Vanderbilt Journal of Transnational Law

Volume 10
Issue 1 *Winter 1977*

Article 3

1977

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DUAL CLAIM AND THE EXHAUSTION OF LOCAL REMEDIES RULE IN INTERNATIONAL LAW

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I. INTRODUCTION

One of the anomalies in the law of international responsibility is the procedural requirement[1] that before a state can espouse a claim at the international level for injury to her national, all the remedies available according to the municipal law of the respondent state must have been exhausted.[2] In applying the rule in the *Interhandel Case,* the International Court of Justice observed that:

> [T]he 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

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1. *See generally,* C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 69-269 (1967) [hereinafter cited as AMERASINGHE]; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 403-10 (2d ed. 1973) [hereinafter cited as BROWNLIE]; T. HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS (1968); C. JENKS, THE PROSPECT OF INTERNATIONAL ADJUDICATION 527-37 (1964); C. LAW, THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW (1961); 2 D. O'CONNELL, INTERNATIONAL LAW 945, 1053-59 (2d ed. 1970) [hereinafter cited as O'CONNELL]; 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 602-12 (3d ed. 1957); Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?,* 31 BRIT. Y.B. INT'L L. 452 (1954); Garcia Amador, (*Third Report*) *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens,* [1958] 2 Y.B. INT'L COMM'N 47, U.N. Doc. A/CN.4/Ser.A/1958; Meron, *The Incidence of the Rule of Exhaustion of Local Remedies,* 35 BRIT. Y.B. INT'L L. 83 (1959) [hereinafter cited as Meron].

2. Some think that the requirement is one of substantive law upon which the very existence of the state's international responsibility hinges. For further discussion, *see* Garcia Amador, *Reports on State Responsibility to the International Law Commission,* [1956] 2 Y.B. INT'L L. COMM'N 173, U.N. Doc. A/CN.4 Ser.A/1956/Add.1; AMERASINGHE, *supra* note 1, at 200. *See also* Barcelona Traction Case, [1964] I.C.J. 115 (Morrelli, J., dissenting); Panevezys-Saldutiskis Ry. Case, [1939] P.C.I.J., ser. A/B, No. 76, at 47 (Hudson, J., dissenting).

> that the state where the violation occurred should have an opportunity to redress it by its own means within the framework of its own domestic legal system.[3]

The anomaly in the rule springs from the implied contradiction in maintaining, on the one hand, that "by 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,"[4] and on the other, that local remedies must be exhausted. If in theory the wrong done is to the state, and the decision to take up the case of a national is at the absolute discretion of the state, then once the state has decided to intervene on behalf of its national, the maxim *par in parem non habet imperium non habet jurisdictionem* would seem to dictate that the exhaustion of local remedies rule should not operate.

However anomalous the rule may be, it is firmly established in international law. It has been observed that the rule is "both ancient and common place . . . is so fundamental that it has become almost a cliche and it is difficult to find any real analysis of its meaning."[5] Among the many reasons that have been adduced in its support are the greater suitability and convenience of national courts as forums for the claims of individuals and corporations; the need to avoid the multiplication of small claims on the level of diplomatic protection; and the desirability of affording the state alleged to have committed the wrongful act an opportunity to amend the wrong.[6] Although there is unanimity of opinion on many aspects of the rule, it is still true that it "is a well established but inadequately defined rule."[7] The immediate problem to be considered here is the role or applicability of the rule in cases of dual claims: *i.e.*, where a state seeks redress from another for direct injury to herself and for injury to one of her nationals, and the same wrongful act alleged is the cause of both injuries.

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3. Interhandel Case (Preliminary Objections), [1959] I.C.J. 27.

4. Mavrommatis Palestine Concessions Case, [1924] P.C.I.J., ser. A, No. 2, at 12.

5. 2 LORD MCNAIR, INTERNATIONAL LAW OPINIONS 312 (1956).

6. *See* E. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 817-18 (1928); BROWNLIE, *supra* note 1, at 482-83; Editorial Comment, 28 AM. J. INT'L L. 718, at 729-36 (1934).

7. P. JESSUP, A MODERN LAW OF NATIONS 104 (1958) [hereinafter cited as JESSUP].

II. Direct and Indirect Injury

The distinction between cases of direct injury and those of diplomatic protection (or indirect injury) is generally recognized both in practice and in the writings of publicists. Thus, Hyde has said: "Claims may be divided into two broad classes: first, those which are based upon private complaints of individuals whose government acts as their representative in espousing their cause; secondly, those which concern the state itself considered as a whole."[8] It is generally agreed that the rule of local remedies is applicable only to cases of diplomatic protection, and it is not applicable to cases of direct injury to the state itself.[9]

In the actual presentation of the claim, however, the distinction between direct and indirect injury to the state may present formidable problems. Too often, a single set of facts will be the cause of both the direct and indirect injury. To illustrate from the angle of usurpation of jurisdiction: State A enacts legislation claiming the right to try all offenses of libel or murder committed in state B. X, a citizen of state B, while visiting state A, is arrested, tried, and jailed for committing the offenses in state B. Not only has state B's jurisdiction been usurped under the circumstances (a direct injury is inflicted), but also one of her nationals has suffered in the process (an indirect injury). Another illustration may be given in the domain of treaty law. A treaty exists between states Y and X prohibiting the confiscation of the assets of nationals of both states in either state. State Y later confiscates the assets of a number of the nationals of state X residing there. State X applies to the International Court of Justice complaining of a breach of treaty obligations by state Y.[10] In these and many other instances elements of direct and indirect injury become confused. It has rightly been observed that "most cases of direct injury contain, in a certain degree, also elements of diplomatic protection. It may well be that at the bottom of almost every international claim there is the motivating factor of interests of individuals which need protection."[11] In these circumstances we are to determine the applicable

8. 2 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States 888 (2d rev. ed. 1947); Jessup, *supra* note 7, at 118.

9. *See, e.g.*, C. Eagleton, The Responsibility of States in International Law 51, 103 (1928) [hereinafter cited as Eagleton]; A. Freeman, The International Responsibility of States for the Denial of Justice 404 (1938) [hereinafter cited as Freeman].

10. *Cf.* The facts of the Interhandel Case, I.C.J. Pleadings 8 (1959).

11. Meron, *supra* note 1, at 86.

criterion to justify the exclusion of the local remedies rule. The question may further be asked whether the local remedies rule applies to *all* cases involving diplomatic protection. A number of criteria used in the case law on the subject and some proposed by publicists may be examined.

III. Various Criteria: The Case Law

A. *The Object and Interest Sought to be Protected*

This approach requires some form of inquiry by the tribunal into the object or interest sought to be protected by the claimant state that has instituted the proceeding. If the object is to protect the right of the state, *qua* state, the rule would be inapplicable. If the object is the protection of nationals, the rule becomes applicable. This approach found some expression in the *Interhandel Case*.[12] In that case, the United States Government had vested the assets of a Swiss company as enemy property under the provisions of the 1917 Trading With the Enemy Act.[13] Most of the shares in this company belonged to Interhandel, another Swiss firm. An order provisionally blocking the assets of Interhandel in Switzerland had been annulled by the Swiss Authority of Review under the procedure established by the Washington Accord of 1946.[14] The Swiss Government contended that the Allied powers, including the United States, were bound by the decision of the Swiss Authority of Review and that the assets vested in the United States should be restored or there should be resort to the arbitration procedure provided for in the Accord. The International Court summarized the Swiss Claim as follows:

> (1) As a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of Interhandel . . . .
> (2) As an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure . . . .[15]

12. [1959] I.C.J. 1.

13. Trading With the Enemy Act, 55 Stat. 839 (1941), 50 U.S.C. App. S.5 (1946).

14. The Washington Accord, 13 U.S.T. 1118, U.K. Cmd. No. 6884.

15. *Id.* at 19. A number of judges thought that the real issue to be decided was whether Interhandel has a neutral or an enemy status. *See, e.g., id.* at 41 (separate opinion of Cordova, J.); *id.* at 38-40 (separate opinion of Hackworth, J.).

The third preliminary objection of the United States to the Swiss claim was the lack of jurisdiction in the Court to hear or determine the matters raised in the Swiss Application and Memorial because local remedies had not been exhausted. The Supreme Court of the United States had reversed the judgment of the court of appeals in an action filed by Interhandel and remanded the claim to the district court. In a sense, therefore, the case was still pending before the United States court. The Swiss Government argued that its final submission sought a declaratory judgment holding that the United States was in breach of the Washington Accord of May 25, 1946, and of the obligations binding upon her under the general rules of international law. This breach constituted a direct violation of international law causing immediate injury to the rights of Switzerland, and, therefore, the local remedies rule was inapplicable.[16]

The Court upheld the United States objection and stated in part:

> Without prejudging the validity of any argument which the Swiss Government seeks . . . to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies . . . . One interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand, the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.[17]

Some of the judges thought the objection should not have been

16. *Id.* at 28.
17. *Id.* at 28-29.

sustained, especially with regard to the alternative Swiss request that the United States should submit to arbitration and conciliation because no issue about the protection of the rights and interests of a national was involved. Judge Winiarski in particular declared:

> The rights and interests at stake derive directly from international instruments which the states have signed and to that kind of dispute the rule of the exhaustion of local remedies does not apply . . . . Where the rights and obligations of the two states flow directly from their treaties and agreements, there can be no question of settling such dispute by recourse to local remedies. The American courts have no competence to adjudicate on the existence of an obligation on the part of the United States to submit to arbitration or conciliation.[18]

Before this approach to the problem is examined, it might be useful to mention a similar, if not identical approach taken by Judge Basdevant in his Individual Opinion. The exact implication of this is not clear, but he concurred in the conclusion of the Court regarding the nonadmissibility of the Swiss Application and reasoned "that in order to assess the validity of the objections advanced, he should direct his attention to the subject of the dispute and not to any particular claim put forward in connection with the dispute."[19] From an examination of the Application in the instant case, he found that the dispute related to "the restitution by the United States of the assets" of Interhandel. This statement of the "subject of the dispute justifies, in this case, the requirement of the preliminary exhaustion of local remedies on the ground that if, through them, Interhandel obtains satisfaction, the subject of the dispute will disappear."[20]

The Court's approach to the issue poses a number of difficult problems, some of which are insurmountable. First, the approach completely ignores any interest which the state, *qua* state, may have in the subject matter. Even in cases consisting entirely of the exercise of diplomatic protection, the state's interest in asserting its own right by taking up the cause of one of its nationals cannot be completely ignored. More fundamentally, the approach of the Court completely ignores the nature of the wrongful act com-

18. [1959] I.C.J. at 83-84 (Winiarski, J., dissenting). *See also id.* at 89 (Armand-Ugon, J., dissenting).

19. *Id.* at 30.

20. *Id.* at 30-31.

plained of and thus includes cases of diplomatic protection where there may be no remedies to exhaust. It is not inconceivable that the nature of the wrongful act that caused the injury to the national evokes no local remedy. To use the example given earlier,[21] state A enacts legislation claiming the right to try all offenses of libel committed in state B. X, a citizen of state B on a visit to state A, is arrested, tried and jailed for committing the offense while in state B. X could hardly be required to exhaust all local remedies before state B could take up his cause.[22] Furthermore, even if state B expressly claims to be protecting her national, the local remedies rule may be inapplicable because the nature of the initial wrongful act—usurpation of jurisdiction—does not permit its application. Moreover, to consider the problem from the point of view of the subject matter of the dispute may be a simplistic approach to the problem. It is doubtful in the instant case whether the subject matter of the dispute relates exclusively to the restitution of Interhandel's assets. The alternative claim of the Swiss Government may have something unrelated to the restitution of property as its subject matter; namely, the duty to arbitrate in conformity with treaty obligations. The subject matter of the dispute normally cannot be stated so easily. Indeed, the essence of the problem in these instances is that the subject of the dispute relates both to an infringement of the right of the state and a situation giving rise to some form of diplomatic protection. Therefore, it may be difficult to identify with any degree of precision the subject matter of the dispute in these cases.[23] Lastly, the approach completely ignores the nature of the claim or the remedy sought by the applicant. This aspect of the Court's approach may be crucial in doubtful cases since the claim made may reveal further the nature of the dispute.[24]

B. *Immediate Injury by One State to Another*

A number of writers state that the local remedies rule is inapplicable when an act causes "immediate" injury to another state.[25] Immediate injury here would appear to be no more than direct

21. *See* Interhandel Case, I.C.J. Pleadings 8 (1959) (accompanying text).

22. *Cf.* The facts of the Cutting Case, 2 J. MOORE, INTERNATIONAL LAW DIGEST 228 (1906) (United States did not wait until the remedies available in Mexico had been exhausted before taking diplomatic action on behalf of Cutting).

23. *See, e.g.*, Aerial Incident of July 27th, 1955 Case, [1959] I.C.J. 127.

24. *See* Meron, *supra* note 1, at 92.

25. *E.g.*, EAGLETON, *supra* note 9, at 51; FREEMAN, *supra* note 9, at 404.

injury to the state. If this is the case, their approach would only state the obvious and provide no means of determining when the rule would be inapplicable where the same act that causes immediate injury to the state also causes some injury to her national. Several cases, however, reveal attempts by states to claim that "immediate" injury has been inflicted and, therefore, the local remedies rule is inapplicable, even though some element of diplomatic protection is present. In the *Salem Case,*[26] the Egyptian Government alleged that Salem had not exhausted the legal remedies available in Egypt. The United States Government replied that:

> Nations are not amenable to the courts of other countries and consequently, the rule of exhaustion of local remedies of necessity cannot apply to cases of direct responsibility of one state to another for its own acts. The unwarranted refusal of the Government of Egypt, acting through its lawfully constituted agents, to recognize the treaty rights of the United States, constituted a direct wrong against the Government of the United States as well as against Salem. Such direct national injuries cannot by the very nature of things, be subjected to adjudication by the municipal courts of the offending state.[27]

In the *Aerial Incident Case,*[28] a civil aircraft belonging to an Israeli company flew into Bulgarian airspace without previous authorization and was shot down by Bulgarian forces. Israel sought a declaration that Bulgaria was responsible under international law for the incident. Pecuniary compensation for the individuals who suffered as a result of the act was tied to the claim. The Bulgarian Government objected on the ground, *inter alia,* that local remedies had not been exhausted in Bulgaria and that the claim, therefore, could not be submitted to the Court.[29] Israel sought to distinguish between the element of diplomatic protection in the case and that of direct injury to the state. In its argument before the Court, the Israeli Government contended that:

> We can recall no precedent in which a government complaining of actions performed by another government *jure imperii* has been referred to the courts of the respondent state as a preliminary condi-

26. Salem Case (Egypt v. United States), 6 Ann. Dig. 188, 2 R. Int'l Arb. Awards 1161 (1932).

27. Brief of the United States in the Salem Case, Arbitration Series No. 4(2), at 93-94, quoted in FREEMAN, *supra* note 9, at 405 n.1.

28. [1959] I.C.J. 127.

29. *Id.* at 134.

> tion to the obtaining of international satisfaction. Our claim is for a declaration of Bulgarian responsibility under international law, and we submit that no domestic court in the world is competent to make such a declaration which alone can lead to the satisfaction of our international claim . . . . The action of the Bulgarian authorities has violated rights which are the intrinsic attribute of Israel as a state, the right that an Israeli aircraft going about its lawful business should not be improperly obstructed or otherwise interfered with, and certainly not destroyed, in the course of its voyage, and its innocent occupants exposed to the gravest terror and danger.[30]

The only problem with this approach is the danger to the individual of losing the state's protection because his cause has been abandoned while the state is defending only its own right. We tend to lose sight of the interest of the national, who might have suffered most. If, of course, the claim that reparation is sought for direct injury is actually a cover for the exercise of diplomatic protection, the tribunal would look behind the claim to discover which interest is paramount.[31]

C. *The Wrongful Act on Which the Claim Is Based*

It is common to allege that there has been denial of justice to the national as soon as a state attempts to espouse the cause of its national. Much of the discussion on the topic of exhaustion of local remedies is clouded by considerations relating to complaints of denial of justice. Such a complaint is not the only one that could be made even in cases of diplomatic protection. The facts of the case may not be susceptible to easy classification into distinct tort categories. The example given earlier may be varied a little to illustrate the point. State A enacts legislation claiming the right to try all offenses of libel or murder committed in state B. X, a citizen of state B, is alleged to have written libellous material in state B. Agents of state A are sent to state B to apprehend him and he is duly brought to state A where he is put in jail for one year without trial and generally ill-treated. In any subsequent action by state B, or in any claim from state A before an international tribunal, the mode of stating the claim may determine whether the exhaustion of local remedies rule would apply in the above situa-

30. Aerial Incident of July 27, 1955 Case, I.C.J. Pleadings 530 (1959) (Statement of Rosenne, Agent of Israel).

31. Interhandel Case, [1959] I.C.J. 4. *See also* Norwegian Loans Case, [1957] I.C.J. 9; Phosphates in Morocco Case, [1938] P.C.I.J. ser. A/B, No. 74.

tion. If the claim is stated in terms of denial of justice to X, then he may be required to exhaust local remedies in A before his state could espouse a claim on his behalf. If the claim is stated in terms of usurpation of jurisdiction, however, the exhaustion of local remedies rule may be excluded. In other words, it is thought that the nature of the wrongful act on which the claim is based may become the crucial factor in determining whether the exhaustion of local remedies rule should apply.

Two suggestions similar to the above may be differentiated. In classifying a case as one of direct injury or of diplomatic protection, two main factors must be taken into account: first, the action which is impugned in the proceedings or the subject of the dispute; and secondly, the nature of the claim.[32] The exhaustion of local remedies rule would not operate if a consideration of these factors reveals that only the protection of the state's interest is being sought. It is possible to equate what has been termed "the action which is impugned or the subject of the dispute" to the nature of the wrongful act committed. Under this approach, only when the wrongful act causes a direct injury in light of the claim will the local remedies rule be excluded. Such a conclusion, however, may not be helpful. Amerasinghe has stated that the real question concerns "the nature of the injury or right violated on which the claim is based."[33] It is doubtful that "injury" or "right" could be used interchangeably here since an injury cannot be violated. However, it is further contended by the learned author that:

> [A]n injury to an alien may very well also be a violation of his state's right. The further inquiry must be made as to the essence of the state's right. If the state's right in its essence has for its object the protection of its nationals as such and if this is the main interest sought from it, it may be concluded that the rule of exhaustion applied to it.[34]

This of course obscures the issue of what the result would be if the same act causes injury to nationals, even though the essence of the right violated is the protection of the interest of the state. Furthermore, the classification of rights into those for the protection of nationals and those for the state's interest seems artificial and may prove to be a difficult undertaking.

The *Barcelona Traction Case*[35] magnified the problem consider-

32. Meron, *supra* note 1, at 86.
33. AMERASINGHE, *supra* note 1, at 179.
34. *Id.*
35. [1964] I.C.J. 4.

ably and provides a basis for the contention that the nature of the alleged wrongful act might be a decisive factor in the determination of whether the local remedies rule is applicable. Belgium complained that the bankruptcy adjudication of a Canadian company by a Spanish court amounted to a usurpation of Canadian jurisdiction. Spanish law provided that an appeal should be lodged within eight days of the declaration.[36] It was part of the Belgian contention that the eight days would not start to run until the company was notified in Canada of the declaration. The declaration was only published in Reus, where the court sat. Consequently, no effort was made to appeal against the declaration within the prescribed eight day period. Attempts by subsidiary companies included in the bankruptcy declaration to secure a review were fruitless because they were said to lack standing, not being the company declared bankrupt. Subsequent efforts by the Barcelona Company to secure a review after the expiration of the eight days bore no fruit. Although little mention was made of it in the Court's opinion, the refusal of the company to challenge the declaration within the eight days must have been due to a belief, which may now be characterized as mistaken, that the declaration should not have been made and was therefore a nullity, there being no jurisdiction in the Reus court to adjudicate in bankruptcy on a Canadian company. It appeared that the directors of the company had notice of the judgment within the eight days, though not officially, but simply refused to act.

From the outset, the primary issue raised by Belgium concerned the protection of her nationals who were shareholders in the Canadian company. The usurpation of Canadian jurisdiction, one of the three complaints raised, was designed to show that this usurpation was the source of the losses suffered by the Belgian nationals. The local remedies issue might have been avoided if the sole basis of the claim had been usurpation of jurisdiction and if it could be shown that the usurpation was the proximate cause of the losses alleged. This line of inquiry might have been more relevant than attempting to determine either the interest the claimant state is said to be protecting or the nature of the injury suffered. Once the usurpation is found to be the proximate cause of the losses, other inquiries become irrelevant. One view of the problem, thought to be the most helpful, is put by O'Connell as follows:

36. SPANISH CODE OF CIVIL PROCEDURE art. 1796(4). *See* Counter Memorial of the Spanish Government, Ch. IV, and argument of Malintoppi, counsel for the Spanish Government, June 16, 1969.

> An injury to an alien not notionally or physically within the jurisdiction of the acting state is directly a wrong under international law through an excess of jurisdiction and since municipal courts are jurisdictionally incompetent at the situs of the event, the injured party is not required to seek redress from them.[37]

The mode of stating the claim in the *Barcelona Traction Case* might have affected the outcome. The various illegal acts allegedly committed by the Spanish authorities, including usurpation of Canadian jurisdiction, were later characterized as amounting to denial of justice. The enlargement of the concept of denial of justice to include usurpation of jurisdiction is bound to draw various other factors, including the possible need to exhaust local remedies, into the matter. It is possible to speculate now that the approach of the International Court of Justice in the *Interhandel Case* might have differed had Interhandel not gone before the United States courts in the first instance. The Swiss Government might have alleged a direct breach of obligation that caused some injury to her national, and the issue of local remedies might have been avoided or precluded.[38]

Further support for the foregoing conclusion is offered by a number of cases also involving some element of usurpation of jurisdiction. In the *Lotus Case,*[39] no issue of the exhaustion of local remedies was raised, though it might have been legitimate to do so.[40] In the *I'm Alone Case*[41] the destruction of a Canadian vessel by the United States Coast Guard on the high seas was considered to constitute a direct injury to Canada, even though the vessel was privately owned. Canada made a successful claim for an apology and the payment of a considerable sum of money, with the exhaustion of local remedies rule playing no part. It is doubtful that it would have made any difference had the wrongful act been committed in the territorial waters of the United States.[42] Finally, although the *Cutting Case* did not go to arbitration, the United States did not wait until local remedies in Mexico had been exhausted before taking up the cause of its national.[43]

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37. O'CONNELL, *supra* note 1, at 956.

38. *Cf.* O'CONNELL.

39. [1927] P.C.I.J., ser. A, No. 9.

40. The joint agreement of the parties to submit the issue to the International Court might, of course, be the factor that made the issue unnecessary.

41. I'm Alone Case (Canada v. United States), 3 R. Int'l Arb. Awards 1611 (1924).

42. *Contra,* AMERASINGHE, *supra* note 1, at 180-81.

43. *See* The Cutting Case, *supra* note 22.

IV. Conclusion

Notwithstanding the anomaly of the procedural requirement that local remedies available in the respondent state must be exhausted before there can be diplomatic intervention on behalf of a national, there can be no doubt that the rule serves some very useful purposes and has become generally accepted. This is demonstrated by the significant role the rule now plays in the resolution of issues before the European Commission of Human Rights.[44] Because the rule is often discussed in the context of a complaint of denial of justice, considerable difficulties may be encountered in determining when the rule should be complied with. This difficulty is particularly manifest when an unlawful act injures both the state and its national simultaneously. When the state takes diplomatic action or institutes judicial proceedings under these circumstances, various tests have been used or proposed for determining whether the requirements of the exhaustion of local remedies rule must be fulfilled. In the *Interhandel Case* the International Court of Justice decided that the applicability of the rule depended on whether the private or the public interest is preponderant in the claim; if the former, local remedies must be exhausted, and if the latter, the rule will not be applied. Other suggested tests that have been considered include making the applicability of the rule depend on the subject matter of the dispute or whether the alleged wrongful act causes an immediate injury to the state.

A possible way of looking at the problem is to consider the nature of the wrongful act alleged to have been committed by the respondent state. This inquiry may reveal a wrongful act directly infringing on the rights of the claimant state, thus making the local remedies rule inoperative. If this same act causes injury to a national of the claimant state, the protection sought for the national of that state will only be incidental to the main claim of protecting the interest of the state. In these circumstances, the proper questions to ask are whether there has been an injury and whether the wrongful act alleged has been the proximate cause of this injury. Instances where usurpation of jurisdiction has been alleged would appear to justify this conclusion.

44. *See, e.g.*, "Lawless" Case, [1961] Y.B. Eur. Conv. on Human Rights 302 (Eur. Comm. on Human Rights); "Retimag" Case, [1961] Y.B. Eur. Conv. on Human Rights 384; "Nielson" Case, [1959] Y.B. Eur. Conv. on Human Rights 412; "XV Federal Republic of Germany" Case, [1958] Y.B. Eur. Conv. on Human Rights 342. The nature of the Commission and the method of access to it no doubt give wider scope of operation to the rule.