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Exhaustion of Local Remedies and Mixed Claims in International Law: An Analysis of International Court of Justice Jurisprudence

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ABSTRACT

The rule of the exhaustion of local remedies serves as an indispensable prerequisite for the admissibility of claims invoked in various fields of international law, including the law of diplomatic protection and international human rights law. A State may invoke the responsibility of another State for injuries suffered by its nationals by exercising diplomatic protection, subject to the satisfaction of certain conditions. Where the legal basis for an application instituting proceedings is predicated upon injury to both the direct rights of the State and the derived rights of its nationals, the characterization of the claim becomes complex. In such instances of "mixed claims," the jurisprudence of the International Court of Justice (the Court, ICJ) applies a "preponderance" test to determine whether the claim is essentially founded upon an injury to the State or to its nationals. Should the claim be determined to relate preponderantly to the interests of the national, its admissibility before the Court is contingent upon the prior exhaustion of local remedies, a fundamental condition for the exercise of diplomatic protection. This article analyses the approach of the ICJ to the exhaustion of local remedies rule, with a particular focus on its jurisprudence concerning mixed claims, to clarify the underlying rationale for the Court's determinations on admissibility.

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Introduction

"Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."[1] Pursuant to the commentaries to the Draft Articles on Diplomatic Protection, the International Law Commission (ILC) has neither provided nor purported to provide a comprehensive definition of diplomatic protection.[2] This is a right accorded to States under international law,[3] which has its origins in the 1758 statement of Emer de Vattel that "[w]hoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen."[4] The Permanent Court of International Justice (PCIJ), in the oft-cited dicta of the *Mavrommatis Palestine Concessions* and *Panevezys-Saldutiskis Railway* cases, affirmed the rule that by resorting to diplomatic protection, a State is in reality asserting its own right - to ensure, in the person of its subjects, respect for the rules of international law.[5]

For a State to exercise diplomatic protection, two requirements must be satisfied; first, the matter of nationality,[6] which falls outside the scope of the present analysis, and second, the exhaustion of local remedies.[7] International claims may arise from injuries directly inflicted upon the State itself, from injuries to its nationals, or from a combination thereof. The doctrinal and practical complexities are most pronounced when a claim partakes of this latter, hybrid character.

On 14 June 2016, the Islamic Republic of Iran filed an Application instituting proceedings against the United States of America, alleging violations of the Treaty of Amity, Economic

1 International Law Commission, '*Draft Articles on Diplomatic Protection*' in 'Report of the International Law Commission on the Work of its Fifty-eighth Session' (2006) UN Doc A/61/10, art 1.
2 ibid, Commentary to art 1, para 1.
3 ibid, art 2.
4 Emer de Vattel, *The Law of Nations* (1758) Book II, Ch VI, para. 71.
5 *Mavrommatis Palestine Concessions (Greece v UK)* [1924] PCIJ (Ser B) No 3, 12; *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* [1938] PCIJ (Ser A/B) No 76, 16.
6 International Law Commission (n 1) 2.
7 Ibid, 3.

Relations, and Consular Rights,[1] arising from a series of legislative and executive measures adopted starting from 2012.[2] In the preliminary objections phase of this case, *Certain Iranian Assets*, the United States raised objections to the jurisdiction of the Court and the admissibility of Iran's claims. The salient objections were, first, that the Court lacked jurisdiction *ratione materiae* to hear claims concerning whether Iran's Central Bank qualified as a 'company' under the Treaty,[3] and second, that Iran's failure to exhaust local remedies rendered its claims inadmissible.[4] Regarding the first objection, the Court determined that the Central Bank exercised sovereign powers and thus was not a 'company' under the Treaty, and concluded that it lacked jurisdiction *ratione materiae* over a substantial portion of Iran's claims.[5]

Regarding the second objection - the main concern of this article - the United States contended that for the Court to hear Iran's claims, Iran was required to demonstrate that "each company has exhausted local remedies in each case"[6], a demonstration which Iran had failed to make. The Court initially observed that in cases of mixed claims, the necessity to exhaust local remedies does not arise where the claim is preponderantly based on an injury to the State itself;[7] however, it continued that in this particular case, it need not undertake a determination of whether the claim was preponderantly of a direct character. Instead, it would examine whether effective local remedies were, in fact, available to be exhausted.[8]

What, therefore, is the governing jurisprudential principle concerning the rule of exhaustion of local remedies in international law, particularly in mixed claims cases, as illustrated by the ICJ decisions in cases such as *Interhandel*, *ELSI*, and *Certain Iranian Assets*? The jurisprudential trend of the ICJ indicates that the exhaustion of local remedies is not rigidly imposed in mixed claims where the claim is preponderantly based on a violation of the State's own interests. Nevertheless, in instances where the Court deals with mixed claims, as in *Certain Iranian Assets*, it may elect to scrutinize the availability and exhaustion of local remedies as a threshold question of admissibility.

This article is a doctrinal legal research utilizing a specialized case-law analysis of ICJ jurisprudence related to the exhaustion of local remedies, aiming to elucidate the evolution and application of the governing principles. It is worth noting that numerous scholarly works have assessed various aspects of this judgment.[9] In this article, we will *first* study Exhaustion

1 Treaty of Amity, Economic Relations, and Consular Rights (United States of America-Iran) (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 93.

2 *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Application Instituting Proceedings, 14 June 2016).

3 ibid (Counter-Memorial of the United States of America, 14 October 2019) 63-72.

4 ibid, 72-76.

5 *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep 54.

6 *Certain Iranian Assets* (Counter-Memorial of the United States) (n 10) 72.

7 ibid,66.

8 ibid, 67.

9 See, for example, Ali Reza Mashhadizadeh and Amirhossein Ghodratnama Shabestari, 'Central Bank: an Independent Company or a Sovereign Organ (with an Emphasis on the Judgment of the International Court of Justice Issued on March 30, 2023)' (2024) 41 (73) *International Law Review* 31; Meisam Norouzi, Saber Habibi Savadkohi, Mehdi Shayanmehr and Seyyed Ali Tabatabai Nesab, 'Jurisdictional Immunities of States and Their Property in International Law: Analyzing the ICJ Decision in the Case of Certain Iranian Assets' (2024) 41 (73) *International Law Review* 45; Ehsan Shahsavari, 'The Status of Clean Hands Doctrine in the Certain Iranian Assets Case' (2024) 41 (73) *International Law Review* 121; Sattar Azizi, 'The Individual Opinions of the ICJ Judges in the Certain Iranian Assets Case: Exclusion of Bank Markazi from the Scope of the Treaty of Amity' (2024) 41 (73) *International Law Review* 157; Mohamad Setayeshpur, 'Realization of the International Responsibility of the United States for "Not Recognizing the Legal Status of Iranian Companies" in the Case of Certain Iranian Assets' (2024) 41 (73) *International Law Review* 181; Seyed Ghasem Zamani and Zohreh Shafiei, 'The International Responsibility of the

of local remedies in international law and its prerequisites; *Second*, we will briefly address the concept of mixed claims; and *finally*, we will analyse the Court's approach in *Certain Iranian Assets* regarding the interplay between exhaustion of local remedies and mixed claims.

1. Exhaustion of Local Remedies in International Law

Exhaustion of Local Remedies (ELR) is a rule that arose out of the debates around dualism and monism.[1] It is defined as "the satisfaction by individuals of a requirement to resort to all available and effective local remedies that exist in a domestic legal order".[2] The rule is firmly established in customary international law, as recognized in various cases, including the *Interhandel*,[3] *ELSI*,[4] *Ahmadou Sadio Diallo*,[5] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation),[6] *Certain Iranian Assets*,[7] and the ILC's 2006 Draft Articles on Diplomatic Protection.[8] Also, it is a well-established rule in other *lex specialis* regimes of international law, such as International Human Rights Law and International Investment Law. In International Human Rights Law, Article 41(1)(c) of the International Covenant on Civil and Political Rights provides:

> *"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;"*[9]

Similarly, Article 35(1) of the European Convention on Human Rights states:

> *"The 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 four months from the date on which the final decision was taken."*[10]

United States of America for the Violations of the Treaty of Amity in the Framework of the Judgment of March 30, 2023, of the International Court of Justice' (2024) 41 (73) *International Law Review* 205.

1 A A Cancado Trindade, 'Exhaustion of Local Remedies in International Law and the Role of National Courts' (1978) 17(3/4) *Archiv des Völkerrechts* 333.

2 Berk Demirkol, 'Exhaustion of Local Remedies' *Jus Mundi* (8 October 2025) https://jusmundi.com/en/document/publication/en-exhaustion-of-local-remedies accessed 15 November 2025.

3 *Interhandel Case (Switzerland v United States of America)* (Judgment) [1959] ICJ Rep 6, 27.

4 *Elettronica Sicula S.P.A. (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 50.

5 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, 42.

6 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558, 129.

7 *Certain Iranian Assets* (Judgment) (n 12) 61.

8 International Law Commission (n 1) art 14 and Commentary.

9 UN General Assembly, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS, art 41(1)(c).

10 Council of Europe, *European Convention on Human Rights*, as amended by Protocols Nos 11, 14 and 15, ETS No 005 (4 November 1950), art 35(1).

In International Investment Law, the rule can be seen in Article 26 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States:

> *"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."*[1]

ELR serves as a prerequisite for an international claim where the claim is brought on the basis of an injury to an individual.[2]Local remedies encompass all judicially or administratively available legal avenues of redress open to an injured person.[3] Although the rule, as a procedure, may slow down the justice and burden extra expenses of proceedings,[4] its underlying rationale is widely regarded as the significant interest for a claim to be legally and factually heard by a domestic court prior to its interposition at the international level.[5]

The classification of ELR as either substantive or procedural is a controversial subject. In investment disputes, as Mohebi and Khakpour have explained, the rule is considered procedural,[6] meaning that although a breach of international law may exist, there is a jurisdictional precondition for the valid presentation of a claim.[7] On the other hand, ILC has accepted the view of Special Rapporteur, Mr. Roberto Ago, that in diplomatic protection, the rule has been treated as a substantive requirement, such that no internationally wrongful act is deemed to have occurred until local remedies have been exhausted without satisfaction.[8] Sabahi and Rubins, in their book on Investor-State Arbitration, note that the substantive conception of the rule is specifically reflected in cases alleging a denial of justice or the 'effective means' standard.[9] Given that Fitzmaurice and Amador believed that the applicable characterization depends on the facts of the case, the rule may function procedurally where the initial act constitutes an independent breach; however, it operates substantively where the only breach is a denial of justice occurring during the exhaustion process itself.[10]

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1 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention, Regulations and Rules, Washington DC: International Centre for Settlement of Investment Disputes, 2003), art 26.
2 International Law Commission (n 1), arts 14(1), 14(3).
3 ibid, art 14(2).
4 Matthew H Adler, 'The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in Elsi' (1990) 39 International & Comparative Law Quarterly 641, 642.
5 ibid, 641; F V Garcia-Amador, L Sohn and R Baxter, *'Recent Codification of the Law of State Responsibility for Injuries to Aliens'* (Oceana Publication, 1974) 72.
6 Eeta Khosro Khakpour, Mohsen Mohebi, 'Exhaustion of Local Remedies Rule in Investment Lawsuits with an Emphasis on the Denial of Justice Lawsuit in *Loewen v United States of America* Case' (2023) 40(69) *International Law Review* 61, 79.
7 Hugh Thirlway, 'The Rule of Exhaustion of Local Remedies' in *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol II, Oxford University Press 2013) 1053.
8 Roberto Ago, *Sixth Report on State Responsibility* (1977) UN Doc A/CN.4/SER.A and Add.1, 22-33; See also ILC, *Draft Articles on Diplomatic Protection* (n 10) art 15(e); Viviana Gallardo and others (Decision of 13 November 1981) Inter-American Court of Human Rights, Series A: Judgments and Opinion, No G 101/81, para 26.
9 Borzu Sabahi and Noah D. Rubins, 'Exhaustion of Local Remedies' in *Investor-State Arbitration* (2nd edn, OUP 2019) 443; Don Wallace Jr, 'Fair and Equitable Treatment and Denial of Justice: From Chattin v Mexico and Loewen v US' in *International Investment Law and Arbitration: Leading Cases from the ICSID* (2005) 669, 671-2.
10 Malgosia Fitzmaurice and Francisco V García-Amador, '[Title of the Specific Article or Speech]' (1961) 37 International Court of Justice Yearbook 32.; *Collected Edition* II, 686; F V Garcia-Amador, 'State Responsibility-Some New Problems' (1958) 94 *Recueil des Cours* 449.

2. Exceptions to the Exhaustion of Local Remedies

The exhaustion rule is not absolute and is subject to recognized exceptions; indeed, these exceptions constitute a large part of the rule's practical application. The ILC draft Articles on Diplomatic Protection enumerate exceptions in Article 15.[1] Pursuant to this Article, there is no requirement for local remedies to be exhausted where such exhaustion would be "futile".[2] ILC equates "futility" and "ineffectiveness" and under this rubric, describes three formulations for an exception: first, where the local remedies are obviously futile; second, where they offer no reasonable prospect of success; and third, where they provide no reasonable possibility of effective redress.[3]

The rule is also inapplicable where there is an undue delay in the implementation of local remedies. The concept of unduly prolonged domestic procedures is inherently fact-specific, and no fixed temporal standard exists; as the ILC notes, the delay must be "unreasonable" and the circumstances of each case must be taken into account.[4] In *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, the African Commission on Human and Peoples' Rights stated that, in order to indicate whether a procedure is unduly delayed, the legal doctrine of *reasonable man's test* could be useful.[5] This test entails an assessment of whether the delay is both "excessive" and "unjustifiable," an assessment which must be conducted on a case-by-case basis.[6]

The ILC specifies further exceptions. It states thatit is unfair to expect an injured person to pursue domestic remedies where there is no reasonable connection, such as a voluntary link or territorial nexus, between the injured person and the respondent State.[7] Moreover, the requirement is waived where the respondent State itself precludes exhaustion, for instance, by preventing the injured person from entering its territory and thereby denying access to its domestic courts..[8] Finally, the requirement is dispensed with if the respondent State waived it, whether expressly or impliedly.[9] The Inter-American Court of Human Rights in *Viviana Gallardo and others* stated that since the exhaustion requirement operates for the benefit of the State, it can be waived by the State, "even tacitly".[10]

A survey of the exceptions presented by the ILC and in jurisprudence suggests that they are not objective or fixed for all circumstances. The recurrent use of the term "reasonable" in the text and commentaries indicates a return to the *reasonable man's test,* as the determination of reasonableness is not amenable to a purely technical or dogmatic

1 International Law Commission (n 1) art 15: "Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted."

2 Marjorie Millace Whiteman, *Digest of International Law* (Vol 8, US Department of State 1967) 777.

3 International Law Commission (n 1) art 15(a), commentary 2.

4 ibid, art 15(b), commentary 5.

5 *Zimbabwe Lawyers for Human Rights v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) 60.

6 ibid.

7 International Law Commission (n 1) art 15(c), commentary 7.

8 ibid, art 15(d), commentary 11.

9 ibid, art 15(e).

10 Viviana Gallardo and others, (n 34) 26.

analysis.[1] This underscores the subjective, context-dependent nature of the exceptions, in which necessitate a case-by-case approach, a rule affirmed by the ICJ in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, which held that "what is reasonable and equitable in any given case must depend on its particular circumstances."[2]

3. The Question of Mixed Claims in the Jurisprudence of the ICJ

Mixed claims are those which involve allegations of injury to both the rights of the State and the rights of its nationals.[3] The ILC in Draft Articles on Diplomatic Protection, observed the difficulty in deciding whether a claim is "direct" or "indirect" where it is mixed, since it contains elements of both.[4] The ICJ has addressed the concept of mixed claims in several cases, including the *United States Diplomatic and Consular Staff in Tehran,*[5] *Arrest Warrant of 11 April 2000,*[6] and *Avena.*[7] To conduct a detailed examination on this concept, an analysis of the ICJ's most instructive jurisprudence is required: first, the *Interhandel,* and second, the *ELSI* case.

3.1. The *Interhandel* Case

On 2 October 1957, the Government of Switzerland instituted proceedings against the United States for a dispute arising from the vesting of the shares of a Swiss company (Interhandel) in the United States on the grounds that they were ultimately owned or controlled by German interests.[8]Switzerland's submissions encompassed allegations of injury to both State and nationals rights.

The Court held that although a customary rule of international law required the exhaustion of local remedies, exceptions might apply where a claim is based on a direct injury to the State itself.[9] To reach such a determination, it was necessary to consider the "principal submission" and determine whether the claim was fundamentally based on injuries directed to the State or to its nationals.[10] Ultimately, the Court found that Switzerland's claims were predominantly indirect, thus necessitating the exhaustion of local remedies.[11]

3.2. The Case Concerning *Elettronica Sicula S.P.A. (ELSI)*

The *ELSI* case revolved around the dispute between the United States and Italy regarding the requisition of an Italian company owned by two American corporations.[12] Italy raised a preliminary objection contesting the admissibility of the US claim, arguing that the local

1 Olivier Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions' (1999) 48(3) *International and Comparative Law Quarterly* 613.
2 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, para 72.
3 Adler (n 30) 642.
4 International Law Commission (n 1) art. 14, Commentary 10.
5 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.
6 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para 40.
7 *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12, para 40.
8 *Interhandel*, Application Instituting Proceedings, 1957, 9-14.
9 *Interhandel* (n 19) (Preliminary Objections) 28.
10 ibid.
11 ibid, 29.
12 *Elettronica Sicula S.P.A. (ELSI)* (n 20).

remedies rule had not been satisfied.[1] Although the Court concluded that local remedies had in fact been exhausted and proceeded to the merits,[2] it addressed the issue of mixed claims in obiter dicta.

The United States argued that certain components of its claim alleged direct injuries to its own rights under the 1948 Treaty of Friendship, Commerce and Navigation (FCN Treaty), hence the exhaustion rule was inapplicable to those parts.[3] The Court, referring to its *Interhandel* judgment, applied the "principal submission" test[4] and rejected the US argument , finding that the claims were in essence brought on account of injuries to its nationals; consequently, no parts of the US claims would be understood as rendering the local remedies rule inapplicable.[5]

As demonstrated above, to adjudicate a claim alleged to be mixed, ICJ jurisprudence indicates its dominant approach of using the "preponderance" test which evaluates "principal submission." A closely related test is the *sine qua non* or "but for" test, which inquires whether, in the absence of the injured national, the State would still have brought the claim.? A negative answer indicates that the exhaustion rule applies.[6] The ILC, in its Draft Articles, provides factors for this assessment, including the subject of the dispute, the legal basis of the claim, and the nature of the remedy sought.[7]

3.3. *Certain Iranian Assets* and the Unavailability of Local Remedies

The Certain Iranian Assets case represents one of the more recent cases before the ICJ. Instituted by Iran against the United States on 14 June 2014, the Application alleged violations of the 1955 Treaty of Amity resulting from measures taken against the Central Bank of Iran (Bank Markazi) and other Iranian companies.[8] The Court noted that Iran's claims in this case concerned a series of legislative, executive, and judicial measures.[9]

The United States challenged the admissibility of Iran's claim, arguing that the Iranian companies had failed to exhaust local remedies, given that the claims are based on alleged injuries to those entities.[10] The United States maintained that an exception to the rule arises only where domestic courts are ineffective.[11] Additional objections to admissibility were raised by the United States, such as Iran's alleged lack of clean hands and abuse of rights.[12]

1 *ELSI* (Counter-Memorial of Italy; Reply; Rejoinder, 16 November 1987) 2729-.
2 *Elettronica Sicula S.P.A. (ELSI)* (n 20) 63.
3 ibid, 51.
4 ibid, 52.
5 ibid.
6 International Law Commission (n 1), art 14, commentary 11.
7 ibid, commentary 12.
8 *Certain Iranian Assets* (n 9) 4.
9 *Certain Iranian Assets* (n 12) 111; Abdollah Abedini, 'Breach of the Obligation Arising from the Adoption of Inconsistent Domestic Law: Analysis of the Judgment of the International Court of Justice in the Case of Certain Iranian Assets' (2024) 41(73) *International Law Review* 11, 20.
10 ibid (n 10) 73-75.
11 ibid.
12 See Seyyed Fazlallah Mousavi and Amir Lohrasbi , 'An Analysis of the Objections Raised by the United States Regarding the Admissibility of Iran's Claim in the Case of Certain Iranian Assets before the International Court of Justice' (2024) 41(73) International Law Review 91.

Opposing this argument, Iran contended, first, that its claim was inextricably linked to the rights of its nationals, and second, that no effective redress was available in US courts.[1]

Iran's position was informed by litigation previously pursued in US courts by Iranian entities, including Bank Markazi and Bank Melli. Bank Markazi had challenged the discriminatory treatment before the District Court, the Court of Appeals, and the Supreme Court.[2] Section 502 of the Iran Threat Reduction and Syria Human Rights Act effectively guaranteed that all potential defenses by Bank Markazi would be rejected, a fate which also befell Bank Melli in the US domestic legal system.[3] These experiences suggested that Iran could rely on the futility exception codified in Article 15 of the ILC Draft Articles on Diplomatic Protection.[4]

The Court first addressed the US objection that the Court lacked jurisdiction due to non-exhaustion, referencing its finding in *Interhandel* that where proceedings are initiated on the basis of diplomatic protection, of the rule relates to admissibility, not jurisdiction.[5] The Court also reiterated the customary nature of the rule.[6] Citing its judgment in the *Avena* case, it held that the obligation to exhaust local remedies does not apply where the claim involves violations of both State rights and rights accorded to its nationals.[7] The Court further noted the provision of Article 14(3), of the ILC's Articles, which implicitly provides that for a mixed claim, it is necessary to examine whether the 'preponderance' of the injury was suffered by the State or its nationals to determine the rule's applicability.[8]Although the Court reaffirmed the preponderance test for mixed claims,[9] it declined to determine whether Iran's claims were preponderantly based on its own rights or those of its nationals, assuming such a determination unnnecessary for its decision.[10] The *ratio decidendi* of the Court on this point was its prior ruling on Bank Markazi's non-qualification as a 'company' under the Treaty of Amity.[11] Consequently, the Court lacked jurisdiction over that part of Iran's claims which alleged direct injury to State rights,[12] rendering that it did not view the case as presenting a mixed claim for the purposes of the admissibility objection.

Nevertheless, the Court proceeded to examine the argument concerning the unavailability of effective redress. Based on the ILC Draft Articles and the specific circumstances, the domestic legal system of the respondent State must be taken into account.[13] Judge Sir Hersch Lauterpacht, in his separate opinion in *Certain Norwegian Loans,* held that international Tribunals apply the exhaustion rule "with a degree of elasticity," noting that it is excluded

1 *Certain Iranian Assets* (n 12) 60.
2 The District Court observed that Bank Markazi "filled the proverbial kitchen sink with arguments," quoted in *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1, 9-10.
3 Ahmad Reza Tohidi and Fatemeh Mirakhorli, 'ICJ's Approach to the Objection of the United States Regarding Compliance with the Exhaustion of Local Remedy Rule: A Focus on the Certain Iranian Assets Case' (2024) 41(73) *International Law Review* 101, 113.
4 *Certain Iranian Assets* (I.C.J. pleadings), Reply of Islamic Republic of Iran, submitted 17 August 2020, 199–201.
5 *Certain Iranian Assets* (n 12) 56.
6 ibid, 61.
7 *Certain Iranian Assets* (n 12) 63; *Avena and Other Mexican Nationals* (n 53).
8 *Certain Iranian Assets* (n 12) 66.
9 ibid, 66.
10 ibid, 67.
11 ibid, 54.
12 ibid.
13 International Law Commission (n 1), art 15(a), commentary 3.

where no available remedy exists in the legal order of the respondent State.[1] In *Certain Iranian Assets,* the Court held that the US measures were legislative and executive in nature, and that under US legal system and jurisprudence, domestic courts are obliged to apply a subsequently enacted federal statute even if it conflicts with a treaty obligation.[2] As held in *Weinstein v. Islamic Republic of Iran,* "[i]n any event, to the extent that TRIA § 201 (a) may conflict with Article III (1) of the Treaty of Amity, the TRIA would 'trump' the Treaty of Amity."[3] This rule was subsequently affirmed in *Bennett v. Islamic Republic of Iran*.[4] Given the legislative nature of the measures and the supremacy of federal statute over treaty obligations in US jurisprudence, the Court concluded that Iranian entities "did not have any reasonable possibility of successfully asserting their rights in US courts.[5] Consequently, the exhaustion of local remedies was not required for the relevant part of Iran's claims.[6]

A salient aspect 30 March 2023 judgment is the Court's implicit endorsement of a standard encompassing both access to a fair trial and a reasonable possibility of redress.[7] Accordingly, the accessibility to domestic remedies entails not only the procedural capacity to bring a claim, but also the existence of a reasonableprospect that the claim, once heard, could result in effective relief.[8]

Conclusion

The exceptions to the *exhaustion of local remedies* rule highlight scenarios where local remedies are ineffective, unavailable, or unduly prolonged, allowing for more equity into its application. An examination of the ICJ jurisprudence concerning mixed claims, notably *Interhandel* and *ELSI*, elucidates the Court's methodology in distinguishing between direct and indirect injuries. These cases demonstrate a consistent application of the exhaustion rule while also acknowledging circumstances where exceptions may apply, thereby refining our contours of this complex legal doctrine. The ICJ's approach in *Certain Iranian Assets* illustrates that while the rule serves to respect State sovereignty, its exceptions - specifically futility - are vital safeguards to ensure that individuals are not left without recourse in the face of systemic failure or injustice within domestic legal systems.

The application of the exhaustion of local remedies rule to mixed claims, particularly through the lens of the *Certain Iranian Assets* case, reveals that the ICJ employs a nuanced methodology. In that case, the Court emphasized the threshold question of the availability of effective redress within domestic legal framework. This analysis contributes to a deeper

1 *Case of Certain Norwegian Loans*, Judgment of 6 July 1957, ICJ Rep 1957, Separate Opinion of Judge Sir Hersch Lauterpacht, 39.
2 *Certain Iranian Assets* (n 12) 69.
3 *Weinstein et al. v Islamic Republic of Iran et al.*, United States District Court, Eastern District of New York, Order of 5 June 2009, Federal Supplement, Second Series, vol. 624, 272, affirmed by United States Court of Appeals, Second Circuit, 15 June 2010, Federal Supplement, Third Series, vol. 609, 43.
4 *Bennett et al. v The Islamic Republic of Iran and others*, United States Court of Appeals, Ninth Circuit, 22 February 2016, Federal Supplement, Third Series, vol. 817, 1131, as amended on 14 June 2016, Federal Supplement, Third Series, vol. 825, 949.
5 ibid, 72.
6 ibid, 73.
7 Tohidi and Mirakhorli (n 73) 115.
8 ibid.

understanding of the legal landscape surrounding mixed claims and prompts critical reflection on how international law can adapt to ensure justice for individuals while respecting the sovereign rights of States. The case further demonstrates that the ICJ's approach to diplomatic protection, the exhaustion rule, and mixed claims proceeds from a holistic perspective. Rather than engaging in a threshold characterization of the claim as preponderantly direct or indirect, the Court opted to assess the overall structure of diplomatic protection to determine whether an exception to the exhaustion rule was manifestly applicable on the facts.

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