where there are no effective remedies, where the exhaustion would be futile, where the respondent state has waived the requirement that local remedies be exhausted, where there is no voluntary link between the injured individual and the respondent state and where the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent state.

Some scholars are mentioning as exceptions to or limitations on the exhaustion of local remedies rule, as follows: the ineffective remedies, the undue delay, the repetition of injury or likelihood of further damage, the circumstances not limiting the operation of the rule and the circumstances rendering the requirement of exhaustion of remedies unreasonable (*Amerasinghe C.F., 2008: pp. 149-161*).

Legal commentators discussed this rule on the assumption that it is limited to remedies of a judicial or legal nature. In principle, the policies behind this rule would not grant an unlimited extension of the concept of remedies to all types of remedies. Although the respondent state is given an opportunity of redressing a wrong, it is also relevant that for social ends the alien is being prevented from obtaining what may be less expensive justice by a direct recourse to an international tribunal. What international law is interested in is the determination according to law, in an impartial manner, of the alien's rights (*Amerasinghe C.F., 2008: p.148*).

2. How the rule of exhaustion of local remedies apply – conditions

In case-law it was mentioned that the futility of local remedies must be attested at the moment of their usage and that the absence of sufficient and adequate remedies, obviously, lead to the dissolution of the obligation concerning the exhaustion of those local remedies.

The conditions of the application of the exhaustion of local remedies rule are as follows:

1. The injured person – the rule is applying to persons and states, if, directly, they are victims, through their organs, by a tortious act (the so-called cases *iure gestionis*). *Per contra*, the rule will not apply regarding the injuries suffered by the state in its capacity as sovereign (as in cases such as the destruction of a warship, injuries caused to an agent of the state in this capacity, the so-called cases *jus imperii*).

So, both natural and juridical persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*. Diplomats or state enterprises engaged in *acta jure imperii*, on the other hand, are not required to exhaust local remedies, as an injury to them is a direct injury to the state to which the exhaustion of local remedies rule is inapplicable (Dugard J., *A/CN.4/514*, 2001: p.4).

2. The effects of local remedies – in order not to become a dilatory means, the exhaustion of local remedies rule must to comport the hope of an useful effect. This rule will not apply when there is absence of any local remedy or when the local remedy formally exists, but is not effective.

3. The obligation of exhaustion of local remedies will be extended to all levels of the judicial hierarchy, but the exhaustion will not be requested when the wrongful act is issued by superior authorities of the state or when the protection is founded on a means that cannot be analysed by the national court or tribunal.

4. The nature of the national contentious – the rule is applying for a cause of responsibility, but no for a cause of interpretation.

The rule of exhaustion of local remedies is not applicable when the respondent state has waived the requirement that local remedies be exhausted.

In case that there are met obligations which are resulting from treaties, in jurisprudence it was raised the question if the rule is still valid. In *the Phosphates in Morocco Case (1938)* the Permanent Court of International Justice made a statement that „*this act being attributable to the state and described as contrary to the treaty right of another state, international responsibility would be established immediately as between the two states. In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies*” (*PCIJ Series, 1938: p.28*).

Per contra, in *the Ambatielos Case (1956)* was stated that the breach of treaties was too far away from being incompatible with the rule of the exhaustion of local remedies and, by consequence, it must be applied.

3. Nature of the rule of exhaustion of local remedies

In relation with its nature, it was raised the discussion if the rule represents a matter of substance or is a simple condition of admissibility. Some scholars stated that „*as long as the local*

remedies rule exists, controversy will remain as to the question of its conceptual nature, i.e. the question whether the rule forms a part of procedural law or whether it operates as a part of substantive law" (Doehring K., 1997: p.240).

In the first case, the responsibility of the wrongdoing state will be raised, not before the moment when the superior authorities would manifestly refused to condemn the culpable agent.

In the other case, the right to repair appear from the moment of the first act, but is subject to a specific final condition – granting the repair/remedy action by domestic way.

So, the exhaustion of local remedies would be only a condition of admisibility and the exhaustion of local remedies rule would have a sole purpose to permit to the responsible state to control the applicant's claims and, eventually, to realise justice.

As regards the legal force of this rule, the general opinion in this field is to support the thesis that it has only a limited force as not being a rule or norm of public order. As a result, the application of this rule can be avoid through a special contrary clause which was introduced in the convention of the claim or in the arbitral *compromis*.

The existing controversy on the nature of the rule has produced three positions.

The first maintains that the internationally wrongful act of the culpable state is not complete until local remedies have been exhausted without succes, that the exhaustion of local remedies is a substantive condition on which the very existence of international responsibility depends. It was called the substantive school and had as fervent representatives Ago and Borchard.

According to the second position, the rule of exhaustion of local remedies is simply seen as a procedural condition which must be met before an international claim may be brought. It was called the procedural school. Legal scholars as Amerasinghe, Doehring or Verzijl are the representatives of this school.

The third position distinguishes between an injury to an alien under the domestic law and under international law. If the injury is caused by 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. It was called as the different or the third school. Its origins are in the writings of Hyde and Eagleton and one of its representatives is Fawcett. In the conception of this school the exhaustion of local remedies rule 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. This position is not incompatible with the procedural school, but the core difference is that consider that *„in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility, the latter to justify interposition"* (Hyde C.C., 1922: p.493).

One of the leading proponents of the third school, was trying to distinguish clearly between the cause of action and the right of action. Therefore, he established three possible legal situations, as follows:

- Case I – the action complained of is a breach of international law but not of the local law;
- Case II – the action complained of is a breach of the local law but not of international law;

- Case III – the action complained of is a breach of both the local law and of international law (*Fawcett J.E.S., 1954: p.452*).

There is a clear consensus that where the original injury is caused by an act or omission in violation of local law only, a denial of justice arising in the course of the domestic proceedings is required before an international claim can be brought. Substantivists accept this and so do proceduralists, but the latter school denies that this phenomenon falls within the purview of the local remedies rule. The refusal of the procedural school to consider this type of case as belonging to the subject of exhaustion of local remedies is of no practical relevance and does not warrant further consideration. Logically, the most satisfactory is the third school (*Dugard J., 2001: p.32*).

The arguing over the nature of the rule of exhaustion of local remedies has resulted in codification attempts, judicial decisions, separate judicial opinions and states' practice. More than that, every serious academic work on the subject of this rule is not complete without an expression of views on the hot issue whether the rule is substantive or procedural.

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