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Stephen M. Schwebel

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Arbitration and the Exhaustion of Local Remedies Revisited

Some twenty years ago, Dr. J. Gillis Wetter and the author wrote an article analyzing, particularly in the light of litigation before the International Court of Justice, whether:

Where a state and an alien agree in a contract to arbitrate disputes relating to the contract, in terms which indicate that arbitration is to be the exclusive remedy, need the alien exhaust any other remedy before an international claim may be presented relating to a dispute which falls within the scope of the arbitration clause?¹

After extended analysis of the arguments of the parties in *The Losinger & Co.* case,² and *Anglo-Iranian Oil Company* case,³ the *Electricité de Beyrouth Company* case,⁴ and the case concerning the *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient*,⁵ as well as the pertinent provision and preparatory work of the World Bank's Convention on the Settlement of Investment Disputes between States and Nations of Other States,⁶ the authors concluded that, as the Report of the Bank's Executive Directors of the ICSID Convention stated:

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.⁷

The authors further concluded:

*Judge of the International Court of Justice.

1. Schwebel & Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 AM. J. INT'L L. 484 (1966).

2. *Losinger Co. Case* (Switz. v. Yugo.), 1935 P.C.I.J. (ser. C) No. 78, at 7.

3. *Anglo-Iranian Oil Co. Case* (U.K. v. Iran), 1951 I.C.J. Pleadings 8.

4. *Electricité de Beyrouth Co. Case* (Fr. v. Lebanon), 1953 I.C.J. Pleadings 9.

5. *Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient* (Fr. v. Lebanon), 1959 I.C.J. Pleadings 4.

6. *Convention on the Settlement of Investment Disputes*, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

7. Schwebel & Wetter, *supra* note 1, at 499.

However, as the argumentation in the *Losinger* and *Compagnie du Port* cases suggests, the decisive factor may be not simply the intention of the parties to have recourse to arbitration only; it may and probably should be whether the arbitration proceedings are or are not subject to the law of the contracting state. While proceedings pursuant to [a typical international] arbitration clause . . . would not seem to be subject to the contracting state's municipal law, the arbitration clauses of certain agreements between states and aliens stipulate that any arbitration shall be governed by the arbitration law of the contracting state, and in other agreements the same intention may be implied. In such a case, the reasonable rule would seem to be that the alien must exhaust those remedies which pertain to the enforcement of the obligation to arbitrate or, where an award has been rendered, to enforcement or interpretation of the award itself. Other remedies unrelated to the arbitral process, however, need not be exhausted.

Conversely, where the arbitral process is not governed by the municipal law of the contracting state, then no municipal remedies of the contracting state need be exhausted; arbitration within the four corners of the agreement to arbitrate is the sole remedy which the alien must exhaust.⁸

In none of the four cases before the Permanent Court of International Justice and the International Court of Justice just referred to, in which the issue under discussion was extensively argued, was a judgment rendered; all four cases were settled.

In 1988, however, the International Court of Justice rendered an Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*.⁹ That Opinion was essentially concerned with whether a dispute existed between the United Nations and the United States giving rise to an obligation of the United States, as party to the Headquarters Agreement with the United Nations,¹⁰ to enter into arbitration in accordance with section 21 of that Agreement. Section 21 provides:

Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.¹¹

The Secretary-General of the United Nations maintained that a dispute did exist between the United Nations and the United States, in view of the enactment into the law of the United States of the "Anti-Terrorism Act of 1987," which provides that, "It shall be unlawful . . . notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other

8. *Id.*

9. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. Reports 12 [hereinafter *Obligation to Arbitrate*].

10. Agreement Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676; 12 Bevans 956; 11 U.N.T.S. 11.

11. *Id.*

facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization. . . ."¹² The Secretary-General further invoked as evidence of the existence of a dispute the initiation by the Attorney-General of the United States of legal action in pursuance of the Act to close the office of the PLO Observer Mission to the United Nations.

The United States maintained that a dispute requiring arbitration did not then exist, since the issue of whether the office of the PLO Observer Mission was to be closed in pursuance of the Anti-Terrorism Act had been submitted to the United States District Court for the Southern District of New York. The United States had informed the Secretary-General that, "The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely."¹³

In substance, the United States appeared to argue that the enactment of legislation providing for closure of PLO offices within the jurisdiction of the United States, and action by the Attorney-General to implement his reading of the Anti-Terrorism Act that required the closure of the office of the PLO Observer Mission to the United Nations, and his consequent seeking of an injunction to that end, were not sufficient of themselves to trigger obligations under the dispute settlement mechanism of the Headquarters Agreement. The inference of the United States' position was that a holding by the competent United States court that the Act did require closure would activate the United States' obligation to arbitrate.

In the event, Judge Edmund Palmieri of the United States District Court for the Southern District of New York held that the Act was not to be interpreted as embracing the office of the PLO Observer Mission to the United Nations, since such application of the Act would place the United States in breach of its treaty obligations under the Headquarters Agreement, a position that could not be sustained in the absence of a demonstration of a clear intention of the Congress to override the international obligations of the United States.¹⁴

The International Court of Justice earlier had unanimously expressed the opinion: that the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.¹⁵

In the course of so concluding, the Court declared:

12. Anti-Terrorism Act of 1987, 22 U.S.C.A. § 5202 (West Supp. 1988).

13. *Obligation to Arbitrate*, *supra* note 9, at 29.

14. *United States v. Palestine Liberation Org.*, 27 I.L.M. 1056 (1988).

15. *Obligation to Arbitrate*, *supra* note 9, at 35.

The Court must further point out that the alleged dispute relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.¹⁶

In a separate opinion, the author stated that among the "restatements of legal principle" made by the Court with which he agreed was that: "It is accepted that a provision of a treaty (or a contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies."¹⁷

While an international treaty provision for arbitration such as that contained in the Headquarters Agreement is not to be equated with an arbitral clause of a contract between a State or State agency and an alien, and still less with that of an international commercial contract between two private parties, nevertheless it is believed that—in the Court's words—"it would be against both the letter and the spirit" of such arbitral agreements for the implementation of their arbitral obligations "to be subjected to such prior recourse" as that entailed by the exhaustion of local remedies (at any rate, if the particular arbitral process is not governed by the law of the contrasting State that requires such exhaustion). The Court's conclusion that, "It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation"¹⁸ is not only sound but susceptible of wider application. When parties provide for international arbitration, they may not be presumed or assumed to contract for or to contemplate the prior exhaustion of local remedies in a contracting State or in the State of the nationality of one of the parties. To require such exhaustion generally would or could mean defeating the purpose, or a purpose, of the provision for international arbitration. Accordingly, it is believed that it is correct to state that, "It is accepted that a provision of a treaty (or a contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies."¹⁹

The Court's Advisory Opinion in the *Obligation to Arbitrate* case thus may be viewed as going some way towards answering the question raised at the outset of this article. While that question was left unanswered by four previous cases in the Court, which did not reach judgments on the merits, and while the

16. *Id.* at 29.

17. *Id.* at 42-43.

18. *Id.* at 29.

19. *Id.* at 42-43.

circumstances of the *Obligation to Arbitrate* case are distinguishable from that addressed in that question and those four cases, nevertheless in substance a significant measure of extrapolation is warranted.

It may be added that there also sits in The Hague these days as there has since 1981 the Iran-United States Claims Tribunal, which has made its distinctive contribution to resolution of the question under discussion. From the outset of its work, the Tribunal has interpreted the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Islamic Republic of Iran of 19 January 1981 as not conditioning the jurisdiction of that arbitral Tribunal on the exhaustion of local remedies.²⁰ It also has held that, "The mere availability of a local remedy, whether judicial or otherwise, cannot preclude the Tribunal from jurisdiction."²¹

It should finally be noted that, at its September 1989 session in Santiago de Compostela, Spain, the Institut de Droit International adopted a resolution on "Arbitration between States, State Enterprises, or State entities, and foreign enterprises," article 8 of which provides: "A requirement of exhaustion of local remedies as a condition of implementation of an obligation to arbitrate is not admissible unless the arbitration agreement provides otherwise."²²

20. See *Amoco Iran Oil Co. v. Iran*, 1 Iran-U.S. C.T.R. 493 (1982); *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. C.T.R. 189 (1987).

21. *Rexnord Inc. v. Iran*, 2 Iran-U.S. C.T.R. 6, 10 (1983).

22. The printed text of the resolution will be published in 63 *INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE* part II (1989).

