AD HOC ARBITRATION

AMBATIELOS CLAIM (GREECE, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND)

INDIVIDUAL OPINION OF DR. RICARDO J. ALFARO

06 March 1956

Tribunal:
Ricardo Joaquin Alfaro (Co-Arbitrator)

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Individual Opinion of Dr. Ricardo J. Alfaro

The Commission has found, in relation to Claim A put forward by the Greek Government, that the claimant failed to exhaust the local remedies because Major Bryan Laing was not called by Mr. Nicholas E. Ambatielos to testify in the proceedings before Mr. Justice Hill. I regret that I am unable to agree with this finding for the reasons hereafter set forth.

1. The judgment of the Commission, with regard to the rule of exhaustion of local remedies, contains the following statement in which I concur:

"The rule requires that 'local remedies' shall have been exhausted before an international action can be brought. These 'local remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane...

"It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure — even one which is not important to the defence of the action — would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable."

2. The "local remedies" rule, as enunciated in the preceding lines, means in my opinion that when a claimant appears before municipal courts, either as plaintiff or defendant, he must exhaust the procedural remedies made available to him by the law of the land before each of the several courts in which the case may be tried. The concept of procedural remedies must be taken in its general sense. Thus, a claimant may be held not to have exhausted the procedural remedies at his disposal, if he failed, for instance, to adduce evidence despite his necessity to prove the facts of the case, or if he failed to appear in Court to argue his case at the stage of the trial in which he had to argue.

3. But the rule cannot be carried so far as to interfere with the actual or concrete use of a given procedural remedy. Thus, a claimant who availed himself of the procedural remedy of adducing evidence, should not be held by an international tribunal to have failed to exhaust local remedies because he did not produce a certain exhibit, or because he did not call a certain witness. Likewise, it would be unfair to apply the sanction of non-exhaustion to a claimant in the international plane, on the ground that his line of reasoning in the argument was not the proper one. This, in the language of the award, "would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable."

4. For the reason stated in the preceding paragraph, I consider that the claimant in this case should not be held to have failed to exhaust local remedies because Major Bryan Laing was not called by Mr. Ambatielos as a witness during the proceedings before Mr. Justice Hill.
5. Whether Mr. Ambatielos or his advisers were right or wrong in not calling Major Laing to testify, I believe is immaterial. Mr. Ambatielos, represented by his advisers, made use of the procedural remedy of adducing evidence in Court. He adduced such evidence as he thought might prove his case. Whether he was clever or made a mistake, whether or not he lost because of an error in handling the instrumentality of evidence, are questions with which an international tribunal cannot concern itself in dealing with the issue of exhaustion or non-exhaustion of local remedies. Such tribunal should not be called upon to pass judgment on the manner in which procedural remedies were used but on the fact that they were used.

6. It is stated in the award that in applying the test adopted by the Commission for the determination of the issue of non-exhaustion, it has been assumed that the Greek Government was right in considering the testimony of Major Laing essential to win the case, and that consequently, Mr. Ambatielos failed to exhaust the procedural remedies, by abstaining from calling a witness whose testimony was essential for the success of his defence.

7. Such an assumption, adopted by the Commission for the determination of the issue, is however contrary to the realities of the case. The evidence before the Commission does abundantly prove that if Major Laing had been called to the witness box, it was extremely doubtful that his testimony, particularly after cross-examination, would have resulted favourably to Mr. Ambatielos. Hence it can hardly be called essential.

8. It is a fact proven by affidavits read in the Court of Appeal on 5th March, 1923, by Mr. Nicholas E. Ambatielos and by his solicitor Mr. F. P. D. Gaspar, as well as by other evidence, that Major Laing was not called to testify because both Mr. Ambatielos and his advisers were not sure that such testimony would be favourable to their cause, chiefly for the reason that at the time of the proceedings before Mr. Justice Hill, Major Laing had refused to make known to them the full contents of his correspondence with Sir Joseph Maclay and had also refused, as Mr. Gaspar said, to give him "any statement or proof at any time either before or during the trial."

9. It seems evident, therefore, that sound considerations of prudence and regard for the interest of their client led the advisers of Mr. Ambatielos while in Court to refrain from calling a witness whose hostile or favourable attitude was decidedly doubtful.

10. It was after a decision was rendered by Mr. Justice Hill that Major Laing made known to Mr. Ambatielos the contents of his correspondence with Sir Joseph Maclay. It was then that Mr. Ambatielos and his advisers considered the testimony of Major Laing essential to prove his case. It was then that Mr. Ambatielos applied in vain to the Court of Appeal for authority to have the testimony of Major Laing admitted as evidence. Finally, it was after all these events that the Greek Government, in its diplomatic intervention and in subsequent actions before the International Court of Justice and before this Commission contended or affirmed that the testimony of Major Laing was essential.

11. In view of the above stated facts, it seems difficult to maintain that not calling a witness in 1922 because at that time his testimony was not deemed essential, and on the contrary was considered dangerous or at least doubtful, constituted failure to exhaust local remedies because in 1923 the same testimony was considered essential. Non-exhaustion of local remedies must necessarily take place at the time when the local remedy can be resorted to, but not afterwards.
12. It is further declared in the award that Mr. Ambatielos failed also to exhaust the local remedies by not prosecuting the general appeal he had lodged against the decision of Mr. Justice Hill. With regard to this point it is my view that according to the evidence before the Commission, particularly the expert opinion of Lord Porter, it would have been clearly futile for the claimant to prosecute his general appeal.

13. The award states that the failure of Mr. Ambatielos to exhaust the local remedy before Mr. Justice Hill by not calling Major Laing as a witness made it futile for him to prosecute his appeal and that for this reason he could not rid himself of the rule of exhaustion of local remedies.

14. My view regarding this situation is that once it has been established that recourse to appeal is obviously futile, the claimant is exonerated from the responsibility of non-exhaustion of that remedy, without entering into considerations as to the cause of the futility. The two things are separate and distinct. Moreover, if Mr. Ambatielos cannot be held to have failed to exhaust local remedies by not calling Major Laing as a witness, he cannot be held responsible for non-exhaustion on the ground that his decision not to call that witness made the appeal futile.