CHAPTER VI

LOCAL REMEDIES RULE

In the earlier chapter we have seen that a State is free to nationalize or expropriate foreign property for public purpose. In that context we have also examined the requirement of compensation under traditional and contemporary international law. In the same connection we dwelt on the principle of "minimum standard of international law". It now remains to be seen whether an aggrieved foreign national has any rights or remedies available to him against the State expropriating his property. It is also pertinent to examine whether the home State of the foreign national could protect the interests of its national and, if so, how?

It is not only a foreign national's right but also his duty to exhaust local remedies available to him before he seeks assistance of his home State. It is a foreigner's privilege to complain if he feels that his legal rights have been violated. On the other hand, the State may insist that the
aggrieved foreign national should exhaust the legal remedies still available to him under national law of the expropriating State.

LOCAL REMEDIES RULE, ITS ORIGIN, NATURE AND MEANING

Alwyn Freeman traces the origin of the local remedies rule to the report of a Committee set up by Great Britain in 1752 to determine the propriety of certain acts of reprisal in the Silesian Loans Case. This report stated as follows:

If ... a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. 1

1 Quoted from Alwyn V. Freeman, The International Responsibility of States for Denial of Justice (London, 1938), p. 403. Some jurists consider origin of local remedies rule obscure. See for example, Thomas Haessler, The Exhaustion of Local Remedies in the Case Law of International
If the above represents a basic rule of international behaviour, the question often arises about the effectiveness of the local remedies rule. Does one judge its effectiveness by reference to the "international standard of justice" or by reference to the principle of equality between nationals and aliens? Further, what does the local remedies rule mean to a foreign national? The report of the Committee appointed by the League of Nations for codifying the subject of State Responsibility, also known as Guerrero report, defined the content of this rule thus: "The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights". However, this statement of the rule is not self-explanatory. Moreover, this tends to characterize the rule merely as a procedural one.

f.n. 1 contd....


Is the local remedies rule purely procedural or does it have any substantive aspect? On this question the publicists have expressed widely divergent views. In response to an inquiry conducted by the League of Nations preparatory Committee for the Conference on the Codification of International Law, the Egyptian Government expressed the view that international responsibility of states was engaged only in cases of (1) refusal to allow foreigners access to the tribunals, and (2) a judicial decision irreconcilable with the express provisions of a treaty. This gives rise to the problem of denial of justice.

The above introductory remarks show that the local remedies rule has to be viewed from several angles, for example:

1. Whether the exhaustion of local remedies is indispensable?

2. Does it have a procedural or substantive character?

3  Freeman, n. 1, p. 4.
3. In what circumstances may the rule be dispensed with and direct resort permitted to international tribunals or diplomatic protection?

4. What are the comparative merits and demerits of the rule?

5. What is its place in contemporary international law?

These questions may be examined one by one.

Whether the Exhaustion of Local Remedies is Indispensable As a Rule of International Law?

Juristic opinion is generally in favor of the local remedies rule. Thus, the rule has been supported by Grotius, Vattel, Anzilotti, Charles de Visscher, Lord Phillimore, C.H.P. Law and also the Institute of International Law in its resolution of 1956. There has in the past been some opposition.

tion to the rigid application of the rule but
very few have opposed its soundness. It has been
described as "one of the fundamental principles
in the matter of international responsibility", 5
a "basic principle of hornbook law", "universally
accepted" 7 and "a well-established rule of customary
international law". The rule that local remedies

5 Garcia-Amador's report on State Responsibility
as reproduced in F.J. Garcia-Amador, L. Sohn
and R.R. Baxter, Recent Codification of the
Law of State Responsibility for Injuries to

6 R.C. Wesley, "Expropriation Challenge in Latin
America: Prospects for Accords on Standards
and Procedure", Tulane Law Review, vol. 46
(1971), p. 279; Also see Fraeeman, n. 172, p.131.

7 Algot Bagge, "Intervention on the Ground of
Damage Caused to Nationals, with Particular
Reference to Exhaustion of Local Remedies and
the Rights of Shareholders", British Yearbook

8 Interhandel case, ICJ Reports (1959), p. 27
Judge Jessup confirms that the rule is
well-established but he feels that it is
ill-defined. (A Modern Law of Nations,
New York, 1956, p. 104); Van Eysinga,
PCLI, ser. A/B, no. 76, p. 36.
must be exhausted before international proceedings are instituted "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 where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system". Further, as Borchard puts it:

The principle of international law by virtue of which the alien is deemed to tacitly submit and to be subject to the local law of the state of residence implies as its corollary that the remedies for violation of his rights must be sought in the local courts. Almost daily the Department of State has occasion to reiterate the rule that a claimant against a foreign government is not usually regarded as entitled to the diplomatic interposition of his own government until

9 Ibid.
he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes claim. 10

It is thus evident that a foreigner whose property has been expropriated cannot invoke diplomatic protection of his home state, nor can the latter institute international proceedings, unless local remedies have been exhausted and found inadequate, or there is "denial of justice". However, as will be seen later, there may be instances where diplomatic protection of home state may be sought or international proceedings instituted ignoring the rule of exhaustion of local remedies. Before examining that aspect, it is pertinent to enumerate reasons why local remedies should be exhausted and

10 E. Borchard, The Diplomatic Protection of Citizens Abroad (New York, 1915), p. 317. As against this, Ralston asserts that the local remedies rule is "for the most part a rule of convenience of foreign offices in determining whether or not they shall interpose to secure special relief for their nationals rather than an imperative rule controlling the jurisdiction of international tribunals". Similar view is held by Tenékides. See Freeman, n.1, p. 412.
why diplomatic protection should not be invoked before exhaustion of local remedies. Borchard states the following reasons:

(i) The citizen going abroad is presumed to be aware of the means furnished by local law for the redress of wrongs;

(ii) The State is justified in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice;

(iii) The offending government must get an opportunity of doing justice to the injured party in its own regular way, and thus, avoid, if possible, all occasion for international controversy;

(iv) If the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the State; and

(v) If it is a deliberate act of the State, it may be necessary to establish that that State is unwilling to right the wrong.

The value that has been attached to the local remedies rule becomes evident from facts of the Finnish Ships Arbitration. When the Finnish Government complained to a predominantly political forum like the Council of the League of Nations against the U.K. Government for not making payment for the hire and loss of some vessels and for refusing to submit the dispute to international arbitration, the U.K. Government pointed out that the Finnish Government could not espouse the claim of Finnish shipowners since the latter had not exhausted the local remedies under the English law. A Committee of the Council of the League of Nations thereupon recommended that the parties should, first of all, seek solution of this question. The parties appointed Judge Bagge to decide whether the Finnish shipowners had exhausted the remedies available in British law.
The judge answered the question in the affirmative since in his view local remedies mentioned by the U.K. Government were either not adequate or not available. There was no need to resort to them if the municipal tribunal had no power to award compensation. There may be other limitations, such as appeal to a higher judicial organ being barred by the local law as being an appeal on a question of fact as distinguished from a question of law. Some recent attempts to codify the law relating to state responsibility make the exhaustion of local remedies virtually indispensable. Thus, Article 1, para. 2(a) of the Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) provides as follows:

An alien is entitled to present an international claim under this convention only after he has exhausted the local remedies provided by the State against which the claim is made. (emphasis added).

However, the Convention treats the exhaustion of local remedies as a matter of procedure or of jurisdiction, rather than one of substance. Thus, the source of responsibility is considered as the original internationally wrongful act rather than the subsequent "denial of justice". Section 206 of the American Law Institute Restatement of the Law Second states the general rule thus:

(1) A state is not required to make reparation on a claim presented on behalf of an alien injured by conduct wrongful under international law and attributable to the state, if the alien has not exhausted the remedies made available by the state, unless such exhaustion is excused under the rule ....

Exhaustion of local remedies is necessary under both the formulations for putting forward a claim. It may, however, be noted that the circumstances of a case may not call for application of the local remedies rule at all. The American Law Institute Restatement considers certain cases

13 See Garcia - Amador, Scan and Baxter, n. 5, p. 155.
14 Ibid., p. 261.
where an alien is "excused from exhausting an available remedy". Thomas Haesler adds: "[In part from the law as regards the exceptions to the rule ... there is no evidence for a relaxation of the stringency of the requirement that local remedies must be exhausted]."

Exhaustion of local remedies is an essential requirement according to General Assembly Resolution 1803, paragraph 4 of which provides:

"In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."

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15 See § 208 of the Restatement, n. 5, pp. 400-401. Among recent attempts at codification of the law relating to state responsibility, the Chancery Convention and OECD Draft Convention, 1967, may be mentioned. Local remedies rule was absent in the former (see Art. II) but was reintroduced in the latter.

16 Haesler, n. 1, p. 37.

17 G.A. Resolution 1803 dated 14 December 1962 (UN Doc. A/5209). See also Art. 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) under which the European Commission of Human Rights accepts petitions after all domestic remedies have been exhausted.
The letter part of this paragraph starting with the word "however" seems to imply that exhaustion of local remedies could be dispensed with in case of arbitration or international adjudication. But this result was apparently not intended. Publicists in their recent writings do not see in this resolution any attempt to qualify the "exhaustion of local remedies" rule. Karol Gess identifies views in the discussion on the draft resolution falling under three broad groups as follows: (1) the privacy of national jurisdiction, essentially equated to the exercise of national sovereignty, with recourse to arbitration or to an international jurisdiction as an exception; (2) the state's right to provide, by prior agreement, 

18 A number of countries such as Jordan, Morocco, Thailand and Argentina felt that the word "however" weakened the provision. A sub-amendment by three of these countries was withdrawn when the sponsors clarified that "however" did not exclude the national jurisdiction and covered duties as well as rights of states, (UN Doc. /C.I.8/E.858).

19 Wesley observes that "efforts to qualify the long standing 'exhaustion of local remedies' rule failed as the General Assembly affirmed the existing rule" (n. 6, pp. 263-264).
for direct recourse to such arbitration or international adjudication; and (3) the perils of adopting a loosely-drafted text. As far as wording of paragraph 4 quoted above is concerned, Gess takes the view that "agreement, whether prior or not, to resort directly to arbitration or international adjudication creates a category of exempt cases ... provided that the agreement in question is not contrary to 'the national legislation in force'. In taking this view, he derives support from paragraph 3 of the resolution: "the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law". Gess's interpretation is plausible but ignores difficulties posed by the use of the expression "and by international law". In any case, even if this view is accepted, it hardly derogates from the normal rule of exhaustion of local remedies.


21 Ibid., p. 435.
Resolution 33(XII) adopted by the Trade and Development Board of UNCTAD on 19 October 1972 reaffirms the principle of permanent sovereignty over natural resources and states that any dispute concerning payment of compensation by a state upon nationalization of foreign-owned property "falls within the sole jurisdiction of its courts ...".

More recently, General Assembly Resolution 3171 (XXVIII) of 17 December 1973, on "Permanent Sovereignty Over Natural Resources" makes no reference to "international law". The General Assembly in paragraph 3 of this Resolution affirmed that any disputes which might arise with regard to amount of compensation and the mode of payment "should be settled in accordance with the national legislation of each state carrying out such measures".

The above Resolution seems to go beyond the rule of local remedies since there is no reference to any other mode of settlement of dispute about

\[ \text{UNCTAD Doc. TD/B/423; International Legal Materials (Washington, D.C.), Vol. II (1972), p. 1475.} \]
payment of compensation. Similarly, as noticed in the previous Chapter, Article 2 of the Charter of Economic Rights and Duties of States provides that in cases of nationalization, expropriation etc. where the question of compensation gives rise to a controversy "it shall be settled under the domestic law of the nationalizing state and its tribunals", unless the states concerned by mutual agreement resort to other peaceful means.

The above provision makes no reference to arbitration or international adjudication but they are obviously not excluded. At the same time reference is not confined to these two methods as in the case of Resolution 1203 of 1962. It may also be observed that, unlike the Charter

23 The Charter of Economic Rights and Duties of States was adopted by the U.N. General Assembly by resolution 3231 (XXIX) of 12 December 1974. (emphasis added).

24 As to availability of adjudication under the Charter, C.N. Brower observes: "this article is a little bit like showing two litigants an architect's plan for a courtroom; there is still no courtroom, there is no judge, and there is no way even to get into court without the consent of the expropriating party". Proceedings of the American Society of International Law, 1975, p. 233.
of Economic Rights and Duties of States, the 1973 Resolution does not expressly deal with "exhaustion of local remedies" rule since it speaks about the applicable law rather than the requirement of exhausting local remedies. The expression "its tribunals" found in the Charter are missing in the 1973 resolution. However, provision regarding "national legislation" and "domestic law" a priori makes it necessary to exhaust local remedies.

Draft Articles on State Responsibility being currently formulated by the International Law Commission also include Article 22 which deals with exhaustion of local remedies. This article was adopted by the Commission at its twenty-ninth session held from 9th May to 29th July 1977.

The representative of Egypt described the Charter of Economic Rights and Duties of States as "an important measure which would enable the legal foundation to be laid for the new international economic order ..." (UN Doc. A/C.2/SR.1651, p. 466). Also see remarks of Alfonso Garcia Robles, Proceedings of the American Society of International Law, 1975, pp. 230-231.
Contemporary developments, such as above, in the field of international economic relations law seem to suggest that "local remedies" rule is not only a well established rule of customary international law, but it is taken for granted. As such, emphasis is laid on "national legislation" and "domestic law" which, in turn, can be tailored by the developing countries to their economic needs and aspirations.

The current status of the local remedies rule is succinctly described by Wesley in the following words:

Emerging in the 20th century as a first principle of international comity, the local remedies rule has been employed in treaties of conciliation and arbitration, in diplomatic practice, and before the Permanent Court of International Justice and the International Court of Justice. 26

Article VI(3) of the Investment Guarantee Agreement between U.S.A. and Brazil of 6 February 1965 incorporates the local remedies rule:

It is accordingly understood that claims arising out of the expropriation of property of private foreign investors do not present questions of public international law unless and until the judicial process of the Recipient Country has been exhausted and there exists a denial of justice .... 27

In practice, local remedies are invariably exhausted, where available, by the foreign investors, if only to be able to invoke diplomatic protection of the home State. Thus, in a recent controversial case of nationalization of International Petroleum Company (I.P.C.), the latter exhausted certain local remedies available under the Peruvian law viz. Article 102 of the Regulation of General Norms of Administrative Procedures. The appeal of Inter-


national Petroleum Company was rejected by the authorities. While doing this, it was pointed out that "the appellant company has not availed itself of the actions which the law makes available to everyone ... in accordance with law, it has, like any person, open to it the judicial process with the several types of authorized procedural law ... it can defend its points of view, judicially, in an action contesting the expropriation payment ... avenues which it has not wished to utilize to date". The case may be different where due to government-level agreement it is considered expedient to skip over the requirement of exhausting local remedies. This is very often the case when lump-sum agreements are entered into. A recent example of this is the Ugandan Assets of Departed Asians (Amendment) Decree, 1975. Under Sec. 15A of this Decree the value of property would be directly notified to the

29 Ibid., pp. 1055-56.

30 Decree No. 12 (A Decree to Amend the Assets of Departed Asians Decree, 1973).
Government of the departed Asian concerned. If the valuation is not acceptable, there is a provision for objecting within a specific period following which either of the Governments could refer the matter to an Arbitration Tribunal. It will, however, be far-fetched to conclude from the practice of lump-sum settlements, as Dawson and Head do, that:

current governmental practice in circumstances of large-scale nationalization of alien property appears to have deprived the Rule of much practical relevance. 32

The authors further add:

The result of this and similar factors has been to place in doubt its continued

31 Arbitration Tribunal Consists of a chairman, three members appointed by the Ugandan Government, and three members appointed by the Government of the departed Asian concerned. The chairman is to be appointed by the members from among an Advocate of the High Court of Uganda, failing which he is to be appointed by the Chief Justice of the High Court of Uganda.

32 Dawson and Head, n. 1, p. 52.
vitality as a condition precedent for espousal, and as a desirable technique to prevent the escalation of essentially local, private issues into matters of international concern. This development is regrettable. 33

Since all compensation disputes cannot be settled by lump-sum agreements, there is obviously need to retain the local remedies rule.

Character of the Local Remedies Rule: Procedural or Substantive

Let us now turn to the question whether the local remedies rule is procedural or a substantive condition for existence of state responsibility. In other words, whether the exhaustion of local remedies "is the indispensable condition for the birth of international responsibility". If requirement of local remedies rule constitutes a pre-condition of state responsibility it may be said to have substantive character. In other words

33 Ibid.

34 Law, n. 4, pp. 32-33.
it should affect substantive rights and duties of states. Widely divergent views have been held on this question. Three schools of thought may be mentioned in this regard.

The first school of thought regards the local remedies rule as procedural or jurisdictional rather than substantive. Consequently, local remedies are resorted to for the redress of what is already an international wrong and operates solely as a bar to the admissibility of a claim. This position is taken by Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) prepared by Louis Sohn and Baxter. This approach rejects the view that State responsibility arises out of a "denial of justice" when the alien fails to get redress from the local courts for an alleged

Garcia-Amador, Sohn and Baxter, n. 5, p. 261 (Para. 1 of Explanatory Note). Judge Tanaka's separate opinion in case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Reports (1970), pp.143, 144. See also Law, n. 4, p. 34 for similar viewpoint. C.F. Amerasinghe is categorically of the view that the rule is procedural one. (state Responsibility for Injuries to Aliens (Oxford, 1967), p. 236, Amerasinghe claims that writers earlier to him have regarded the rule either of substantive or mixed character but not of purely procedural character. (ibid.). Freeman also seems to regard the local remedies rule as of purely procedural character. (Freeman, n. 1, p. 407; Francis, UN Doc. A/C. 6/32/SR.35 (1977), p. 3 (para.4).
internationally wrongful act. Sohn and Baxter avoid using the term "denial of justice". Castor Law considers that denial of justice is itself a breach of international law giving rise to State responsibility. In other words, denial of justice does not depend on exhaustion of local remedies which, according to him, is a procedural requirement. Ferrari-Bravo of Italy, in a recent statement before Sixth Committee of the General Assembly, has also come to the conclusion that there is no logical connection between the exhaustion of local remedies and denial of justice. The second school of thought considers the "exhaustion of local remedies" rule substantive in character. This school has its foothold in the countries of Continental Europe although jurists from other parts of the world have also supported substantive character of the rule. For example, Judge Hudson of the U.S.A. expresses his support to this school as follows:

36 Law, n. 4, p. 34.

It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is a part of the substantive law as to international, i.e. State-to-State, responsibility. 38

Similar view has been taken by the International Law Commission in Article 22 of draft Articles on State Responsibility adopted by it at its twenty-ninth session. It reads as follows:

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or

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juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

The Commission, in its commentary to this article, refutes suggestions to the effect that local remedies rule is merely a rule of procedure and concludes that the rule "necessarily operates at the level of the actual mechanism of fulfilment of an international obligation and, consequently, at the level of determination of the existence of a breach of an international obligation", and hence at the level of the generation of international responsibility. In other words, the international responsibility of the respondent State was generated only when local remedies had been exhausted. It may, however, be stated that the Commission has not denied procedural aspects of the rule. In fact, the Commission is likely to devote one or two articles to

deal with this aspect. The application of the rule as drafted by the Commission is limited to cases of obligations of result, as distinguished from obligations of conduct. According to draft Article 21, when the conduct of a state is not in conformity with the result required of it by an international obligation, but that obligation allows it to achieve an equivalent result by subsequent conduct, there is a breach of the obligation only if the state also fails by its subsequent conduct to achieve the required result.

Sir Ian Sinclair of the U.K., while commenting on draft Article 22 on State Responsibility, vehemently criticized the Commission for taking the view that the local remedies rule was a substantive rule and argued that it was primarily procedural. On the whole, most of the representatives adopted a conciliatory approach to the

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Commission's decision to treat the rule of local remedies as primarily substantive in character. Thus, the Indian representative stated that his delegation "would have no objection to the rule of local remedies, which was generally regarded as a procedural rule, being regarded as a substantive rule, if that helped to strengthen the sovereign equality of states". He, however, clarified that the rule could not be given the same force as a rule of *jus cogens*.

The third school of thought follows a middle path and represents the view that the rule may be substantive or procedural, depending on the circumstances. This viewpoint is attributed to Eagleton who says: "Responsibility arises from an internationally illegal act, and is not necessarily contingent upon local redress".

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42 Eagleton, n. 11, pp. 97-98 (emphasis added). It appears that the words in the italics have led Amerasinghe to associate Eagleton with this school of thought. (See Amerasinghe, n. 35, p. 200). See also García-Árias, Sonn and Baxter, n. 5, p. 73. Those supporting mixed character of the rule include Eustatiades, Kearney (Yearbook of the International Law Commission, vol. 1 (1967), p.226) and Starke (Yearbook of the International Law Commission, vol. 2 (1956), p.206).
Fawcett's view of the local remedies rule is somewhat similar to Eagleton's. His view is based on a distinction between breach of international law and local law. According to him, the rule operates substantively where there is a breach of local law resulting in denial of justice. The local remedies rule does not apply in case of a breach of international law. Where there is a breach of both international law and local law, the rule is a procedural one. There is a group of writers which considers that in some situations the local remedies rule would not be a defence at all or the rule would be wholly inoperative.

43 See J.E.S. Fawcett, "The Exhaustion of Local Remedies -- Substance or Procedure?", British Yearbook of International Law, vol. 31 (1954), p. 454. Also see Amerasinghe, n. 35, pp. 210-211. In the Norwegian Loans case, Judge Lauterpacht in a separate opinion expressed the view that it was precisely where there was an initial breach of international law that the rule of local remedies operated. (ICJ Reports, 1957, p. 39).

44 Fawcett, ibid., p. 457.

Lastly, we may also refer to a suggested solution by Amerasinghe. Under the suggested rule there must be a breach of international law in respect of an alien and he must resort to local remedies before an action is brought before an international tribunal. Breaches of local law are irrelevant. Thus, "an opportunity of setting right an international delinquency ... is a concession to the respondent State". Amerasinghe’s analysis of the local remedies rule is admirable but he fails to place the importance of the rule in its correct perspective.

It is submitted that it is not a "concession to the respondent State", but it is 'right' to insist on the exhaustion of local remedies. This observation finds support from Judge Bagge who says that:

a State having committed a breach of international law by inflicting damage on a foreign subject or his property, a

sanction of the violated rule of international law should be provided. This may be done either by a decision of an international tribunal, condemning the delinquent State to reparation or damages, or by redress obtained by the injured foreigner by way of local remedies. The defendant State is entitled to have the opportunity of making use of the latter method. 48

The former special Rapporteur, García-Amadeor, in his reports on State Responsibility steered clear of the controversy on substantive or procedural aspects of the rule and emphasized its practical aspect in the following words:

... the responsibility or duty to make reparation for an injury caused to an alien is not exigible by means of an international claim so long as the local remedies have not been exhausted. In this sense, the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility as such may or may not exist, but unless and until the condition is fulfilled,

48 Bagge, n. 7, p. 166.
the state of the nationality of the alien has only a potential right. 49

The above exposition of the local remedies rule tends to treat it as a substantive rule. It also does not prejudge the issue whether breach of international law has taken place till the local courts have had the opportunity to pronounce. This conclusion, it is submitted, is supported by the words "responsibility may or may not exist" found in the above statement. However, Amerasinghe does not attach much significance to this aspect of the problem. The true application of the rule requires that, before seeking international interposition local remedies must be exhausted whether it is the international law breached or the local law. If the application of the local remedies rule is sought to be restricted, consequently bringing the matter into the international arena, difficulties in maintaining international legal order are bound to multiply.

It now remains to be seen whether there is any practical aspect of the controversy about the

49 García-Arévalo, Sohn and Baxter, n. 5, p. 73 (emphasis added). The representative of Greece speaking before Sixth Committee of the General Assembly also pleaded that the rule should be defined in a neutral manner. (UN Doc. A/C.6/32/ SR. 40, p. 4, para. 7).
substantive vs. procedural character of the rule. This is accurately analysed by Amerasinghe. If the rule is regarded as a procedural one the cause of action precedes resort to local remedies. The right of action arises only after exhaustion of local remedies. If the rule is regarded as substantive, the cause of action arises after the exhaustion of local remedies (e.g., resulting in denial of justice etc.) and coincides with the right of action. Distinction between the "substantive" and "procedural" approach is of considerable practical importance to the capital exporting countries adhering to traditional principles of international law in cases of expropriation of alien property. According to the "substantive" approach, damages would be calculated not as of the

50 Amerasinghe, n. 35, p. 215.

51 Amerasinghe, n. 35, pp. 201-202. The analysis seems to be based on distinction made by Fawcett between the moments of State responsibility and of diplomatic intervention. He regards the former as the "cause of action" and the latter as the "right of action". (See Fawcett, n. 43, p. 452).
time of the injury but as of the time of the exhaustion of local remedies, interest accruing only from the time of exhaustion. However, according to traditional international law, when a state expropriated alien property it was obliged to pay compensation as of the time of the taking. If it failed to pay such compensation even on the exhaustion of local remedies, an international wrong would arise concerning which the Government of the alien state could make an international claim. The Commission has taken the view that the breach of the international obligation resulted from the whole series of successive acts of state conduct, from the first which set it in motion to the last which completed it. The Commission considers that for purposes of determining the amount of reparation for internationally wrongful acts, it is permissible by virtue of the twin criteria of justice and equity to take as a basis the injury caused by the first act.

There is also the question of allocation of burden of proof depending on whether the rule is classified as substantive or procedural. In
the former case, the burden of proof is on the claimant state to prove that local remedies were not available or were deficient resulting in denial of justice. In the latter case, it is for the respondent state to raise the question of exhaustion of local remedies. The weight of authority seems to consider the rule as predominantly substantive in character.

It would be appropriate at this stage to probe whether there are any exceptions to the local remedies rule.

In what Circumstances the Local Remedies Rule may be Discarded and Direct Resort may be had to International Tribunals or Diplomatic Protection?

This aspect could be dealt with in the following different ways:

52 Amerasinghe, n. 35, p. 206; Fawcett, n. 43, p. 453. Judge Lauterpacht in the Norwegian Loans case opined that there should be a division of the burden of proof (ICJ Reports, 1957, p. 39).
(1) Cases where local remedies may be deemed to have been exhausted;

(ii) Express or implied waiver of the rule.

(1) Local Remedies Deemed to have been Exhausted

The first category of cases have been listed by the American Law Institute Restatement:

(1) Where it is apparent that the remedy would not satisfy the requirements of procedural justice;

(2) Where resort to local remedies would be ineffective in view of adverse decisions taken in identical cases. Thus, as explained by Alwyn v. Freeman:

Where there are several victims who suffer damage at the same time and under the same circumstances, it is unnecessary that all of them should have had resort to the local courts; if it is found, in a cause instituted by one of them, that the local means

53 see n. 5, pp. 400-401.
of redress must, for a reason common to all, remain without satisfactory result, that will be sufficient. 54

Special Rapporteur Garcia-Amador's approach is different. He thinks that it tends to limit the principle of the exhaustion of local remedies.

(3) Where the State of the alien's nationality is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful act.

In the Aerial Incident of 27 July 1955 (Israel v. Bulgaria) (Preliminary Objections) the Government of Israel pleaded that the shooting of the Israeli Civil Constellation aircraft by Bulgarian

54 Freeman, n. 1, p. 421. Justice Tanaka subscribes to this viewpoint in his separate opinion in Barcelona case, n. 35, p. 148.
55 Garcia-Amador, Sorn and Baxter, n. 5, p. 73.
air force was a case of direct injury rather than one of diplomatic protection. The Court in this case did not consider the question of exhaustion of local remedies because the case was dismissed on a preliminary objection. The nature of remedy in such a case would depend on whether the aircraft was state-owned or belonged to private persons. Exception to the local remedies rule based on "direct injury" principle, as incorporated in the American Law Institute Restatement, seems to be inspired by Theodor Meron's article who believes that it is necessary to classify each case as one of diplomatic protection or one of direct injury. Amerasinghe, however, rightly points out that the mere fact that an injury to an alien is a violation of an international agreement or

contrary to an international judgement does not mean that local remedies need not be exhausted.

The former Special Rapporteur García-Amador of the International Law Commission is of the view that the fact of local remedies having been exhausted could be "verified objectively". Thus local remedies shall be deemed to have been exhausted when the decision of the competent body or official that rendered it is final and without appeal. It may be observed that the criterion of a decision which is "final and without appeal" as contained in the draft


59 García-Amador, Sohn and Baxter, n. 5, p. 74.

60 Ibid. During a debate in the Council of the League of Nations in connection with the cancellation by the Persian Government of the Anglo-Persian Company's 1901 Concession the United Kingdom representative pointed out that resort to local courts would have been futile in view of the cancellation having been ratified by the Persian Parliament. Courts had no jurisdiction to grant a remedy. League of Nations Official Journal, vol. 14 (1933), pp. 198-204).
Articles, is preferable to the one suggested by Judge Tanaka in his separate opinion in the Case Concerning the Barcelona Traction, Light and Power Company, Limited, which was as follows:

'Exhaustion' can be seen to be a matter of degree. Minor omissions should not be imputed to the negligence of those concerned. It is sufficient that the main means of redress be taken into consideration. 61

If the above criterion were followed, it would be difficult to objectively verify whether the requirement of local remedies had been fulfilled. We however agree with Judge Tanaka that the rule should not be construed to demand what is "impossible ... but only what is required by common sense, namely, 'the diligence of a bonus paternom's'.

61 Barcelona Traction Case, n. 35, pp. 148-149. We may here refer to Article 12 of the Draft Articles on the Status of Aliens formulated by Asian African Legal Consultative Committee (hereinafter referred to as A.A.L.C.C.) which provides for very vague and indeterminate criterion viz. local remedies found "inadequate or unsatisfactory". (A.A.L.C.C., 3rd session, 1960, p. 130).

62 Barcelona Traction case, ibid.
(ii) **Express or Implied Waiver of the Local Remedies**

The second category of cases where local remedies rule may not apply are those in which the local remedies have been waived expressly or impliedly. As far as express waiver of the rule is concerned, there appears to be no difficulty. This could be done by an agreement between the States either before or after expropriation of alien property. An instance of this in State practice during twentieth century is Article VI of the 1923 Convention between Mexico and United States establishing a special claims commission. It *inter alia* provided as follows:

*The Mexican Government agrees that the Commission shall not disallow or reject any claim by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.*

However, such waivers have been looked with scepticism due to history of interventions by great powers in Latin American States. Thus, Judge Ammoun in his separate opinion in the Barcelona Traction case observed that Mexico had been forced to agree to the above convention not to avail itself of the local remedies rule. Exclusion of prior recourse to local remedies, he observed, entailed discrimination against the State which was made to waive its right. This is a problem for which other solutions, such as avoidance of treaty due to coercion etc., under the law of treaties, especially under Vienna Convention on the Law of Treaties, 1969, may be available. But the international community cannot remain complacent if these situations continue to arise given the changed world complexion. It appears that Special Rapporteur, Garcia-Arredor, who included an article

64 Barcelona Traction, Case, n. 35, p. 291 (n. 7).

65 Ibid. In this connection, he refers to statements of Valladao, Yasseen and Jimenez Areuaga at the Institut de droit international (Annuaire de L' Institut de droit International, vol. 2 (1967), pp. 431, 432, 435-436).
in his draft Articles for express waiver of local remedies rule was not unduly alarmed. American Law Institute Restatement makes a specific provision for waiver of exhaustion as follows:

A state may, by appropriate manifestation of intention, waive the exhaustion of available remedies. 66

The above provision is couched in general terms and hence express provision for waiver of the local remedies rule here does not appear necessary. John-Baxter Draft Convention does not include any article on waiver of the local remedies. It would, however, appear that implied waiver does not find favour with them since, as noted earlier, even in case of an arbitration agreement they deem it necessary that local remedies be exhausted unless such an agreement is to the exclusion of all other remedies. In any case, an agreement freely entered into between the concerned states waiving local remedies rule cannot be questioned. Under Article 26 of the Convention on the Settlement

66 Garcia-Amador, John and Baxter, n. 5, p. 401.
67 Ibid., pp. 264, 265.
of Investment Disputes between States and Nationals of other States, the parties consenting to arbitration are deemed to do so to the exclusion of other remedies unless as a condition of such consent they require exhaustion of local remedies.

Where local remedies rule has not been expressly waived it gives rise to the problem of ascertaining the intention of the parties. This has been done in some cases in the past in the following ways:

(a) A tacit agreement to waive the local remedies rule is inferred from an arbitration agreement or agreement for judicial settlement of disputes. After the dispute arises parties

Art. 26 reads as follows: "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". (Cmd. 2745, 1965),
may enter into an ad hoc agreement for its immediate arbitration or judicial settlement. A tacit agreement to waive the local remedies rule is read into such an ad hoc agreement since local remedies rule was not invoked by the concerned State. A number of examples on this are available in arbitration cases.

(b) There are several instances of States entering into agreements for arbitration or judicial settlement before a dispute arises. States have no particular dispute in mind while concluding such agreements. Therefore, it is not easy to get any indication that parties intended to waive the local remedies rule. In fact, there may be strong reasons to believe that parties had no intention of discarding the local remedies rule.

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Law, n. 4, p. 94. See also Kronfol, n. 80, p. 126, who refers to case where an alien may not get arbitration proceeding specifically required in an agreement (such as Art. 22(A) of the Concession Agreement of 29 April 1933 between the Persian Government and the Anglo-Persian Oil Co. Ltd.) in which case he is under no obligation to exhaust local remedies.
and that there was only general agreement to settle the dispute at the international level. However, where parties provide in these agreements that "direct" recourse may be had to arbitration or judicial settlement, there should be lesser or no hesitation to imply waiver of the rule. A recent survey of investment laws in Africa reveals that out of a twenty-six investment laws in Africa, twelve have specific provisions concerning arbitration. In some states there are no special provisions on arbitration. Hence, in case of a dispute, either of the parties resort to ordinary law or depend upon remedies provided in terms of contract. It would appear that where specific arbitration provisions exist, there is an intention to go directly to arbitration in view of special nature of the disputes.

70 Law, ibid.

(c) Apart from the fact of implied waiver of the rule, the question arises whether the rule is at all applicable in case of a general arbitration treaty which makes no reference to the rule. There is no uniformity of views on this. Judge Van Eysinga in his dissenting opinion in the Panevezys - Salbutiskis Railways Case expressed the view that "compulsory arbitration, accepted unconditionally, constitutes an exception to the applicability of the local remedies rule". Since the unconditional acceptance appears to be the basis of Judge Eysinga's opinion, it would be really a case of implied waiver of the local remedies rule rather than the rule being inapplicable. Implied waiver has to stem from intention of the parties whereas inapplicability of the rule

72 PCIJ (1939), series A/B, no. 76, p. 37 (Emphasis added). Thus, the submission of States to Court's compulsory jurisdiction or a declaration under the Optional Clause under Art. 36 of the Statute of Permanent Court of International Justice were construed to constitute exceptions to the local remedies rule (ibid. pp. 35-36).
must be based on some general or customary principle of international law. "Denial of Justice" may belong to the latter category. Borchard, like Judge Eysinga, thinks that the local remedies rule does not apply in case of general arbitration treaties if such a treaty is silent on application of the rule. Borchard's view is not shared by Freeman and Verzijl. In their view the local remedies rule applies under all circumstances unless it is expressly waived. Freeman observes as follows:

The necessity of exhausting internal remedies must be regarded as a fundamental rule of international law; as mandatory upon international tribunals (in the absence of an express contrary stipulation in the compromis) .... 74

Since there is no uniformity of views in the matter, it has been noticed that some states make express provision for exhaustion of local remedies in

73 E. Borchard, Annuaire de L'I.D.I., vol. 1 (1931), pp. 427-428; Also see n. 4, p. 95.

74 Freeman, n. 1, p. 414; Also see Verzijl, Annuaire de L'I.D.I. (1956) pp. 3-4.
the treaties. However, a majority of awards deny the waiver in case of a general arbitration agreement. In view of the delicate sovereignty issues that may arise on the question of exhaustion of local remedies, it is submitted that it would be wise not to rely on implied intention of the parties unless there is overwhelming proof thereof. As such, no exception of the rule can be presumed.

It may also be mentioned in the passing that application of the local remedies rule may not be necessary or relevant where the limited question is whether there is an obligation to arbitrate under a treaty. Once it is decided by an international court or tribunal that parties are under an obligation to arbitrate it will be for the other designated authority to decide issues pertaining to merits of the case.

75 For examples of such treaties, see Law, n. 4, p. 96, n. 11. For recent examples, see n.25.
76 Law, ibid., p. 97.
77 Ibid., p. 98.
Comparative Merits and Demerits of the Local Remedies Rule

In cases of expropriation and nationalization of alien property, the "international rule of the exhaustion of local remedies may sometimes place the foreign owner on the horns of a dilemma". Thus, in the case of Indonesian nationalization of Dutch enterprises although the Indonesian law made a provision for appeal from Government Committee on compensation to the Supreme Court, the Dutch owners on the advice of their Government did not submit claims for compensation. The Netherlands Government felt that submission would amount to assisting in the application of the Indonesian law and to recognize its legal validity which that Government denied. The


79 M. Domke, "Indonesian Nationalization Measures before Foreign Courts", American Journal of International Law, vol. 54 (1960), p. 484. When the matter subsequently came before the Court of Appeal at Bremen, it rejected the plea of a Dutch Tobacco Company that the Indonesian nationalization law was confiscatory. They could be relieved of their obligation to avail themselves of local remedies only if they could prove that the Indonesian law made no provision for payment of compensation, which was not the case (See Domke, ibid., p. 305).
Netserland's view of the remedies available under the Indonesian law was somewhat exceptional and extreme. This in no way blemishes the rule. The view taken by Zouhair Kronfol that in most cases of nationalization the local remedies will not come into operation, "since the injury to the alien is caused by the application of the local law which is binding on the local courts", also appears erroneous since in many countries courts have the power of judicial review. Moreover, binding effect of the local law on the local courts is not peculiar to cases of nationalization. As such, this cannot be considered a sufficient justification for discarding local remedies rule. It has been conceded by well-informed publicists that "proper application of the ... Rule resulted, in the nineteenth and during the first half of the twentieth century, in the disposal of the great majority of aliens' complaints at the local level ...". This may in fact be considered


81 Dawson and Head, n. 1, p. 19.
as the main asset of the local remedies rule. It may help in localizing the conflict and prevent it from escalating into an international conflict. If a dispute is settled at the local level it is not likely to become a political issue at international level. Interest of the international community would be best served if there is lesser tension and if threat to peace is avoided. Once the issue gets politicized it becomes harder to settle it. Further, parties benefit by saving their time and money. It is also important that international tribunals and the Court are not unduly burdened with litigation. This is a rule which reaffirms the principle of the sovereign equality of States, satisfies the ego of sovereign states, and takes into account its sensitivities by subjecting its action to test by one of its own organs. It is also an instrument of protecting state sovereignty and hence " aids to reconcile the

82 In this connection, it would be pertinent to remember that certain foreign powers had concluded capitulation agreements excluding their nationals from the jurisdiction of colonies in Asia and Africa ruled by them.
conflict between sovereignty and international law". Local remedies rule is specially significant in view of the principle of permanent sovereignty of states over their natural wealth and resources, a principle which has become a tenet of contemporary international law. Local courts are best suited to uphold the objectives and values behind national legislation concerning expropriation or nationalization of foreign property. In the absence of local remedies rule, foreign offices would be greatly burdened with frivolous complaints for diplomatic protection. Although foreign offices are not under an obligation to take up every such case, they have to


84 Thus, Clyde Eagleton observes as follows: "It [local remedies rule] is an eminently fair and serviceable rule, respecting territorial sovereignty and recognizing the impossibility of guaranteeing to the alien a perfect protection against all harm, and at the same time allowing for proper protection of the rights of aliens, without the necessity of overburdening chancelleries with thousands of diplomatic claims." (Ibid., p. 539) (emphasis added).
examine each case with a view to taking a decision. According to Meissner of German Democratic Republic the rule of exhaustion of local remedies is "a means to prevent issues that might arise between States in connexion with the treatment accorded to aliens from immediately being raised in the international arena and being used as a pretext for intervention in the affairs of smaller States".

Local remedies rule creates hardships where aliens are expelled *en masse* and have to seek the remedies after having been repatriated to their home States. At times they are ordered to depart at short notice leaving behind their assets and property. Even personal effects are not allowed to be taken in full. The actions are not regulated by law and extra-legal methods are followed to squeeze the aliens. In all these cases, where either the compensation procedures have not been settled at the time of such actions or certain measures are not within the pale of law, it becomes extremely difficult for the aliens, rendered destitute, to pursue local remedies from a distance.

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Local remedies in such cases may have to be pursued at prohibitive cost or abandoned altogether. Some of these difficulties were faced by Indian repatriates from Burma, Uganda and a few other countries. The question of Ugandan Asians was raised in the Sub-Commission of the U.N. Human Rights Commission on Prevention of Discrimination and Protection of Minorities by the British delegate although the Commission declined to intervene in the matter. Subsequently, the Government of India and the Government of Uganda reached an understanding on the quantum of compensation payable to the Indian nationals.


87 "In respect of certain items figuring in the claims the question of payment, restoration or reimbursement was left to be pursued through diplomatic channels or established procedures". See statement of the Deputy Minister in the Lok Sabha/Rajya Sabha made on 29.1.76.
Yet another drawback of local remedies rule may be said to be lack of confidence of aliens in the local courts. The problem may become acute when relations between the capital-importing State and capital-exporting State are not smooth. Hostility may also have been generated due to activities of multinational corporations. However, this is matched by a general lack of confidence of developing countries in the international arbitral tribunals because they do not consider existing international law truly universal. The reason for this is well explained by Guna Roy as follows:

The bulk of existing international law is an undoubted legacy from the international community of the past — a community limited both racially and geographically .... The so-called international community, the smaller but more powerful part, dominated the bigger but weaker part. The universality, therefore, of even that part of international law which governed all the members of that old international community was the universality of a very small slice of our world —
a slice which ignored the other part except for its own ends. 88

On balance, therefore, reasons for retaining rule of local remedies appear to be far greater than 89 for discarding it.

Place of Local Remedies Rule in Contemporary International Law

It has been widely recognized by modern jurists that national courts dealing with international legal issues as part of their jurisdiction, are significant partners in the development of international law. In fact they have been


89 This view finds support, among others, from Dawson and Head, n. 1, p. 55.
urged to fill the gap left by international organs. This may look utopian at first sight. However, several aspects of international law are presently being codified or progressively developed. Multilateral law-making and other conventions are taking place. It is the responsibility of individual States to implement these various norms of international law through the instrumentality of their judicial or other organs. In this connection, States may be required to enact legislation on such matters as human rights, protection of diplomats or other internationally protected persons, privileges and immunities of States, or international organizations, protection of minorities, stateless persons etc. In view of this, role of local

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91 In some areas although States have not undertaken treaty obligations but they have chosen to follow the existing international conventions or emerging consensus in practice. These include the Vienna Convention on the Law of Treaties and even certain concepts of law of the sea, sea-bed and ocean-floor.
remedies rule need hardly be overemphasized. It is a mere truism to observe that states are not prepared as yet to give a go by to their sovereignty or accept any perceptible curtailment thereof. Further, if expropriated property is found after sale or transfer in a foreign state and title to such property is challenged before its courts, they are unlikely to lightly disturb foreign "act of state" unless exception to sovereign immunity has been specifically made by a legislative provision such as section 1605(a)(3) of the Foreign Sovereign Immunities Act of 1976 enacted.

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93 Sec. 1605(a)(3) of the Foreign Sovereign Immunities Act of 1976 codifies exception to sovereign immunity for any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States".
by the United States of America. It may be interesting to note that Hickenlooper Amendment which was made to undo the decision in the Sabbatino Case has already been diffused by an amendment to the Foreign Assistance Act of 1973. This amendment makes the application of Hickenlooper Amendment discretionary. The practice of the courts to respect foreign "act of State" may discourage aliens from invoking jurisdiction of the courts other than those of the nationalizing State. In the Sabbatino case it was held that the forum may not apply its local law regarding foreign expropriations. Particularly, concession agreements and state guarantees are creations of local law, and, unless otherwise provided, are protected only by recourse to local remedies. Thus, limitations of


Ranco Nacional De Cuba v. Sabbatino, 376 U.S. 398 at 438 (1964), p. 229. In this case, local remedies rule was expressly recognized by the U.S. Supreme Court (ibid., pp. 422-423).

Wesley, n. 6, p. 285.
foreign courts as stated here also indicate that local remedies rule has assured role in the international setting of today.

Against the above background, it is not surprising that local remedies rule has been given respected place in the European Convention on Human Rights, Schm-Baxter Draft Convention, American Law Institute Restatement, Draft Articles of Asian - African Legal Consultative Committee, ILC Special Rapporteur Garcia-Escudero's Draft Articles on State Responsibility, General Assembly Responsibility resolution 1803 of 1962, Draft Articles on State Responsibility being currently prepared by the International Law Commission as well as in Charter of Economic Rights and Duties. Recent decisions of municipal and international courts have likewise fully recognized its position in international law. It has, however, been contended

97 See ibid.

98 Interhandel case, n. 8.
recently that local remedies rule is "suffering an eclipse", and that vast nationalization programmes have "severely challenged the assumptions underlying the Local Remedies Rule". Nationalizations by Communist and other Socialist States in the post-Second World War period were aimed at bringing about structural changes in their socio-economic order. As such they did not permit recourse to local courts. Effectiveness of the local remedies rule is also doubted in some Latin American States. In Guatemala judges who agreed to hear an appeal against valuation procedures under Agrarian Reform law of 1952 were summarily dismissed. These factors have contributed to aliens seeking direct relief from their home Governments. The latter in turn have attempted to secure compensation by negotiating lump sum settlements. As earlier noticed in case of Ugandan deprivations affecting Asian assets, the local remedies rule was dispensed with and a lump sum settlement took place.

99 Dawson and Head, n. 1, p. 50.

100 Ibid., p. 51.
It is felt that these practices have greatly eroded the practical relevance of the rule. Hickenlooper Amendment to the Foreign Assistance Act, which does not make suspension of aid to the expropriating state conditional upon the exhaustion of local remedies by alien investors, has been mentioned as yet another instance of local remedies rule having been ignored. Dawson and Head argue that the "present poor health of the Local Remedies Rule is not by any means sufficient reason for its total abandonment. Indeed, the contrary is the case .... The same persuasive reasons which made the Local Remedies Rule so attractive a century ago remain largely valid today". We cannot but agree with this view. The local remedies rule may not be relevant where direct settlements take place between the Governments concerned. Direct lump sum settlement may be facilitated if the expropriating State does not insist on alien property-owners seeking local redress. But this may not always happen. Therefore, instances where local remedies rule is rendered inapplicable or dispensed

101 Ibid., p. 55.
with may be treated only as insignificant aberrations from its general validity. We agree with Dawson and Head that the local remedies rule should be "revitalized as a means of settling both substantive and procedural disputes on the lowest levels of tension". It may be hoped that its role will gradually enhance as states endeavour to achieve new international economic order which, in turn, must reflect national aspirations of the developing countries.

**Relationship between Local Remedies Rule and Denial of Justice**

We have already seen that a majority of writers treat the local remedies rule as substantive in character. It, therefore, follows that state responsibility arises out of a "denial of justice" in the course of an alien's attempting to gain redress within the courts of the respondent state for an alleged wrong by that state. In *Ibid.*, p. 56.

See Explanatory Note to Article 19 of Soehn-Baxter Draft Convention, n. 5, p. 261. In the Barcelona case, the Court while deciding to join third and fourth preliminary objections to the merits observed thus: "The objection of the Respondent that local remedies were
other words, there must exist in the state concerned a judicial situation which makes it impossible for an alien to fulfil the condition of resort to local remedies. Where this situation prevails, it constitutes exception to the application of the local remedies rule. But, as Eagleton puts it, "denial of justice is practically always discussed in connection with the rule that local remedies must first be exhausted. Thus, relationship between the exhaustion of local remedies and denial of justice is borne out by several cases decided by claims commissions and arbitration tribunals, such as Mexican Commission of 1968, Venezuelan Arbitrations

f.n. 103 contd.

not exhausted is met all along the line by the Applicant's contention that it was, inter alia, precisely in the attempt to exhaust local remedies that the alleged denials of justice were suffered." (Judgement of 24 July 1964 (Preliminary Objections), ICJ Reports (1964), p. 57).

104 See separate opinion of Judge Tanaka, n. 35, pp. 144-45.

105 Eagleton, n. 83, pp. 542; 558-59. Also see Phillimore, Commentaries, II, pp. 4-5.
of 1903, General Claims Commission between United States and Mexico of 1927, opinion in the case of the Orinoco Steamship Company and the Pratt case.

DENIAL OF JUSTICE

Denial of Justice in the early period of the present system of international law gave rise to reprisals. The terms "reprisals" and "denial of justice" were so closely linked that the latter was a necessary condition for the legality of the former. Reprisals represented the idea of self-help. If aliens were denied justice they could resort to reprisals against individuals who had done them wrong. It developed into the use of reprisals based upon the default of a

106 For example, see Eagleton, ibid., pp. 542-44.

community in dispensing justice. The idea further grew into justification for legitimate war and reprisals. Later Vitoria saw in reprisals the consequences of a tort committed by the state, or denial of justice, which involved the duty of the state to accord justice to a foreigner. Gentili divided denial of justice into refusal to do justice and neglect in doing justice. The term "denial of justice" gradually went on losing its original meaning. To Vattel this expression meant the refusal to accord justice to foreign individuals and the necessity of a prior wrong. But the wrong could also be committed against a foreign state. Thus, the meaning was enlarged so that it extended to a general international delict. Reprisals became detached from denial of justice.

108 Ibid., p. 70.
109 Ibid., p. 72.
110 Ibid., p. 73.
111 Ibid., p. 76.
The Narrow and Broad Meanings of Denial of Justice

A sizeable section of writers belongs to the school of thought which extends the meaning of "denial of justice" to all international illegalities. Thus, the term "denial of justice" is used in two senses. In its broader sense it means any arbitrary or wrongful conduct on the part of any of the organs of government. It includes every act of commission or omission of governmental authority, not redressed by the judiciary, which denies to the alien the protection and treatment to which he is entitled. Latin American States accept the definition of this term only in its narrower sense. The most representative viewpoint of this school may be found in the famous Guerrero Report which is to the following effect:

112 See C.C. Hyde, International Law (Boston, 1945), vol. 2, edn. 2, pp. 903-914. In the Near Case, General Claims Commission, U.S. and Mexico, Opinions, p. 77, F.K. Nielson expressed the view that "it is useful and proper to apply the term denial of justice in a broad sense than that of a designation solely of a wrongful act on the part of the judicial branch of a government".
Denial of Justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although, in the circumstances, nationals of the State would be entitled to such access.

In conclusion, therefore, we infer that a State, in so far as it is bound to afford judicial protection, incurs international responsibility only if it has been guilty of a denial of justice, as defined above. 113

A recent statement of the Latin American attitude to denial of justice is available in one of the ten postulates of state responsibility formulated by Inter-American Juridical Committee. It reads as follows:

The obligation of the State regarding juridical protection shall be considered as having been fulfilled when it places at the disposal of foreigners the national courts and the legal remedies essential to implement their rights.

Therefore:

(a) There is no denial of justice when aliens have had available the means to place their case before competent domestic courts of the respective States.

(b) The State has fulfilled its international obligations when the judicial authority pronounces its decision, even if it disallows the claim, action or appeal brought by the foreigner.

(c) The State is not internationally responsible for a judicial decision that is not satisfactory to the claimant.

The above formulation includes not only the availability of access to domestic courts but also duty of the latter to pronounce decision in cases brought before them by aggrieved foreigners.

114 Garcia-Amador, Sohn and Baxter, n. 5, p. 362.
Advisedly, it has not been considered expedient to elaborate on the type or quality of decisions that may be given, for, as Lillich and Christenson point out, denial of justice is an elusive term used in many different contexts. Any attempt to envisage or to exhaustively deal with all the varied circumstances in which objectionable decisions may be rendered, or to enumerate infinite varieties of judicial misconduct, is neither feasible nor likely to succeed. It was never designed to encompass every conceivable irregularity. Whereas denial of justice as understood stricto sensu is a fairly well-defined concept, denial of justice lato sensu is capable of as many meanings as there are supporters.

115 R.B. Lillich and G.A. Christenson, International Claims: Their Preparation and Presentation (Syracuse, 1962), p. 54, n.217. Tenekides considers that "denial of justice" is a relative concept (see Law, n. 4, p.126). Fitzmaurice discusses in detail when an erroneous judgement could be considered unjust but ends by saying: "Admittedly, however, many gaps and difficulties remain. The question is really one of fact in respect of which no definite rule can be formulated". G.G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice'" in British Yearbook of International Law, vol.13 (1982), p. 114.
Among the modern jurists Roberto Ago, who is presently Special Rapporteur of the International Law Commission on State Responsibility, favours Inter-American Juridical Committee's approach to denial of justice in its strict and narrow sense. While participating in a discussion on the question of state responsibility in the International Law Commission, he stated that:

He was convinced that a claim for violation of international law by reason of denial of justice to an alien could be brought only if the alien concerned had been denied access to fair judicial process; it would be extremely dangerous to endeavour to apply the concept of denial of justice to cases in which free access to the courts and guarantees of fair process had not been denied but the actual decision rendered was criticized as contrary to the law, or manifestly unjust. The attempt to appraise the merits of a decision adverse to an alien would inevitably transform international justice into a process
of appeal from decisions of national courts. 116

With reference to some earlier formulations of the concept, such as in the Harvard Draft, another member of the International Law Commission, Zourek, pointed out that they were based on "one economic and legal system, and no attempt had been made by the authors to work out provisions capable of being applied at the international level to all states, whatever their economic and social structure". 117

116 Yearbook of the International Law Commission, vol. I (1960), p. 277, para. 14. Anzilotti holds a similar view (see Fitzmaurice, n. 115, p. 100). However, Fitzmaurice rejects this view (ibid., p. 101) and thinks: "All courts ... render decisions of some sort. The question cannot, therefore, be limited to whether the court has given a decision .... It is the nature of the decision which matters". Garcia-Amador also does not support Guerrero Committee's view (see n. 5, p. 73).

117 Yearbook of the International Law Commission, ibid., p. 282, para. 49. He feels that Harvard Draft was based on privileged position of aliens in economic matters. He also does not seem to favour the vague concept of "generally recognized principles of justice, ... as though it were a definable entity". (ibid., p. 121, para. 281, para. 48). See, however, Freeman, n. 1, p. 632; Neer Case, n. 112, p. 77.
The reasons for failure to devise a satisfactory formulation of the concept of denial of justice are perhaps more political than legal. As Fitzmaurice explained, on the one hand there are creditor states "whose institutions are strong and whose courts relatively impartial, who lend money to other countries for their development and whose nationals are accustomed to carry on business abroad". On the other hand, there are debtor states "whose independence and civilization are relatively recent, whose institutions are often weak and whose courts are not infrequently under the control of the executive or at the service of purely national interests".

The Cause of Difference in Approach

Although the world is primarily divided into two groups of developed and developing countries, yet legal systems within these groups vary widely. In response to the Department of State's circular instruction to all American diplomatic posts, the

118 Fitzmaurice, n. 115, p. 93 (also see p. 101).
119 Ibid.
latter had conducted a survey on two questions viz. (1) whether citizens of the country enjoyed a right to bring suit against the government and (2) whether aliens were accorded national treatment in this respect. The replies were classified in five groups of countries: (1) The first group consisted of countries, with common law tradition, that by law authorized suits against the State by citizens and aliens alike; (2) The second group, which was the largest one with a civil law tradition, allowed the aliens full civil rights including access to the courts on the same basis as citizens. The relevant provisions were contained in constitutions, civil codes or statutes; (3) The third group was comprised of states where the rights of both citizen and alien to bring suit against the state derived from unwritten or 'common law' or from tradition or had become an established feature of national jurisprudence; (4) The fourth group made the right of aliens to bring suit against the State contingent upon the existence of reciprocity or treaty provisions; (5) This group of countries
did not give any definite assurance of adequate rights either for citizens or aliens. Most of the countries included in the survey belonged to the first three groups which represented both developed and developing countries. By law aliens had been accorded equal rights to sue the governments but in practice the law might not be fully implemented. The reasons for this, in case of some developing States, might not be difficult to seek. Evidently, attitudes of these States might have become conditioned by political necessities. These in turn gave birth to new trends in international law. As Fitzmaurice has rightly observed, the reasons for lack of agreement on exact scope of "denial of justice"

For a list of countries in each group, see M. Whiteman, Digest of International Law (Washington, D.C., 1967), vol. B, pp. 411-413. Also see Wesley, n. 6, pp. 270-271. Colombian Constitution provides national treatment to aliens but by law may "for reasons of public order, subject foreigners to special conditions or deny them the exercise of specified civil rights". See F. G. Dawson, "International Law, National Tribunals and the Rights of Aliens: The Latin American Experience", Vanderbilt Law Review (Tennessee, Vand.), vol. 21 (1968), p. 739.
are political. It may be added that these reasons are not only political but practical.
The weaker nations clearly visualize that it will be in their interest to keep cases of denial of justice to the minimum possible. This, in turn, would give rise to lesser number of diplomatic claims by mighty capital-exporting countries. The weaker States have often alleged the abuse of the right of diplomatic protection by these States. In this connection, we have already referred to the observations of Judge Padila 121 Nervo in the Barcelona Traction case.

Let us examine how the right of diplomatic protection was used or abused. This right was exercised without sufficient justification i.e. when denial of justice, which is the very basis of the right, was absent. We are not concerned here with diplomatic assistance extended in the establishment of investments but diplomatic activities designed to protect already existing economic stakes abroad.

DIPLOMATIC PROTECTION

We have already dealt with numerous instances of exploitation of weak states by powerful countries when the latter obtained concessions in respect of natural resources and mineral wealth of colonized territories and other weak states under their domination. Desire to protect economic and commercial interests of their nationals led the same states to intervene militarily and even occupy these territories. International claims were used to justify armed intervention and occupation in Mexico by France in 1838 and 1861, Germany's use of warships in 1897 to demand indemnity from Haiti, in the Caribbean by the United States after

f.n. 121 contd.

Freeman who while conceding that the system of diplomatic interposition has been abused in the past, feels that the weaker states are adopting a policy of resisting every claim irrespective of its merits (n.172, p.143).

122 See Chapter IV, pp. 106-132.
1900, and occupation of Venezuelan ports by Germany, Britain and Italy in the 1902-1903. According to Freeman, the practice of extending diplomatic protection to a nation's citizens abroad was established by 1789, although it did not originate then. The device of diplomatic intervention "served as a substitute for territorial conquest in bringing the Latin-American states within the orbit of international trade and intercourse ...". Armed and disguised interventions continue to take place in Latin American countries in support of big multinational corporations and economic interests. In Chile, Allende Government was overthrown and attempts were made to eliminate Castro from the Cuban scene. A recent report of the U.S. Senate Foreign Relations Sub-Committee on Multinational Corporations reveals that the Central Intelligence

123 Further instances of abuse of diplomatic protection are given by Salston, n. 155, p. 575; also see Wetter, n. 131, pp. 298, 299. Judge Ammoun, Barcelona Traction Case, n. 121, p. 465; Jessup, n. 192, p. 113.

124 See Freeman, n. 172, p. 139.

125 Dunn, n. 135, p. 58.
Agency (CIA) and International Telephone and Telegraph Corporation (ITT) had planned economic chaos in Chile in 1970 to ward off the election of a Marxist President. Later a conspiracy was also hatched to topple the government of Chile headed by President Allende. Cases of "covert intervention" have also caused deep concern to international lawyers. Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations corroborates the fact that "in a number of cases, multinational corporations have actively promoted political intervention in domestic affairs of host, particularly developing countries". Interventions

126 See Times of India (New Delhi, 23 June 1973), p. 9. In this connection the Senate Subcommittee criticized "40-Committee" headed by Dr. Henry Kissinger, an interdepartmental group that reviews CIA's clandestine operations (Ibid., p. 6).


in some form or the other continue in several States, a recent instance being that of Dominican Republic. There have been several cases of premature interventions. Thus Wetter, who recently made a survey of the diplomatic protection rendered between 1900 and 1940 by the United States to its nationals investing abroad, observed as follows:

... the United States has not regarded it as necessary to await the occurrence of actual damage or loss but has intervened even in the early stages of incidents where action by a foreign government has only been threatened or proposed. 131

There have been cases of diplomatic intervention

130 M.J. Gordon, The Expropriation of Foreign-Owned Property in Mexico (1941), p. 78. American practice of premature diplomatic intervention has been criticized by Gordon; also see J.C. McCarthy, United States Policy Towards Expropriation of American-Owned Property (University of Georgia Dissertation, 1967), p. 146, n. 9

where even local remedies had not been exhausted. Bitter history of interventions is recalled from time to time in many forums of the United Nations. Thus, a recent report of the Sixth Committee for Thirtieth Session of the United Nations General Assembly on the work of the International Law Commission pertaining to State responsibility mentions the following:

At one time ... the principle of State responsibility had been invoked by strong States to exert pressure on less powerful States. In this connection, some representatives referred ... to the history of the international relations of Latin American countries and to various claims commissions established in the past to deal with international claims made against those countries. Not infrequently, against these countries at the end of the nineteenth and beginning of the twentieth centuries, foreign citizens who had suffered minor injury in Latin American countries because of civil wars, riots or other disturbances of the public order had managed to mobilize an entire political and diplomatic apparatus in their own countries .... The concept of the minimum standard of civilized societies was then advanced

132 Ibid., p. 316.
by States who, assuming the role of international legislators, tried to impose their own scale of values. 133

In spite of frequent outbursts against the doctrine of diplomatic protection, it seems to have been recognized in Article 3(1)(b) of the Vienna Convention on Diplomatic Relations of 1961, according to which one of the functions of a diplomatic mission is to protect "in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law...". A number of States wanted a safeguard to be provided against abuse of the above function of diplomatic missions. As a result, on Mexican suggestion the words "within the limits permitted by international law" were added. Indian and Ceylonese amendments had the same intention. A Cuban amendment seemed to authorize the sending State to help

its nationals in protecting the rights enjoyed by them under the domestic law of the receiving state.

Legal Basis of Diplomatic Protection

The institution of diplomatic protection did not exist in its present form a few centuries ago. Instead, complaints and demands for redress were placed before the other state for redress.

134 See United Nations Conference on Diplomatic Intercourse and Immunities, Vienna (2 March-14 April 1961), Official Records (Geneva, 1962), vol. 2, UN Doc. A/Conf. 20/14/Add.1; see also Mexican amendment, ibid., p. 11; Indian amendment, ibid., p. 9; Ceylonese amendment, ibid., p. 10, which envisaged safeguarding by all lawful means the interests of ... its nationals ..."; Cuban amendment, ibid., p. 15. The Mexican amendment received support from U.K., U.S.A., U.S.S.R., Czechoslovakia, Yugoslavia, Iraq, Venezuela, Japan, Guatemala, Colombia (See pp. 79-81 of Conference vol. 1, UN Doc. A/Conf. 2/14). Switzerland, France and Italy did not favour inclusion of the words "within the limits permitted by international law" (ibid., p. 80).
on the basis of international comity and main-
tenance of friendly relations. This was
replaced by direct interference based on Vattel's
thesis that whoever "ill-treats a citizen indirectly
injures the State, which must protect that citizen.
The sovereign of the injured citizen must avenge
the deed and, if possible, force the aggressor
to give full satisfaction or punish him, since
otherwise the citizen will not obtain the chief
end of civil society, which is protection". The
basic philosophy behind this doctrine has been
frequently recognized by several publicists and
in international judicial decisions. Since
individual was always treated as an object and not
subject of international law, the right of diplo-
matic protection was conferred on the State to

135 See F.S. Dunn, The Protection of Nationals
(Baltimore, 1922).

136 E.De.Vattel, Classics of International Law,
Text of 1758, Book II, Chapter VI, edn. 3
which the alien belonged. Article 1 of the Harvard Research Draft refers to the duty of a State to make reparation to another State "for the injury sustained by the latter state as a consequence of an injury to its national”. The comment to the article reads as follows: "The injury for which a state is responsible is always an injury to another state. Such injury to the state arises out of what was originally loss or damage inflicted upon its national”. Borchard expressed the same idea of the international responsibility of the delinquent State and stated that it was the home State of the alien "which in international theory is considered as injured in the person of its citizen".

137 Harvard Law School, Research in International Law, Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners, American Journal of International Law, Special Suppl., vol. 23 (1929), p. 140.

138 Ibid., p. 141.

The above view held the sway for a considerable time and was supported in *Case of the Mavrommatis Palestine Concession* by the Permanent Court of International Justice:

It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. 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. 140

This view has been reiterated in the *Case Concerning the Payment of Various Serbian Loans* 141

*Issued in France*, and the *Fenevezys-Saldutiskis Railway Case*. The right of diplomatic protec—

142 PCIJ (1939), ser. A/B, no. 76, p. 16.
tion by States of their nationals has also been upheld in the recent *Barcelona Traction* case. However, there is a difference of opinion on the precise legal basis of the right of diplomatic protection. Judge Ammoun, who examined this question in his separate opinion in the *Barcelona Traction* case, took the view that diplomatic protection did not derive from a general principle of international law recognized by the nations. He then examined whether it could form part of customary international law. In this regard he noticed that the principle of protection had met with considerable opposition from the developing countries. It appears that his remarks were confined to diplomatic protection of the shareholders of companies in respect of which he concluded that there was no international custom. He stated:

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143 *Barcelona Traction* Case, n. 121, p. 475. Guha Roy holds the same view, see n. 199, p. 872.

144 Ibid., p. 490. Judge Ammoun refers to some fifteen cases in which diplomatic protection was opposed.
This conclusion is reinforced by the opinion ... held by a multitude of states — new states and other, very numerous developing states — with regard to the application of diplomatic protection, the rules of which are only accepted by them to the extent that they take account of their state of underdevelopment, economic subordination and social and cultural stagnation, in which the colonial powers left them and in which they are in danger of remaining for a long time, in the face of powers strong in industry, know-how and culture. 145

He further added: "A general custom, I am persuaded, can henceforward no longer be received into international law without taking strict account of the opinion or attitude of the States of the Third World". It may be mentioned that this view is shared by a large number of developing countries and jurists belonging to the latter.

There are some inherent inconsistencies, it is pointed out, in the traditional doctrine of diplomatic protection. Is it predominantly the

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145 Ibid., p. 503.
146 Ibid. p. 504.
interest of its citizen or is it its own interest that State is seeking to protect? The latter is true only if direct injury has been caused to the State in which case local remedies are not required to be exhausted. However, in case of individuals there is an obligation to exhaust local remedies. If it is the substantive right of the national State which is violated, it is difficult to see, as Amerasinghe puts it, why the ensuing remedial rights should be contingent upon exhaustion of local remedies by the alien, nor how the latter’s satisfaction at the municipal level can wipe out the injury to his national State. Guha Roy feels that by seeking diplomatic protection of his home State an alien will in fact get "double protection": One by way

147 Ralston observes that the principle of diplomatic protection "being for the alleged relief of private individuals, and not of the nation in a national capacity, it is not international law" (n.155, p. 575).

148 See Amerasinghe, n. 35, p. 62.

of local remedies, and another by diplomatic intervention of the home State. He also questions resort to diplomatic protection or to international tribunals since it amounts to a right of appeal from local remedies. He argues that a State has no legal interest but only a political interest in the protection of his nationals. In his view this right grew as among some States "out of their diplomatic practices in handling the interests of their nationals in one another's territory". But he questions its existence "as part of universal international law". Brierly also had reservations on the traditional concept of diplomatic protection. He recognized that a State had in general an interest in ensuring that its nationals were fairly treated. But he said "it is an exaggeration to say that whenever a national is injured in a foreign state, his state

150 Ibid., p. 174.
151 Ibid., p. 160; Also see, Guha Roy, n. 88, pp. 872-875.
152 Guha Roy, n. 88, p. 876, 880-881.
as a whole is necessarily injured too". Umpire Parker in an arbitration award warned that the generally accepted theory of Vattel "must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant ...". The most pugent attack against the doctrine of diplomatic protection came from no less a person than Ralston. He stated:

... the real party is the person affected, and the nation projects itself into the dispute. By so doing, it is said that the national converts a private difficulty into an international one. Such a course of procedure on the part of one nation for the benefit of a small fraction of its citizenry cannot be a source of international law.


He further argued that the custom or practice of diplomatic protection was imperfect and unequal. If a state was entitled to protect its citizens abroad, it should also be held responsible for their acts. Ralston denied that every custom among states was law. In his view,

Customs ... must be reasonable, reciprocal, and universal. That this custom is none of these, I have already indicated. Being without foundation, it can only be a bad custom -- without validity. 157

The backbone of the practice and custom of diplomatic protection had been power prestige and use of force. Ralston considered that the theory of the right of State to prosecute claims on behalf of its nationals "is an active cause of international difficulty. The peace of the world would be infinitely better assured should such a thing never be given recognition,"

156 Ibid.
157 Ibid., p. 573.
158 Ibid.
159 Ibid., p. 575.
The principle of diplomatic protection is also attacked because it is argued that an alien who voluntarily decides to reside in a foreign land can have no cause of action and therefore does not involve a principle of international law.

Ralston firmly rejected the principle since it converted or ratified the conversion of a private right into a national one. He advised that an alien would do better to trust to the natural processes of nature than to rely upon the uncertain aid of his government. As for the country which denied justice to the aliens by unwarranted cancellation of concessions etc., it would soon be let alone "to stew in the juice of its own inequities" as it would receive nothing in the shape of men, money and culture.

According to Fenwick, in question of mixed political and legal character the application of legal principles to concrete cases must be made.

160 Ibid., p. 575-76.
161 Ibid., p. 576.
in a spirit of justice and equity looking at all
times to the circumstances under which the debtor
States assumed the obligations. He would seem
to attribute mixed character to questions of denial
of justice and diplomatic protection.

The right of diplomatic protection is
not always exercised on a purely legal basis
although the substantive rights asserted are
frequently legal in nature. As traditionally
understood, the right of diplomatic protection
may be exercised only if local remedies have
been exhausted and there is a denial of justice.
However, in actual practice the Great Powers and
powerful nations have in the past exercised
it with much less circumspection. Wetter, who
examined the United States practice of half a
century providing diplomatic assistance to
American citizens investing abroad, convincingly
demonstrated that it

See C.G. Fenwick, "The Progress of Intern-
ternational Law During the Past Forty Years",
Recueil des Cours, vol. 79 (1951), no. 2,
P. 48.
has not regarded itself as severely bound by formal criteria in offering diplomatic protection. The State Department has pursued a flexible and realistic course in situations where, from a reasonable point of view, American investments may be said to suffer from unwarranted interference by foreign governments but where the strict and often cumbersome requirements of municipal law have not yet been fulfilled. 163

Nature of Diplomatic Protection and Claims

Diplomatic protection of investments abroad may take many forms. Wetten refers to the following: (1) Armed intervention; (2) Severance of diplomatic relations; (3) Economic and political sanctions and other coercive actions; and (4) Protests, representations and good offices. Diplomatic protection in all these forms was exercised depending upon the response required in a given situation. Where a powerful state is involved, the efficacy of even 'good offices' should not be underestimated as it would be

understood "as relatively forceful exercise of diplomatic protection".

According to some publicists the United States policy in exercising right of diplomatic protection is different in the case of investments made on the basis of contracts with foreign governments as distinguished from other investments. Thus Hackworth states that:

Generally speaking the Department of State does not intervene in cases involving breaches of contract between a foreign state and a national of the United States in the absence of a showing of a denial of justice. However, it may use its informal good offices in appropriate cases in an effort to bring about an adjustment of differences. The practice of declining to intervene formally prior to a showing of denial of justice is based on the proposition that the Government of the United States ... cannot assume the role of endeavouring to enforce contractual

undertakings freely entered into by its nationals with foreign States. 165

This view is, however, not shared by Wetter who concludes that the right of diplomatic protection was exercised in every conceivable area of American economic interests abroad and observes that "the United States recognizes few doctrinal restrictions upon its right to intervene in support of any private American investment abroad ...". Generally speaking, diplomatic protection was based on confiscation, discrimination, and procedural denial of justice.

It may also be mentioned that diplomatic intervention was so timed as to be fully effective even though it might have been premature. It was exercised whether or not actual loss had occurred and even where action had merely been proposed or threatened and had not taken any concrete shape. It was not considered necessary to await the


166 Wetter, n. 131, p. 325.
occurrence of actual damage or loss. Thus, the instrument of diplomatic protection had been used in the past with considerable flexibility. One should assume that this pattern is unlikely to undergo any significant change so long as this institution survives. It may not be out of place to observe that where the executive branch of the United States failed to invoke traditional diplomatic strategies to prevent further assaults upon United States property abroad, the alternative was provided by Hickenlooper Amendment enacted by the United States Congress in the wake of the Cuban nationalizations. The Hickenlooper Amendment

167 Wetter has made it clear: "Once an American citizen possesses vested rights abroad which are exposed to danger of politically motivated loss or unwarranted interference, the interest will — absent strong reasons to the contrary — normally coincide with that of the investor". (ibid., p. 294). The practice of great European powers, it appears, was not any different.

168 See R.B. Lillich, "Requiem for Hickenlooper", American Journal of International Law, vol.69 (1975), pp. 97-100. This provision required the President to suspend foreign aid to any country taking the property of, or repudiating or nullifying contracts with, any American citizen, unless appropriate steps were taken to pay compensation as required by international law. This mandatory provision has been amended in 1973 to make it optional.
required single mandatory solution in each situation, that is, suspension of aid to the country expropriating property of American citizens. This was in sharp contrast to institution of diplomatic protection which was a discretionary remedy and applied in a flexible manner. In many a case diplomatic assistance rendered even fell short of formal espousal.

On the other hand, the developing countries of the third world, particularly the Latin American states, have felt extremely annoyed and aggrieved with frequent abuses of the right of diplomatic protection which had been unscrupulously exercised by some colonial powers in aid of investments abroad by their citizens. It is, therefore, not surprising

169 See Lillich and Christenson, n. 115, pp. 92-101. In such cases the communication from Secretary of State to the other country specifically mentioned that "I desire ... to propose informally by way of good offices, on behalf of the company ...". (See Matter, n. 131, p. 308).
that at times "the anticolonial pressures have almost taken the form of a campaign against foreign investments". Thus, the developing countries have been attempting to suitably change the norms of traditional international law relating to expropriation of alien property as well as to limit resort to diplomatic protection by aliens in case of nationalization or expropriation of their property. Unable to comply with the so-called "minimum standard of international law" with regard to payment of compensation, the Latin American States devised doctrine of national treatment of foreigners. This doctrine was introduced by Andres Bello, the famous Venezuelan who had drafted the Chilean Civil Code in 1825. We have dealt with national treatment and international minimum standard of international law in Chapter V while discussing the question of compensation. But we shall examine the doctrine in greater detail here since it forms one of the important constituents.

of Calvo doctrine which is aimed at severely restricting recourse to diplomatic protection by the aliens.

CALVO DOCTRINE

The abuses of diplomatic protection led Carlos Calvo, an Argentine jurist, to proclaim the doctrine in answer to international claims based on the violation of the so-called international minimum standards of justice. According to Calvo, "Aliens who establish themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection". This doctrine obtained approval of the First International Conference of American States in 1889-1890 which recommended its adoption as one of the principles of American international law. The doctrine is based on three principles:

171 C. Calvo, Le droit international (Paris, 1885), vol. 6, p. 231.
(1) Sovereign states, being free and independent, enjoy, on the basis of equality, the right to freedom from interference by other states either through force or diplomacy; (2) Aliens may seek redress for investment or other commercial disputes only in the local courts; (3) aliens are not entitled to more favourable treatment than the nationals. The Latin American States have denied that a nation's obligations to foreigners under general international law could be any different or more extensive than those granted by a state to its own subjects. (Art. 9 of the Montevideo Convention of 1933 on the Rights and Duties of States is to similar effect). In other words, a diplomatic claim could not be presented where foreigners were given equality of treatment with nationals. Another constituent element of the Calvo doctrine is that the final word in the matter of international obligations
rests with the local courts.

The Calvo doctrine has been articulated from time to time in several conferences. It has been suggested that the right of diplomatic protection is a product of Hegelian influence and a totalitarian concept. It is unequal and ineffective when employed by small states. Mexico's Ramon Beteta distinguished diplomatic protection of the

172 See A.V. Freeman, "Recent Aspects of the Calvo Doctrine and the Challenge to International Law" American Journal of International Law, vol. 40 (1946), p. 123. Freeman contends that Calvo never propounded any absolute maxim governing international responsibility and that his work is cited out of context. He was against privileged position for aliens "but did not go to the extent of maintaining that equality with nationals under that law was in itself a bar to any international enquiry". (ibid., p. 133). This seems to find support from Travis Jr. who thinks that Calvo's works were "relatively tempered as compared to provisions in the American Treaty on Pacific Settlement" which categorically bar recourse to diplomatic protection (M.S. Travis Jr., "The Political and Social Bases for the Latin American Doctrine of Non-Intervention", Proceedings of American Society of International Law, (1959), p. 68.)
person from protection of property. According to him diplomatic protection was not permissible to assert an international claim. Where there was a denial of justice denoting impossibility of reparation it would warrant arbitration. However, enforcement of arbitral award was not a matter for diplomatic protection.

At the Third Conference of the Inter-American Bar Association held in Mexico City in 1944 García Robles asserted that diplomatic claims "have lost in America all legal foundation". At the Buenos Aires Conference of American States in 1936 the Committee on Juridical Problems discussed the question of elimination of diplomatic intervention in cases of pecuniary (i.e., contract) claims, but no agreement could be reached. A Convention on Fundamental Rights and Duties of States concluded at Bogota in 1948

173 See Freeman, ibid., pp. 124-125.
174 Ibid., p. 138.
175 Ibid.
contained a very sweeping statement of the principle of non-intervention which was declared to be applicable not only to use of armed force, but to any other form of interference or attempted threat against the personality of the State or its political, economic and cultural elements. Article 16 of the Convention prohibited the states from using coercive measures of an economic or political character to force the sovereign will of another State and obtain from it advantages of any kind.

176 The Ninth International Conference of American States, Bogota, 1948. The Pact of Bogota for the Pacific Settlement of Disputes provided that "The high Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when said nationals had available the means to place their case before competent domestic courts of respective state". (Quoted in Cuthbert Joseph, Nationality and Diplomatic Protection (Leiden, 1963), p. 30. Nine States (excluding U.S.A.) subscribed to this provision.
The report of the 1958 Inter-American Juridical Committee declared that "The State is not responsible for acts or omissions with respect to aliens except in those cases where it has, under its own laws, the same responsibility towards nationals". This doctrine of national treatment is a corollary to the principle of non-intervention and comes into direct conflict with traditional doctrine of minimum standard of international law. The conflict between these two doctrines has been revived once again by recent pronouncements of the United Nations General Assembly regarding "new international economic order". It would be appropriate, therefore, to dwell on this dichotomy.

**International Standard and National Treatment**

National treatment, international standard and the doctrine of diplomatic protection are all inter-related concepts. Most of the developing countries of Latin America, Asia and
Africa are in favour of according national treatment to aliens. They are opposed to the so-called international standard of treatment of aliens which would perpetuate the old vested rights in disregard of the changing needs of international community. The developed states, with the exception of the Soviet bloc, are in favour of international standard of treatment of aliens which alone could guarantee protection of their vested rights. There is, however, a third school of jurists which considers both the concepts outmoded in view of the changes and developments in international law. According to García-Amador, the former Special Rapporteur of the International Law Commission on State responsibility, human beings as such are under the direct protection of international law and the distinction between aliens and nationals has "disappeared from contemporary international law when that law gave

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recognition to human rights and fundamental freedoms. However, Garcia-Amador's thesis does not settle the main problem since property rights are not uniformly recognized as human rights even among the developed States. It may be recalled that in the European Convention of Human Rights (1950) the right to property is to be found in the Protocol and not in the main Convention. The protection accorded to property rights varies from one national system to another. Moreover, within a single national system property rights of aliens and citizens may not

178 See Garcia-Amador, Soan and Baxter, n. 5, p. 5; Yearbook of International Law Commission, vol. 2 (1956), p. 195, para. 135. This view seems to be shared by Professor Martin B. Travis Jr., n. 172, p. 72, who thinks that "the time has come to take a new look beyond both equality and minimum standard doctrines, neither of which has been too clearly defined". Yet another school of thought would wish to retain both the standards and reconcile international standard and national standard. This view is held by Yokota of Japan who states: "Since both principles had sound foundations and were to a large extent accepted by States, it would be unwise to adopt one and sacrifice the other". Yearbook of International Law Commission, vol. 1 (1957), p. 160, para. 25.
be alike. Consequently, national standard of treatment may not always correspond to the so-called international standard.

The international standard of treatment may be traced to common traditions among a certain group of states giving rise to such systems as capitulations which were for long imposed on weaker States of Asia and Africa. Borchard concedes that "powerful states have at times exacted from weak states a greater degree of responsibility than from states of their own strength". The national standard of treatment is a reaction to the international standard of treatment which seeks privileged position for the aliens.

The main arguments marshalled in favour of the international standard are that it is an objective standard essential to protect fundamental human rights and freedoms as well as necessary

179 Borchard, n. 10, p. 178.
to uphold principles of international law. It has also been argued that it is not the powerful States that require the protection of international law but the weak ones. The concept of international standard is supported by

180 Sohn-Baxter Draft Convention, American Law Institute Restatements and several publicists.

On the other hand, it has been criticized because of its vagueness, impossibility of its application in a majority of cases involving State responsibility, its absolute character, requirement of preferential treatment to aliens, and as a tool of "perpetuation of existing injustices."


181 Ibid., p. 392. Also see "Text of 1965 Reflecting the View of the United States of America" (Ibid., p. 363).


183 See Hagleton, n. 83, pp. 538-539; Travis Jr., n. 1256, p. 72; Dawson, n. 129, p. 718, n. 29.

Briggs would like this concept to be ignored since better set of rules are available.

While reviewing the American Law Institute Restatement, which includes international standard, he states:

The political wisdom of placing almost all eggs in the basket of the international standard of justice may ... be questioned when there are less controversial ways of setting forth the established rules of international law on state responsibility for injuries to aliens. 186

The developing States discard the international standard because it has been used in the past to maintain privileges and acquired rights of the aliens obtained through coercion or other means of doubtful validity. As a reaction to this, as we have been, doctrine of national treatment has been invoked. The doctrine was originally

185 Guha Roy, n. 88, p. 882; Also see S. Friedman, Expropriation in International Law (London, 1953), pp. 132-133.

evolved to encourage aliens to work and invest in Latin America or elsewhere, rather than to restrict their rights. Gibson claims that it is international conventional law that is the source of national treatment and that provisions making the specific commitment that the nationals of each country shall enjoy within the territories of the other a protection of their persons and property which is equal to the protection extended by the country to its own nationals did not appear until the Belgian and Sicilian treaties of 1845. But the same doctrine which was meant to grant equality to aliens became an instrument of protection for the weak States. The doctrine of national treatment which was a positive concept guaranteeing equality to aliens became restrictive, implying that aliens were not entitled to better treatment than nationals. This doctrine has received the support of Asian-African


188 W.M. Gibson, Aliens and the Law (Oxford, 1940), p. 27.

189 Ibid., pp. 155-156.
Legal Consultative Committee which regarded the doctrine of minimum standard of treatment as "somewhat outmoded". The Committee recommended "equality of treatment" of aliens with the nationals of the State. Proponents of the national treatment argue that an alien voluntarily entering the foreign land "may reasonably be assumed to do so with the full knowledge of what the internal conditions of the territory he enters are ... His entry there is entirely at his own risk". Alien's visit to a foreign land is dictated by expectations of material gain and in pursuit of his own ends. "Where then is the moral justification of the Law of Nations butting in with a double set of norms


for his protection ...?", asks Guha Roy. Padila
Nervo asserts that the rule of equality between
alien and the national is the "sole rule truly
compatible with the principle of sovereign
equality of States".

Although by and large there is a broad
agreement among the developing States to accord

192 Ibid., p. 172. In United States and Salvador:
Claim of Rosa Gelbtrunk, the Arbitration
Tribunal held that: "A citizen or subject
of one nation who, in the pursuit of commer-
cial enterprise, carries on trade within
the territory and under the protection of
the sovereignty of a nation other than his
own is to be considered as having cast his
lot with the subjects or citizens of the
State in which he resides and carries on
business". (Fenwick, n. 1, p. 259).
Jessup favours an international bill of
rights both for aliens and nationals but
an additional one for special rights to
be accorded to aliens for the sake of "the
orderly promotion of international trade
and intercourse". (see A Modern Law of

193 Yearbook of International Law Commission,
vol. 1 (1957), p. 156, para. 54.
national treatment to aliens, even this right is not considered unqualified or unrestricted nor is it considered automatically available. Thus the Guerrero report states:

The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that the State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to its nationals. 194

Moreover, under national laws certain rights are exclusively reserved for citizens. It has never been contended that aliens be granted all the privileges which citizens enjoy. El-Erian, a member of the International Law Commission, elaborated this viewpoint:

It was a customary rule of international law that there were limits to the rights that the State must accord to aliens in the field of civil and commercial law, especially property rights. In view of the economic importance of land, for example, the right to own it was, in the municipal law of many States, reserved for their nationals, and such a provision had never been regarded as contrary to international law ... there were many exceptions to the general principle of equality of nationals and aliens. Indeed, it might be argued that it was inherent in the very concept of nationality that nationals should have special duties towards the State and corresponding special rights. 195

Thus it is clear that the doctrine of national treatment does not extend all rights to aliens which are enjoyed by the citizens. Perhaps an alien would have only those rights which are today considered essential or fundamental by the international community. There is no question of an alien having absolute equality with the nationals.

195 Yearbook of International Law Commission, vol. 1 (1957), p. 162, para. 39. Among further exceptions mentioned by El-Erian are certain professions or trades closed to aliens such as shipping for reasons of labour policy or national interest.
Despite its "simplicity, practicality and its logical compatibility with the principle of sovereignty and equality of States" the doctrine of national treatment does not find favour with developed states as the sole criterion of treatment of aliens. Some of the reasons for this are: (i) that the doctrine prescribes the maximum rather than the minimum standard of treatment; (ii) that the principle conflicts with the supremacy of international law; and (iii) that whereas the national can resort to political remedies, aliens have no such remedies. The last of these is really not an objection but an argument against the principle. As against the first two arguments it may be said that any standard which is more extensive than the standard of national treatment and gives preferential treatment to aliens will increase the gulf between aliens and citizens. During the dictatorship of Diaz there

was in fact a saying that "Mexico is the mother of foreigners and the step-mother of Mexicans".

The above appraisal of the international standard, sometimes called the minimum standard of international law, and of national standard of treatment of aliens leads us to the conclusion that both the doctrines are used for defence, one for the defence of the aliens and another in defence of the States. The first is invoked as the basis for the exercise of the rights of States to protect their nationals abroad, while the second is relied upon for rebutting responsibility by the State of residence of the aliens.


198 Roth states that national standard of treatment is not designed to protect aliens "but to protect the state from the alien, extraordinary though it may sound". (A.H. Roth, The Minimum Standard of International Law (Leiden, 1949), p.117). Dawson puts it thus: "when ... Latin Americans became aware that diplomatic protection was being abused, their jurists looked anew at the National Treatment concept, seeking to turn it to protective ends". (n. 187, p. 720).
The developing countries being the ones most affected by foreign investments, have been making concerted efforts for recognition of national treatment standard as the sole criterion for treatment of property of aliens in various resolutions of the United Nations General Assembly pertaining to permanent sovereignty over natural resources which recognize the right of sovereign States to nationalize alien property. Thus, while dealing with the local remedies rule, we have already seen that UNCTAD resolution of October 9, 1972 on Permanent Sovereignty Over Natural Resources, the UN General Assembly Resolution 3171 (XXVIII) of December 17, 1973 and the Charter of Economic Rights and Duties of States adopted by the General Assembly on 12 December, 1974, all seek to declare the domestic courts of nationalizing States as the final arbiters in disputes concerning payment of compensation to aliens. Lillich contends that
Read together, the two resolutions and the Charter are no more than a thinly-disguised attempt to endow the Calvo Doctrine ... with limited international status. This development, which would immunize states from potential international responsibility by denying alien claimants the right to seek the diplomatic protection of their states, is as unnecessary as it is unfortunate. 199

It is submitted that the fear expressed above is misplaced and unfounded. Although the resolutions and the Charter read together call for settlement of nationalization disputes under the local laws by national courts for redress, there is nothing to warrant the conclusion that diplomatic protection is altogether abolished. The only logical conclusion that may be drawn is that the so-called international standard has been derecognized. Consequently, diplomatic protection of aliens will

have to be based on failure to remedy breach of domestic laws rather than the so-called international standard which has become somewhat anachronistic. However, it can not be seriously argued that the concept of denial of justice, despite wide divergence of views as to its scope, has also become irrelevant. We are supported in our contention by the decision of the General Claims Commission in The United States of America on Behalf of North American Dredging Company of Texas, Claimant v. The United Mexican States (1926) which held that the fact that the claimant was governed by those laws and remedies which Mexico had provided for the protection of its own citizens "did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice ...".

Lillich also argues that the Calvo doctrine is no longer necessary since "substantive norms" for payment of compensation on nationalization have been reformulated with full participation of the developing States. In his view, it is "somewhat inconsistent for the developing states — which pushed through the above two resolutions and the Charter — to support a doctrine permitting them to avoid the application of those same norms". This again indicates that the learned writer is blowing hot and cold in the same breath. On the one hand, it is claimed that diplomatic protection is under attack by the resolutions and the Charter; on the other hand, diplomatic protection is sought to be preserved only to invoke the reformulated substantive norms which are suspect in the eyes of the developed countries. Reformulated norms are again challenged when the learned writer argues that "states whose conduct measures up to international standards have little to fear from diplomatic protection, while its abolition
would leave alien claimants without even nominal procedural safeguards under the existing international legal order. It is thus clear that diplomatic protection is being claimed not against violation of the reformulated substantive norms (such as "appropriate" or "possible" compensation) but for violation of the so-called "international standard" which the developing countries are seeking to replace by the new norms. It is submitted that it is not diplomatic protection that is the subject-matter of attack by the above two resolutions and the Charter of Economic Rights and Duties of States but the so-called "international standard". Professor Lillich's real anxiety is, therefore, for these standards rather than diplomatic protection, which according to our submission is neither under attack nor destroyed. Records of debates in connection with the resolution and the Charter in question do not justify the fears expressed by Professor Lillich. Therefore,

diplomatic protection has not been abolished but its application may undergo a qualitative change in accordance with new concepts being developed in response to demands for a new international economic order.

The developing countries, particularly the Latin American States, have in the past sought to limit the right of diplomatic protection by (1) incorporating suitable provisions in their Constitutions or municipal legislation; (ii)

203 Also see Adede, n. 199 and by the same writer, "International Law and Property of Aliens: The Old Order Changeth", Maleya Law Review (Singapore), vol. 19 (1977), p. 192.

204 See for example Art. 32 of the Peruvian Constitution which reads thus: "Foreigners as regards property are in the same condition as Peruvians without being able in any case to invoke an exceptional position in this respect or have recourse to diplomatic claims". Similarly, Art. 19 of the Costa Rica Constitution; Art. 20 of the Bolivian Constitution; Art. 38 of the Ecuador Constitution; Art. 124 of the Venezuelan Constitution; Colombian law of 26 November 1885 and Arts. 5 and 6 of Colombian Immigration law of 1908; Art. 20 of El Salvador Constitution (1962); Art. 28 of Nicaragua Constitution (1950); Also see Wesley, n. 26, pp. 820-826, 834 for recent constitutional and other provisions.
entering into contract with aliens seeking waiver of diplomatic protection by them. This contractual stipulation is called "Calvo Clause". As a term of the concession contract itself, alien waives his right for diplomatic protection. In a few states, right of aliens to seek diplomatic intervention of their states is acknowledged in cases of denial of justice.

205 For example see International Petroleum Corporation and Peru Agreement on La Brea Y Parinas Oilfields (Lima, 12 August 1968). A preambular paragraph reads as follows: "International" is subject to the laws and courts of the Republic of Peru, the judges of Lima being the only ones with jurisdiction to try any judicial controversy which might arise between the Government and International concerning the present contract. Wherefore, International expressly renounces all diplomatic claims". *International Legal Materials*, vol. 7 (1968), p. 1219; Similarly, Supreme Resolution of 14 August 1968 granting concessions for operation of Talara Refinery (ibid., pp. 1247, 1250, 1254). Also see Borchard, n. 10, p. 843 for other treaties.

206 Art. 14 of Guatemalan Constitution: "Foreigners may have recourse to diplomatic channels only in the event of a denial of justice. The mere fact that a decision may be adverse to their interests is not to be considered as such ...". Also see Arts. 127 and 129 of Venezuelan Constitution (1961); For recent examples, see Wesley, n. 26, pp. 833-834; Borchard, n. 10, p. 842.
In some cases penalties are imposed for seeking diplomatic protection. Alien's invocation of diplomatic protection has been generally considered a serious act. "It was deemed an affront to independence and a disregard for territorial jurisdiction that contracting States should suffer negotiations with aliens through diplomatic channels rather than to refer them to the simpler, less dangerous procedure of adjudicating alleged breaches of contract in the local courts".

[**W**4]** Waiver of Diplomatic Protection and Calvo Clause

The Calvo Clause was conceived as a device to resist economic imperialism of the powerful developed States. Although Summers had concluded that "Calvo doctrine is moribund" he conceded that it had given "birth to an heir which is far from dying, the Calvo Clause".

207 Freeman, n. 1, p. 469.

Concessionnaires were induced by this clause in their contracts to renounce the protection of their governments.

It may be pointed out that although the principle behind Calvo doctrine and Calvo clause is the same, that is, requiring submission of alien claims to the local courts without seeking diplomatic protection of the home state, the enforcement of the former is a unilateral act whereas the latter stems from abandonment of diplomatic protection by free-will of the person concerned. The question has often arisen whether an alien is competent to barter away the right of his national state for diplomatic protection. Several publicists take the view that Calvo clause cannot modify the "State's right of protection

209 Calvo doctrine is much broader than the Drago doctrine which prohibits armed intervention for collecting public debts (see A.S. Hershey, "The Calvo and Drago Doctrines", American Journal of International Law, vol. 1 (1907), pp. 31, 43. Hershey considers that general principles or rules propounded by Calvo are sound but he goes too far in not allowing any exceptions.
which springs from international law alone, which is by that law alone subject to restraint". This view is not shared by those who think that individual has emerged as a true subject of international law. As such, he is fully competent to renounce diplomatic protection of his state. Thus, Jessup asserts that

Under the contemplated changes in the law, diplomatic interposition could not be extended without the concurrence of the individual since it is his right which is being protected and not the right of his state. 211

Donald Shea also feels that

In the field of international jurisprudence, the most promising possibility of the complete validation of the Calvo Clause lies in the growing recognition of the status of the private individual in international law. 212

210 Freeman, n. 1, p. 471. This view is shared by Alvarez who doubts validity of Calvo clause because "a diplomatic claim, by its very nature, must be governed, in the absence of treaty, by the principles of international law". (Quoted in Freeman, ibid.).

To some writers, a Calvo Clause is nothing more than a promise to use local remedies. In a recent study, Jean Chappez argues that the Calvo Clause is a mere restatement of the local remedies rule and, as such, unnecessary. In a number of cases before claims commissions the Calvo Clause has been construed to mean an agreement to resort to local remedies "and not as a brazen attempt to emasculate the institution of protection". Freeman feels that the commissions before which cases were referred

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f.n. 211 contd.

American Dredging Company case, UNRIA, vol. 4 (1926), p. 26, it was held that if a person could voluntarily expatriate himself, he could logically exercise a right falling short of expatriation.

212 Shea, n. 208, p. 282. Jessup says that with this hypothesis raison d'etre of the Calvo clause also disappears.


214 Freeman, n. 1, pp. 467-468.
"may have been influenced by subconscious considerations of political expediency to construe the clause as an agreement to resort to local remedies". In his opinion, the Commissions should not have denied jurisdiction which was based on treaties. He is also of the view that in cases of denial of justice the Calvo clause would be ineffective. Freeman observes:

If a Calvo Clause in a given contract is susceptible of being interpreted merely as a promise to the local courts for the solution of differences which might arise between the parties in connection with the contract, and not as excluding international action in the event of a denial of justice, there is clearly no rule of law of nations which deprives it of validity. On the other hand, if the clause is so framed as to involve a complete waiver of the right of diplomatic protection ... so as to reject the principle of responsibility for ... denial of justice — it must to that extent be held void ab initio. 216

215 Ibid., p. 489.

216 Ibid., pp. 489-490. Also see Spiegel, n. 107, p. 80, who holds similar view. Alf Ross considers Calvo clause invalid or superfluous (see A Text Book of International Law (London, 1947), p. 265).
Jessup does not seem to be opposed to an individual waiving right of appeal to his own government, but for reasons of "international public policy" he is against such an individual ousting jurisdiction of an international tribunal unless some other suitable substitute is availed of. However, the awards rendered by the arbitration tribunals seem to indicate a different approach. Once there is a denial of justice, both the government or an international tribunal as the case may be, are considered competent to intervene at the initiative of the aggrieved alien. Awards rendered in arbitration cases also indicate that effect has been given to the renunciatory clause "at least as often as it has been denied."

In the North American Dredging Company case the Calvo Clause was stoutly defended. The

217 See Jessup, n. 211, p. 919.

218 Freeman, n. 1, p. 473. The position was recognized in the Dredging case (see Fenwick, n. 200, pp. 269-270).
General Claims Commission in this case "appreciated the legitimate desire on the part of nations to deal with persons and property within their respective jurisdictions according to their own laws and to apply remedies provided by their own authorities ...". Article V of the treaty of 1923 between the United States and Mexico provided that: "... no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim". Article 18 of the contract between Mexico and the company read as follows:

The contractor and all persons, who as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim,

219 Fenwick, n. 200, p. 269.
nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.

In the face of Article V of the treaty between U.S.A. and Mexico, the Commission came to the conclusion that the claimant in the instant case had "waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies". The Commission further held that the Calvo clause cannot be separated from the rest of the contract "as if it were just an accidental

220 Ibid., p. 273.
postscript". As to the conduct of the claimant, the Commission observed that article 18 was used to procure the contract with no intention of ever observing its provisions.

In the Orinoco Steamship Co. case, Venezuelan executive decrees cancelled a concession for the navigation of certain channels. Article 14 of the contract provided for the submission of disputes and controversies arising out of its interpretation or execution to the local courts, and prohibited international interposition. Article 1 of the Protocol establishing the Commission enjoined the Commission to examine and decide "upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation", "all claims owned by American citizens against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments ...".

221 Ibid., p. 274.
The Umpire Barge disallowed the claim on the ground that article 14 had been repeatedly disregarded by the claimant company which did not make any effort to obtain relief in the Venezuelan courts. He further held that the rule of "absolute equity" could not permit a contract to be made "a chain for one party and a screw press for the other".

In the Mexican Union Railway case, the decision in Dredging case was followed and it was held that there was no denial of justice. There being a denial of justice the Commission would have asserted its jurisdiction despite the presence of a Calvo clause. The Commission held that the company was required to limit itself to

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222 Quoted in Freeman, n. 1, p. 476; Also quoted in Borchard, n. 10, p. 303; John Bassett Moore, A Digest of International Law (Washington, 1906), vol. 6, p. 306.

223 See Freeman, n. 1, p. 486.
local remedies in matters connected with the contract except when there was denial of justice. According to Sir John Percival, the dissenting Commissioner, the Mexican Government's intention was to prevent the claimant government from interfering diplomatically in any case in which the company "might have suffered loss in relation to its existence, business, or property, even though such loss had arisen through breach of the rules or principles of international law".

In the Martini's case, Venezuela invoked article 16 of the contract which provided as follows:

The doubts or controversies which may arise as to the interpretation and execution of the present contract shall be resolved by the tribunals of the Republic, conformably to the laws, and shall in no case afford ground for international claims.

Ibid., p. 483. Decision in the Interocesnic Railway Co. case is also to similar effect. In this case the plea of undue delay of justice was rejected, (ibid., p. 486).
Ralston held that the right of a sovereign power to enter into an agreement (which provided for the submission of claims of Italian citizens against Venezuela to a mixed commission) was entirely superior to that of the subject to contract it away. Therefore, an Italian subject could not extinguish the superior right of his country. However, in the Tattler case involving arbitration between U.S.A. and Great Britain, waiver of diplomatic protection was upheld.

In reply to a questionnaire sent by the League of Nations Preparatory Committee for the Progressive Codification of International Law, ten States in their reply accepted the decision in the North American Dredging Co. case "as good law". They also approved the statement by the


226 See McCarthy, n. 130, p. 174. For the agreement establishing Commission, see 37 U.S. Stat. 1625.
Commission to the effect that a stipulation in a contract purporting to bind the claimant not to apply to his government to intervene in the event of denial of justice or violation of international law was void.

There is also support for the view that concessions should be given a special treatment in dealing with commercial contracts. It has been suggested by Feller that an international tribunal should be more reluctant to invalidate a Calvo clause in concessions than in ordinary commercial contracts. In his view, this distinction is justified in view of special interest of the States in protecting their national

227 See Freeman, n. 1, p. 488, n.2; See K.H.R. Darja, Towards Improving Legal Conditions of Viability of Economic Development Agreements (J.S.D. Diss. 1985, Harvard Law School) according to whom "the real legal situation it /Calvo clause/ creates makes it impossible, technically, for any 'denial of justice' or any other act or omission which is illegal or arbitrary from the point of international law to arise". (p.36).
resources from unregulated servitude to foreign capital. It is submitted that this view should be given special weight in case of pre-independence concessions.

Even without a Calvo clause, some Great Powers have in the past declared it to be their general policy not to intervene on behalf of their nationals in support of pecuniary or contractual claims. Thus, in 1848, Lord Palmerston stated that

the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

In 1881, Secretary Blain considered it a "rule of universal acceptance and practice" that a person

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229 quoted in Hershey, n. 209, p. 38. (emphasis added.)
voluntarily entering into a contract with the government of a foreign country or with the subjects or citizens of such foreign powers, for any grievance he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose government or citizens the contract is entered into for redress. 230

Thus, Great Britain professed to have refrained from diplomatic intervention in contractual matters for reasons of policy whereas the United States did so out of regard for what it considered as reflecting the law of nations. This being the

230 Ibid., p. 39 (emphasis added).

231 In actual practice, however, interventions took place on all sorts of grounds and pretexts. See, for example, ibid., p. 41. Hershey observes: "The subject of intervention is one of great difficulty and complexity. This arises from the fact that there exists nowhere else within the wide range of international relations such an apparent conflict between political theory or fundamental principles on the one hand and actual international practice on the other". (ibid., pp. 40-41).
declared position where there is no Calvo clause, the States should be expected to interfere only rarely in the case of contracts with a Calvo clause. The United States position on the Calvo clause was crystallized in a reservation to the Bogota Pact of 1948. The United States does not consider insertion of Calvo clause in contracts as improper, and refuses to advise citizens not to make such commitments. While deciding whether or not to espouse contractual claims of its citizens it is not uninfluenced by renunciation clauses.

Recent drafts attempting to codify the law relating to responsibility of States for injuries to aliens by and large confirm the
validity of Calvo clause with the usual exception of denial of justice. Thus, Garcia-Amador, former Special Rapporteur observes as follows in his first report:

... the Calvo Clause, within the limitations indicated, must continue to have the effect of denying jurisdiction to any international body before which the national State may bring a claim, or else that of exonerating the State of residence from international responsibility if the national State attempts to exercise diplomatic protection. 234

Article 22 of the 1961 Harvard Draft Convention on International Responsibility and Article 24 of Sohn-Baxter Draft Convention (which is a slight revision of the 1961 Harvard Draft) likewise confirm the validity of Calvo Clause. The claimant may waive, compromise or settle his


claim after the injury or waive his right in advance under the latter Convention. This position is based on the philosophy that a state cannot be said to have any interest in a claim separate and apart from that of its national. If this claim is waived by him, there remains no claim which the state may present or pursue.

However, the Draft Convention gives only "limited effect" to the Calvo Clause. For example, wilful mistreatment of aliens is not excused. American Law Institute also recognizes validity of the Calvo Clause if specified conditions are fulfilled e.g., when (i) there is no violation of an international agreement; and (ii) bona fide remedy for injury is afforded by local law satisfying requirements of procedural justice.

In the Asian-African Legal Consultative Committee there was divergence of opinion on acceptance of Calvo Clause. Sri Lanka, Indonesia and U.A.R. were inclined to accept validity of Calvo Clause, whereas Burma and Iraq categorically rejected it. India recommended further study in the matter. Japan did not make any comment.

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Latin American States continue to oppose the exercise of diplomatic protection in investment disputes. Recently, the Convention on the Settlement of Investment Disputes between States and Nationals of other States sponsored by the International Bank for Reconstruction and Development (hereinafter referred to as IBRD Convention) has made a partial attempt at incorporating a Calvo type provision. Article 27 of the Convention reads as follows:

(1) No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purpose of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute. 237

This provision, according to Paul Szaasz offers "precisely what capital-exporting states had never conceded in any other general treaty, and what the Calvo Clause incorporated into a private contract between an investor and a host government cannot fully accomplish: the possibility of an effective (because authorized by each Contracting State through its ratification of the Convention) waiver by an investor of the right to his State's diplomatic protection with regard to any matter that the host State is willing to take to the Centre for arbitration".

It is even said that the Convention has its own built-in Calvo Clause. On the other hand, it may be argued that resort to arbitration under IBRD Convention amounts to rejection of the Calvo


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clause. Latin American States have not subscribed to the Convention perhaps for this and the following other reasons: (1) Submission to international arbitration of disputes between the State and a foreign investor is prohibited by Latin American Constitutions; (2) The Convention violates the constitutional principle of equality of citizens and aliens; and (3) The establishment of international conciliation and arbitration is evidence of an unacceptable lack of confidence in the integrity and independence of the national courts. However, these objections are not considered well founded by Broches, the Secretary-General of the Centre.

240 See Walter Sedat in Don Wallace, Jr. (ed.), n. 238, p. 152, according to whom Calvo doctrine has also been used to reject the jurisdiction of third parties and international tribunals. Also cf. Detlev Vagts in Don Wallace, Jr. (ed.), Ibid., pp. 241-242.

241 See A. Broches, "The Convention on the Settlement of Investment Disputes", American Bar Association Section International and Comparative Law Bulletin, vol. 9 (1965), p. 21. For a statement on behalf of Latin American States by Felix Ruiz, see International Legal Materials, vol. 3 (1964), p. 1175, who said: "The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, f.n. contd."
The Latin American opposition to diplomatic protection and to removal of national jurisdiction in favour of outside agencies has again been registered in Article 51 of the Andean Foreign Investment Code which reads as follows:

In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors. 242

According to Wesley, this clause "clearly forges an entrenchment of Calvo, and if construed to the extreme, could preclude foreign intervention in the national state through both espousal and claim subrogation, even under circumstances...

f.n. 241 contd...

dispensing with the courts of law. This provision ... would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority".

manifesting a denial of justice in international law. Such ... thinking ... cannot easily be dislodged". A recent Diplomatic Note from the foreign office of Peru to the Government of the United States of America make it absolutely clear that the Calvo doctrine is very much alive and is being asserted by the Latin American States from time to time. It reads thus:

In the first place, it is precisely in the exercise of ... acknowledged right of every sovereign State to expropriate property within its own jurisdiction that the Government of Peru has proceeded to enact and enforce the Decree-laws ... From the recognition of this right, it follows that its exercise could not become the basis of diplomatic action, nor could such an action be permitted by a Government which has lawfully exercised this right. The doctrinal and constitutional position of the Government of Peru in this respect, as is true also of the other Latin American nations, is clear and definite. 244

243 Wesley, ibid.

The above note further adds:

Your excellency is not unaware that the IPC Ltd. has gone before the Judicial Power with respect to some of the acts related to those which form the basis of Your Excellency's note, and I can assure you that by this appropriate channel or before the State power itself, all measures, procedures and actions relating to the expropriation shall be observed, within the specific standards and guarantees which the law grants without discrimination to both Peruvians and aliens. 245

In an agreement with the Government of Peru, the International Petroleum Company had expressly renounced "all diplomatic claims". At a meeting of the Sixth Committee of the United Nations General Assembly at its thirtieth session, in the course of discussion of the work of the International Law Commission, the representative of Argentina observed that although "initially treated with hostility and contempt", the Calvo clause "was now beginning to be accepted

245  Ibid., pp. 1263-1264.

246  See n. 205, p. 1219.
even in countries where the opposition had been greatest."

Finally, since pre-independence concessions, in our view, could be terminated at the option of the newly independent states, it would be only logical to exclude them from the purview of diplomatic protection.

CONCLUSION

The local remedies rule is a well-established principle of international law as evidenced by decisions of the International Court of Justice, international tribunals, and the resolutions of the United Nations General Assembly. The rule may be expressly waived by agreement but its waiver cannot be lightly inferred from the circumstances. This

will not be in the best interests of the orderly relations among nations. The weight of juristic opinion appears to be in favour of treating the local remedies rule as substantive and not merely procedural. There are merits and demerits in having the local remedies rule but on balance it would be desirable to retain this rule as a rule of international law. Denial of recourse to local remedies and access to local courts may result in denial of justice. A narrower definition of denial of justice in its strict sense is preferable to a wider definition which could be neither exhaustive nor objective. It is the denial of justice which gives rise to right of diplomatic protection. As such, too broad a definition of denial of justice is unlikely to be acceptable to a majority of States. It is widely recognized that the right of diplomatic protection is not unlimited. It should be exercised with caution and with due regard to the sovereign equality of States. Calvo doctrine was devised to limit and not abolish the right to diplomatic
protection. However, the cause of action giving rise to State responsibility in the field of treatment of alien property has to be determined not in accordance with the so-called international standards but the domestic laws of the States which are expected to conform to substantive norms as reformulated under the auspices of the United Nations. For purposes of diplomatic protection, "breach of the domestic law of the receiving State was also breach of international law". The right of diplomatic protection of the aliens has to be recognized as a lesser evil. Its abolition may lead to drastic and violent remedies. Therefore, we cannot recommend its abolition. However, there is an impediment if an individual waives his right of diplomatic protection contractually, for example, through a Calvo clause. Since it is the individual's right that a State is expected to protect, the

same individual should be free to waive it voluntarily. It is submitted that the Calvo doctrine and Calvo clause are not extinct and are showing their appearance on the international scene with lesser hostility from States. In this study, we have considered pre-independence concessions voidable. Therefore, it would be logical to exclude them from the purview of diplomatic protection. This step should cause no difficulty, for, it will only give a normative character to the already existing practice of some big powers not to intervene diplomatically in contractual matters. However, it may not be in the interests of an orderly international society to do away with diplomatic protection altogether in every case arising from expropriation or nationalization of alien property.