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Summary record of the 2718th meeting

Topic:
Diplomatic protection

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2718th MEETING

Friday, 10 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPporteur (continued)

1. Mr. OPERTTI BADAN said that with reference to the exhaustion of local remedies, he had doubts as to whether the concepts of voluntary link and territorial connection covered in subparagraphs (c) and (d) of article 14 of the Special Rapporteur's third report (A/CN.4/523 and Add.1), on which there was no general consensus, should be included as criteria in the draft articles, although they might merit separate consideration in another context. That view was supported by the Commission's approach at its twenty-ninth session during its first reading of article 22 of the draft articles on State responsibility.⁴

2. Several members had endorsed the position that local remedies did not need to be exhausted where there was no voluntary link between the injured individual and the respondent State; such a link might include voluntary physical presence (of an individual or, *mutatis mutandis*, a legal person), residence, ownership of property or a contractual relationship with the respondent State (para. 67 of the report), but not private relationships between individuals of one State and individuals of another State. However, there were cases in which such private relationships could, in

fact, give rise to international protection by the State, and they deserved further consideration.

3. He did not agree with Ms. Xue that the exhaustion of local remedies was a procedural issue. Actually the concept was substantive, though the manner in which it was implemented might fall within the scope of procedural law. Where there was a link between the individual and the foreign State, the latter must have an opportunity to provide a remedy under its own legislation.

4. Recent changes in international law had a bearing on both the nature and scope of diplomatic protection, on the one hand, and the applicability or non-applicability of the rule on the exhaustion of local remedies, on the other. In the first case, the changes were, in his view, related to events such as transboundary environmental harm and the shooting down of aircraft that had accidentally strayed into a State's airspace (para. 68 of the report), which did not fall within the traditional scope of diplomatic protection. The question, then, was whether such matters would be better handled under environmental law, in the first instance, or State responsibility, in the second. As to the draft now under consideration, the aim therefore should be to clearly define the object of the future convention, thus making a successful outcome possible.

5. It was important to consider how, in the absence of solutions in public international law, individuals were able to exercise their rights and to make claims. In the private sphere, other forms of law were applicable only to the effects of acts by the authorities, not to the acts themselves; they were useful only in the absence of, or in addition to, other remedies. It had been maintained that the *Trail Smelter* case had resolved the question of compensation, but not that of responsibility. It might then be asked whether, when an individual claimed pecuniary compensation for harm caused by the act of a foreign State in the latter's domestic courts without undertaking proceedings concerning the lawfulness or wrongfulness of the act as such, this should be deemed to be the equivalent of exhaustion of local remedies. A clearer distinction must be made between international claims and diplomatic protection; the former could be brought by either the individual or the State of nationality, while the latter could be exercised only by the State of nationality.

6. Again, it was necessary to distinguish between the types of risk assumed by the individual. A foreigner who carried out activities connected with the foreign State might be assumed to have voluntarily submitted himself to its laws and courts; in such cases, the risk could be said to have been freely assumed. In other cases, however, no such risk had been assumed because no *voluntary* link had been created; in private international law, the appropriate term for such situations would be "extra-contractual responsibility". A link with the foreign State might exist, but it existed against the individual's will or as a result of unforeseeable events, as in the case of the Chernobyl nuclear plant explosion or the *Amoco Cadiz* oil spill. Because the *Trail Smelter* case had been resolved through arbitration, it did not provide a valid example of the principle in question.

¹ For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2000*, vol. I, 2617th meeting, p. 35, para. 1.

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

⁴ See 2712th meeting, footnote 6.

7. In such cases, the victims should have the option of seeking a remedy in the courts of the responsible State, but they should not be obliged to do so. The Special Rapporteur, in commenting on article XI, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects (para. 80 of the report), appeared to be pointing to such a broader view. In the case of catastrophic damage affecting the population of more than one State, one possibility would be to allow victims who had suffered physical harm to lodge claims either in the courts of their own State of residence or in those of States with a reasonable connection to the event. In other words, exhaustion of remedies should not be confined to remedies exclusively in the State causing the damage. The Special Rapporteur's language in paragraph 72 of his third report suggested a certain distancing from the relevance of the concept of a voluntary link rule.

8. In the *Trail Smelter* case, Canada had not insisted on the exhaustion of local remedies. That case, which had established a precedent in private law that the State must assume responsibility for environmental harm resulting from activities that it had permitted in its territory, had been of great importance to the Sandoz-Rhine and *Bhopal* cases. In paragraph 75 of the report, the Special Rapporteur suggested that Canada's position in the *Trail Smelter* case might have been based on the view that local remedies did not need to be exhausted because the case involved direct injury or on the fact that the arbitration agreement in question did not require such exhaustion. The second of those hypotheses would remove the case from the context of the exhaustion of local remedies since arbitration, by its very nature, involved a voluntary agreement by the parties to submit themselves to it.

9. In his discussion of State practice, the Special Rapporteur gave several examples of wrongdoing States which had elected not to require the exhaustion of local remedies. In all those cases, however, the reason for that position seemed to be grounded in policy considerations—such as the impact on public opinion—rather than in legal theory, a fact which diminished their value from the point of view of codification.

10. The Convention on International Liability for Damage Caused by Space Objects was an element to be taken into account and linked up with Mr. Simma's comments at the 2716th meeting that environmental law, for example, entailed other criteria that the Commission had to acknowledge.

11. He was not fully convinced that there were sufficient elements on which consensus had been reached to warrant sending the matter under discussion to the Drafting Committee. In particular, he had doubts regarding article 14 and especially Roberto Ago's statement that local remedies should be effectively usable.⁵ His own view was that, the more usable local remedies were, the smaller the scope for diplomatic protection. He therefore agreed with Mr. Pellet that the draft articles provided a code of con-

duct for States rather than an instrument for the settlement of disputes between them.

12. He wished to stress that the abuse of diplomatic protection could best be prevented by increasing the guarantees of effective local remedies. The remedies currently available under public international law were inadequate; there was no general treaty framework in various areas, including that of environmental law; and there were at the present time no alternatives to make up for the absence of a normative framework in public international law to protect individuals and legal persons and recognize their right to compensation, as in the case of private international law. The Special Rapporteur's work was therefore an invaluable contribution to the topic, and the objections raised by members merely pointed to issues which would, in any case, be raised either in the Sixth Committee of the General Assembly or by States themselves at the time of ratification of the draft articles.

13. Mr. KEMICHA said that draft articles 12 and 13 should be deleted; there was nothing to be gained from a discussion of whether the rule on the exhaustion of local remedies was substantive or procedural in nature and, in any case, those articles added nothing to article 11, although the latter would benefit from redrafting.

14. Article 14, on the other hand, sought to cover too many issues. He preferred the third option presented under subparagraph (a) of article 14, namely where there was no reasonable possibility of an effective remedy. As to subparagraph (b), he joined those who believed that waivers must be explicit, and he had no reservations regarding the reference to estoppel. Subparagraph (d) should be deleted, since the situation in question was already covered by subparagraph (c). He welcomed the suggestion that a separate article should be devoted to the applicability of the rule on the exhaustion of local remedies in the absence of a voluntary link. Subparagraphs (e) and (f) could be combined with subparagraph (a). Last, he supported those who had proposed the deletion of draft article 15.

15. Mr. Sreenivasa RAO said that the institution of diplomatic protection had undergone tremendous changes over the years. At a time when communications had been poor and opportunities for approaching international forums lacking, the intervention of a State on behalf of individuals had been considered essential. However, now that individuals were increasingly acquiring their own personality and the opportunity to exercise their rights through various forums and channels, that need was slowly diminishing: States were at best reluctant to take up individual cases and to upgrade a private claim to a State claim. Nevertheless, the topic continued to be important and was thus in need of codification.

16. The question whether the principle of exhaustion of local remedies was procedural or substantive in nature reminded him of a similar debate on the question whether the principle of recognition was declaratory or constitutive in nature. What was clear was that the principle was a part of customary international law; that, as such, it was central to the triggering of diplomatic protection; and that, accordingly, it must be stated as clearly and unambiguously

⁵ See the sixth report on State responsibility, *Yearbook ... 1977*, vol. II (Part One), document A/CN.4/302 and Add.1-3, p. 39, para. 100.

as possible. Viewed from that standpoint, articles 12 and 13 either duplicated the statement of the principle contained in articles 10 and 11 or else merely flagged notions, such as denial of justice, which they failed to articulate fully. Accordingly, both articles could be eliminated without adversely affecting the economy of the draft articles as a whole, and their content could be integrated in articles 10 and 11, or in the commentaries to these articles.

17. While article 14 should be referred to the Drafting Committee, subparagraphs (a) and (e) needed to be realigned and reconciled. Of the three options presented for subparagraph (a), he, too, favoured option 3. The criterion of “reasonableness” was workable and, as Mr. Pellet had pointed out, one that had wielded considerable influence in the area of maritime law. “Effective remedies” and “undue delay” were relative concepts, in respect of which no universal standards were possible. In the last analysis, they must be judged in the light of the particular context and circumstances, and on the basis of other equally important principles: equality before the law, non-discrimination and transparency, to the extent that they were firmly based in the statutes of the State.

18. Useful comments on the question of waiver by Mr. Gaja, Mr. Simma and others should be accorded further attention in the Committee. Implied waiver must not be lightly presumed, but must be rigorously tested. Similarly, estoppel, where proven, would amount to an exception to the rule on the exhaustion of local remedies, being a general principle of law.

19. Subparagraph (f) of article 14 required further work in the light of comments made by Mr. Koskeniemi, the Chair and others. He shared the view that the concept of voluntary link should be treated more as a condition precedent than as an exception to the operation of the rule on the exhaustion of local remedies. That concept was useful and had underpinned a host of diplomatic claims. However, in the contemporary context, sponsorship of private claims through diplomatic means, even in the absence of a voluntary link in the strict sense, was becoming increasingly frequent. In the case of transboundary harm, it was open to States to consolidate and present claims for redress on behalf of their citizens and others under their jurisdiction to the responsible State. It was also open to individuals to approach the juridical or other quasi-judicial bodies for redress, if this was convenient or otherwise felt to be useful. That was reflected in the principle of non-discrimination, which had gained recognition in Europe and was now part of all recent international environmental instruments, and which did not, in his view, debar the State from intervening on behalf of a group of individuals resident in its jurisdiction and affected by the transboundary harm, particularly if those claims were numerous or if the injured individuals were unorganized, ignorant of the complicated legal procedures, or devoid of financial means of pursuing the claims on their own behalf. Thus, the concept of voluntary link was mostly useful as a legal basis in individual cases and should be dispensed with in some situations, for which specific provision must be made in the draft articles. Injury caused extraterritorially or in a transboundary context was one clear example, but there might be others.

20. Finally, he agreed with those members who did not favour referring article 15, on the burden of proof, to the Drafting Committee. The burden of proof was a principle of evidence and could be left to the rules of procedure or *compromis* in the case of international judicial forums, and to the law of the State in cases of resort to domestic forums of adjudication. Accordingly, article 14 should be sent to the Committee, while articles 12, 13 and 15 should be eliminated, as their content was suitably explained elsewhere.

21. Mr. MOMTAZ said he was gratified to note that, in paragraph 63 of his third report, the Special Rapporteur declared unequivocally that the rule on the exhaustion of local remedies was indeed a rule of customary international law; for there was a danger that, in the light of the imposing list of exceptions proposed in article 14, that valuable rule might be whittled down until little remained.

22. Admittedly, the Special Rapporteur, after offering a nearly exhaustive review of the doctrine and jurisprudence, hesitated to recognize the validity of some of the exceptions he proposed, such as the absence of a voluntary link between the injured individual and the respondent State. He too would concede that, as with any rule of international law, there were exceptions to the rule on the exhaustion of local remedies. One such exception, to which Mr. Fomba had drawn attention, was the case of a State such as Rwanda, in which the judicial system had totally or partially collapsed as a result of internal armed conflict. In his view, however, to provide for an exception to the rule in such cases would do nothing to solve the problem, which was by its very nature intractable. On the other hand, provision could be made for an exception in cases in which a State’s judicial system was unable to obtain the necessary evidence or otherwise unable to carry out its proceedings—a situation specifically covered by article 17, paragraph 3, of the Rome Statute of the International Criminal Court, a provision that the Commission might wish to transpose to the case under consideration.

23. A further candidate for inclusion in the list of exceptions might be the case in which a State’s procedural rules excluded aliens from justice. He was not thinking of subparagraph (f) of article 14, which covered situations in which the State prevented the injured individual from gaining access to its institutions for reasons, *inter alia*, of security or political expediency. In his view, such a case did not warrant elevation to the status of an exception, for in such instances a local lawyer could ensure that local remedies were exhausted. He was thinking, rather, of cases in which there was provision in the State’s legislation for discrimination against non-nationals. They must clearly constitute an exception to the rule. The same was true of cases in which there was a well-established line of precedents adverse to the alien—a situation to which the Special Rapporteur alluded in paragraph 42 of his report.

24. He also had doubts about the validity of the exception set out in subparagraph (e) of article 14, on undue delay. Undue delay might simply be the result of overburdening of the justice system, which often occurred in countries faced with serious shortages of resources, and,

in particular, of qualified judges to deal with cases. Such situations should not be treated as exceptions to the rule on the exhaustion of local remedies, particularly in view of the fact that in such circumstances citizens of the State in question would, like non-nationals, have to wait patiently for justice to be dispensed.

25. As to the question of a voluntary link, which had given rise to an interesting and controversial debate, he had been persuaded by the arguments put forward by Ms. Xue, who rightly considered that the State practice whereby injured individuals were authorized not to exhaust local remedies resulted from the development of international environmental law, a specialized branch of international law that had no great bearing on the issue under consideration. As for cases involving the shooting down of foreign aircraft, referred to in paragraph 79 of the report, generally speaking, the States responsible insisted that the act had been an accident, refusing to accept responsibility for a wrongful act, and offering *ex gratia* payments to compensate the victims. He thus doubted that, in cases of that kind, there was an argument in favour of an exception based on a voluntary link. As for the example to be found in paragraph 83 (c) of the report, that of the killing of a national of State A by a soldier of State B stationed on the territory of State A, the Special Rapporteur clearly envisaged a situation in which the armed forces of State B were stationed on the territory of State A in peacetime and at that State's request. In such a situation, the States concerned generally concluded agreements to settle such matters, and hence there was no need to provide for an exception. The same was true of transboundary abduction of foreign nationals, a situation referred to in paragraph 83 (d), and one which, fortunately, very seldom arose.

26. With regard to waiver of the rule on the exhaustion of local remedies, it was a well-established rule of international law that there must be no presumption as to the limits to State responsibility. Accordingly, he doubted the validity of a provision on implicit waiver. Mr. Rodríguez Cedeño had rightly pointed out that, setting apart cases in which States waived that rule by agreement, any unilateral waiver must take express form. Indeed, like Mr. Simma, he wondered whether it was really necessary to have a provision covering express waiver, which, where covered by an agreement, constituted a *lex specialis*.

27. Finally, he was grateful to Mr. Pellet for his remarks concerning the need to submit legal arguments in order to exhaust local remedies, and for pointing out that it was not sufficient simply to have referred the matter to the courts in order to satisfy that rule. The Special Rapporteur should give that aspect of the question further consideration.

28. In conclusion, article 14 would benefit from being simplified, as some of its clauses could be combined, irrespective of the separate issue of their relevance to the article. The rule on the exhaustion of local remedies should be respected unless local remedies were obviously futile: hence his preference for option 1.

29. Mr. SIMMA said he took issue with the view expressed by Mr. Momtaz that there should be no exception to the rule on the exhaustion of local remedies in cases

in which the undue delay was attributable to the inability of the respondent State's judiciary to cope with a heavy backlog of cases. Even where there had been no intentional frustration of local remedies, there must still come a point in time at which a foreigner would be entitled to resort to the diplomatic protection of his own State. Some international minimum standard must exist, and the Commission might look to the jurisprudence of human rights treaty bodies for guidance on that matter.

30. Mr. MOMTAZ said he agreed that it would be a good idea to refer to the jurisprudence of human rights treaty bodies, with a view to determining what constituted "undue delay". The notion was subjective, and objective criteria needed to be established, in the framework of which allowance could be made for situations in which a State's judicial systems were hampered by a lack of human and material resources.

31. Mr. CHEE said that the Special Rapporteur's work on the topic of diplomatic protection was to be commended for its scope and for its penetrating scholarship. Article 10 reaffirmed the rule on the exhaustion of local remedies in the context of codification, and he accordingly endorsed its wording. Article 12 was acceptable, though it might raise some drafting issues. As to article 13, he was inclined to take the view that the rule formed part of procedural law. Denial of justice was an extremely broad subject, and one which went beyond the scope of diplomatic protection. Accordingly, it should be dealt with separately in an addendum.

32. He favoured option 3 in subparagraph (a) of article 14 and experienced problems with the concept of "implied waiver" in subparagraph (b) as it seemed to suggest that, in some circumstances, the respondent State might waive the rule on the exhaustion of local remedies by tacit acquiescence.

33. As to subparagraph (c) of article 14, the question of a voluntary link—what it was, what it did and what it should not do—was an important matter. The Special Rapporteur produced four cases involving voluntary link that should be regarded as exceptions to the rule on the exhaustion of local remedies. While he agreed with those examples, more could be cited, thereby improving the draft.

34. The domestic law principle that justice delayed was justice denied had essentially been incorporated in the provision on undue delay set out in subparagraph (e) of article 14. Delay was an ambivalent concept, however, and he was not sure that it was an objective standard. "Unconscionable delay", the phrase preferred at the Conference for the Codification of International Law, held at the Hague in 1930, was an aspect of undue delay in which an element of intent was involved. He had no objection to the wording of subparagraph (e) but would prefer to see the unconscionable aspect of delay included.

35. With reference to subparagraph (f) of article 14, he had some doubts about the actual practice by States of obstructing justice. If it was simply a theoretical problem, and unless the Special Rapporteur could present case law

in support of the proposed provision, it should not be included.

36. Finally, article 15 was acceptable. It corresponded to several rules currently practiced by municipal courts in relation to burden of proof, and even though very few international tribunals had clear relevant evidentiary rules, retention of the article might act as a guide to practice in international proceedings. In any event it would do no harm.

37. Mr. MANSFIELD said that he accepted the Special Rapporteur's conclusion in connection with subparagraph (b) of article 14 that the existence of waiver and estoppel as possible exceptions to the rule on the exhaustion of local remedies needed to be specifically covered. He also agreed that the hurdle before any argument based on implied waiver or estoppel was a high one. He had no particular problem with the formulation of the provision and agreed it should be referred to the Drafting Committee, but the Committee might wish to consider its placement, bearing in mind Mr. Gaja's comment that it really was of a different character than the other subparagraphs dealing with the scope and content of the rule.

38. The underlying issues in subparagraphs (c) and (d) of article 14 were very significant, if not fundamental. Undoubtedly a provision was necessary to deal with those issues, which included, but were not limited to, the hardship cases set out in paragraph 83 of the report. He accepted the point made in paragraph 84 that in many of those cases—for example, wrongful transboundary environmental harm or wrongful shooting down of an aircraft—there would be a direct injury to the State, and the rule on the exhaustion of local remedies would be inapplicable. It was inherent, however, in the workings of the contemporary world that many cases could arise in which a State wrongfully injured the national of another State without causing direct injury to that State and the circumstances were such that it would be unfair or would create hardship if the individual was required to exhaust local remedies.

39. He was far from satisfied that subparagraphs (c) and (d) of article 14 would capture all those cases. In the field of commerce, for example, the world worked very differently today from the classic nineteenth-century situation behind the thinking about the rule on the exhaustion of local remedies. It was, of course, inappropriate for an individual who had made his living in a foreign country to refuse to exercise the local remedies available when something went wrong and try instead to get his State of nationality to bring a claim on his behalf. In contrast, many owners of small businesses in small countries, many of them developing countries, were selling goods or services into niche markets around the world. They might never—or hardly ever—set foot in the States where those markets existed. If a regulatory agency in the market State wrongfully injured the foreign national, for example, by negating one of his or her intellectual property rights, but not in such a way as to trigger a remedy through WTO, was it fair or reasonable that the foreign national should have to exhaust local remedies before the case could be raised at the international level? The effect of the wrong-

ful act might be catastrophic for the small business, but the cost of pursuing local remedies through the courts of the market State might be more than the entire business was worth, simply because of the cost structure and exchange rate differential. There might be no class action available to help spread the costs. Was there really a sound policy reason why a State-to-State claim should be precluded in such circumstances? Such issues had to be further discussed in order to give adequate guidance to the Drafting Committee. Subparagraph (c), as it stood, loaded more elements of fairness and equity onto the concept of voluntary link than the concept was really able to bear. In some circumstances, in fact, it might give rise to the very unfairness it was intended to avoid.

40. Like others, he had doubts as to whether subparagraph (d) of article 14 really helped very much with the underlying issues of fairness and equity.

41. The CHAIR, speaking as a member of the Commission, said he agreed with most of what had been said so far. He had no difficulties with referring articles 11, 12 and 13 to the Drafting Committee for consideration, either in connection with article 10 or separately. He could also go along with those who argued against referring article 13, as long as the grounds for not doing so were in no way perceived as disagreement with the "third view" on the nature of the exhaustion of local remedies. The "third view" was espoused by Fawcett and was laid out in exceptionally clear terms in the excerpt from the United States Government submission⁶ contained in paragraph 52 of the Special Rapporteur's second report.

42. As to the third report, he commended the Special Rapporteur on his inclusive approach. It could do no harm to bear in mind that one scholar explicitly and some others implicitly, reasonably or otherwise, had characterized the Commission's draft on State responsibility as thin gruel. That did not mean, however, that the Commission must feel chastened. In paragraph 13 of his report, the Special Rapporteur had referred to *Hamlet* without the Prince of Denmark, but Tom Stoppard's play *Rosencrantz and Guildenstern Are Dead* said a great deal about life in general and the Danish royalty in particular without ever bringing in the Prince of Denmark.

43. As Mr. Brownlie and others had pointed out, to venture into some of the areas raised by the Special Rapporteur was perhaps more foolhardy than courageous and likely to militate against the Commission's ability to produce a useful draft on the core elements of diplomatic protection. He was referring specifically to denial of justice, burden of proof and the notion, now archaic but well motivated at the time of its creation, known as the Calvo clause. What had been defensible in the era of gunboat diplomacy was less acceptable now, when the protection of individuals was paramount.

44. He agreed with the Special Rapporteur that the exercise should not be expanded into the areas listed in paragraph 16 of the report, although some flexibility might be prudent. There was substantial support for options 2 and

⁶ See 2712th meeting, footnote 10.

3 in subparagraph (a) of article 14 which seemed to differ in drafting rather than in substance, and they should be referred to the Drafting Committee. The text and/or the commentary should make it clear that expense and delay figured in the calculation of “reasonable”. The quotation from Mummery⁷ in paragraph 37 of the report was a good example of what the commentary could usefully include.

45. Subparagraph (b) of article 14 could also be referred to the Drafting Committee, although he agreed with Mr. Gaja that waiver and effectiveness should not be mixed. The Special Rapporteur was right to say that subparagraphs (c) and (d) were unnecessary and, for the reasons he gave, did not need to be referred to the Committee. It was important, however, to make clear that not including those provisions was not a denial of their content, but simply a belief that there was no need to spell it out. He was also open-minded about subparagraph (f). It was neither useful nor wise to state that such a provision would constitute progressive development. Any reasonable court or tribunal would find in accordance with the notion set out therein. Hopefully the point could be clarified through the work of the Committee.

46. The role of voluntary link should not dominate the exhaustion of local remedies. He very rarely differed with Mr. Brownlie, but suspected that he was guilty of what Alfred North Whitehead, in a slightly different context, had called the fallacy of misplaced concreteness. Exhaustion of local remedies did not involve the assumption of risk but was a way to resolve issues between Governments before they became international problems. To focus on certain aspects of the rule that tended to distort it into an assumption of risk on the part of the individual would be misleading. There was certainly room for the notion as part of the concept of reasonableness or some other concept leading to distinctions based, *inter alia*, on the activity of the individual and the extent to which the burden of exhaustion was onerous, but it was in that subsidiary capacity that the notion should be examined rather than as a primary consideration which would turn the exhaustion of local remedies into something entirely different from what it had always been meant to be and do.

47. Mr. FOMBA said that subparagraph (b) of article 14 raised three issues. The first, express waiver of the requirement that local remedies be exhausted, posed no problem, although one might question the need to formulate something that was juridically self-evident, even if it was important. On implicit waiver, two trends had emerged in the debate: some, apparently a majority, opposed taking it into account, whereas a minority were in favour, as exemplified by Mr. Pellet’s view. His own opinion was that the possibility of implicit waiver should not be rejected out of hand. The causal approach should be given priority, stressing the criteria of intention and clarity of intention and taking into account all pertinent elements.

48. The term “estoppel” seemed to cause certain philosophical, conceptual and doctrinal difficulties. To avoid them, one might by analogy include that phenomenon

within the more general thesis of implicit waiver, something that seemed to follow from the general tenor of the cases mentioned by the Special Rapporteur in paragraphs 60 to 63 of his report.

49. The phrase “voluntary link” in subparagraph (c) of article 14 seemed bizarre or at least unfamiliar. On substance, his view was that, even if the phrase appeared not to have entered into the literature and judicial decisions, or to a sufficient extent, the situations envisaged in the provision were not without interest. Consequently, it should be taken into account, but in the best way possible and in the proper place within the text, for the purpose of progressive development of the law. He had some doubts about the need to retain subparagraph (d).

50. On the whole, he agreed that in the very structure of article 14, a spirit of contention should be discarded and a more global approach, one of judicial policy, should be envisaged. Last, diplomatic protection should be restored to its proper legal context by replacing the phrase “respondent State” with the words “responsible State”.

51. Mr. BROWNLIE recalled that when he had originally addressed the issue of voluntary link, he had done so from a policy standpoint, not from the point of view of whether it was positive law or not. He had used the possibly emotive phrase “assumption of risk”, not invoking it in the technical sense as in the English and American law of tort, but as a way of explaining the attitude of Governments to certain types of claim. He had tried to demonstrate that, in certain circumstances, to insist on the exhaustion of local remedies was unrealistic and oppressive to individuals who did not have the backing of some specific economic interests, were not part of some kind of lobby or did not have sufficient funds.

52. Although in paragraph 70 of his third report the Special Rapporteur took a very indifferent view of the authority for the requirement of voluntary link, there was in fact a great deal of authority, from all legal traditions and geographical locations and sometimes going back many decades. Nevertheless, some definition had to be provided for the concept of voluntary link. A situation in which tourists or other transients could be seen to have a voluntary link with a State was unacceptable. There had to be some persistence and quality to the link.

53. The CHAIR said the problem might arise from the disparity between voluntary link as a subset of exhaustion of local remedies and voluntary link as a subset of the concept of reasonableness.

54. Mr. YAMADA said the reports submitted by the Special Rapporteur were full of thought-provoking analysis and the debate had been extremely useful. As Chair of the Drafting Committee, he would refrain from commenting on specific draft articles in order to maintain his neutrality, but he wished to make a general observation on the scope of diplomatic protection.

55. He shared some of the concerns expressed by Ms. Xue and Mr. Simma. Perhaps he was a conservative, but to him it seemed that diplomatic protection was a regime

⁷ D. R. Mummery, “The content of the duty to exhaust local judicial remedies”, *AJIL*, vol. 58, No. 2 (April 1964), p. 389; see especially pp. 400 and 401.

essentially meant to enable a State to protect its nationals who suffered injury abroad. The classic case was when a national of State A suffered an injury arising from an internationally wrongful act of State B in a place under the jurisdiction or control of State B, and the injury was not remedied by that State. State A then invoked a fiction, that the injury suffered by its national was injury to itself, and presented a claim to State B.

56. True, the regime of diplomatic protection had to adjust to contemporary requirements and there was a need for progressive development, something that would involve introducing adjustments and exceptions in the rules on State of nationality, continuity of nationality and exhaustion of local remedies and other rules. But to describe cases such as *Trail Smelter*, Chernobyl and other incidents of transboundary harm and environmental pollution as falling under the rubric of diplomatic protection made him, as a practitioner of diplomacy, uneasy.

57. In cases of transboundary harm, the injury occurred in most cases to nationals residing under the jurisdiction and control of the State of nationality. There was a direct injury to that State, which did not have to invoke a fiction but could present a claim directly to the State that had caused the injury. For example, before the conclusion of the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water, the United States had conducted a series of atmospheric nuclear tests in the Pacific. In 1954, a Japanese tuna fishing boat had suffered radioactive fallout well outside the danger area designated by the United States. The crew had been exposed to an overdose of radiation, and as a result, one member had lost his life. The Japanese Government had immediately presented a claim for redress of the injury suffered by Japan. The United States Government had responded promptly, and an amicable settlement had been reached within a short period of time. Neither Government had considered the case as one of diplomatic protection.

58. He hoped the Commission was not expanding the scope of diplomatic protection too far. He was encouraged to hear that the Special Rapporteur intended to complete the topic within five years, making diplomatic protection part of the Commission's achievements in the current quinquennium.

59. Mr. DUGARD (Special Rapporteur), recalling that he had suggested that it was unnecessary to include a provision on voluntary link precisely because in most cases direct injury of one State by another was involved, obviating the need for exhaustion of local remedies, asked whether Mr. Yamada felt that the question of voluntary link could simply be left to the existing exceptions to the rule on the exhaustion of local remedies.

60. Mr. YAMADA said that in the *Aerial Incident of 27 July 1955* case, the United States and the United Kingdom had taken part in the claim against Bulgaria and had resorted to diplomatic protection. The injury had occurred abroad from the standpoint of the United States and the United Kingdom, so there was an element of a voluntary link. That could be considered within the framework of exhaustion of local remedies.

61. The CHAIR, speaking as a member of the Commission, said that Mr. Yamada's point was well taken.

62. Mr. TOMKA said that he had no objection to article 14, subparagraph (a). The Drafting Committee should be able to find a suitable formulation on the basis of options 2 and 3. Clearly, the test of obvious futility would be too stringent. With reference to article 14, subparagraph (b), he agreed with those who argued that the presumption should be against any implicit waiver and wondered whether the Committee might not draw upon the example of article 45 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session⁸ and the loss of the right to invoke responsibility. The same applied to the issue of estoppel. He had no disagreement with the concept as such, but it might be difficult to translate it into other official languages, such as Russian and French.

63. He experienced misgivings about the issue of voluntary link. The Special Rapporteur himself was not convinced that subparagraphs (c) and (d) were necessary and thought that the cases considered might be covered under other exceptions. The examples given were not from the field of State responsibility, but from that of liability. In his own view, the institution of diplomatic protection was closely linked to the issue of State responsibility. The Drafting Committee had proposed that diplomatic protection consisted of the result of diplomatic action or other means of peaceful settlement by a State acting in its own right or because of an injury to a national arising from an internationally wrongful act of another State. Thus, a wrongful act causing injury to a national was an essential element. He therefore did not understand why the example of the Convention on International Liability for Damage Caused by Space Objects was cited, for it did not concern State responsibility, but rather a special regime. Similarly, there were special conventions covering transboundary harm or creeping pollution where no issue arose, strictly speaking, of an internationally wrongful act by a State with resulting injury to a national. He would also be reluctant to draw conclusions, as the Special Rapporteur had done, from the fact that some States had not raised exhaustion of local remedies or voluntary link in proceedings before ICJ, for example in the *Aerial Incident of 10 August 1999* case when Pakistan had filed an application against India. In his understanding, it had been sufficient for India to refer to a general declaration under paragraph 2 of Article 36 of the Court's Statute and to argue that the case was not within the jurisdiction of the Court. Thus, the examples in paragraph 79 of the report did not support the inclusion of voluntary link. He shared the Special Rapporteur's view that article 14, subparagraph (c), was not strictly necessary, and he was against referring it to the Committee.

64. As to subparagraph (e) of article 14, it was difficult to accept the argument about the national judiciary which did not have sufficient means, being overburdened by the number of cases involving both nationals and aliens. The rationale for the exhaustion of local remedies was to give a State an opportunity to redress the injury caused before a local claim became an international one. If a national judiciary had allowed a case to be unnecessarily delayed,

⁸ See 2712th meeting, footnote 13.

a State should not benefit from that fact to argue that local remedies had not been exhausted.

65. Subparagraph (f) of article 14 should be referred to the Drafting Committee and, although the issue of burden of proof was interesting, there was no need to include article 15 in the draft articles on diplomatic protection. He subscribed to the Special Rapporteur's view that a flexible approach to the subject was required. In his view, article 15 should be deleted.

66. Ms. XUE said that the theory of voluntary link was very useful in the context of the regime of diplomatic protection. It offered one of the most convincing arguments for requiring the exhaustion of local remedies before an injured foreign national could turn to the Government of his own State for assistance. It also helped overcome the narrowness of simply establishing the link on a territorial basis. But it would be problematic to use the absence of a voluntary link as an exceptional clause that gave the right to diplomatic protection. Such issues as transboundary harm or some of those set out in paragraph 83 of the report did not fall within the scope of the present topic, because otherwise the Commission would be suggesting that in all cases of transboundary harm, foreign victims must first resort to local remedies for their injury. That was not what was meant here. On the contrary, when transboundary environmental harm became very serious, the State took the matter into its own hands and dealt with it on an international basis. In such cases, it was not just a State's right but rather its obligation, at least on a national basis, to take international action *vis-à-vis* the State which had caused the transboundary harm. It was not a matter that should be covered under diplomatic protection.

67. To enlarge the scope of diplomatic protection to transboundary damage by including the absence of a voluntary link as an exception would have a number of implications. First, it would imply that only through such a clause could a State exercise diplomatic protection on behalf of its nationals who had suffered transboundary damage arising from activities in the territory of another State. That would lead to the sweeping conclusion that all such international claims were covered by the regime of diplomatic protection, which was certainly not the view of States in practice. Mr. Yamada had just given a good example in that regard. The second implication would be that, by having such an exceptional clause, the Commission would transform all cases of transboundary environmental harm into remedy cases. But that was not the reality of the matter either, because such harm often had to do with prevention and cooperation between the States concerned and was not simply a question of remedy. The *Trail Smelter* case, to which reference had been made, was not merely about calculating remedies.

68. The third implication had to do with the relationship between diplomatic protection and international environmental law. What was the rationale behind the principle of non-discrimination? In practice, even when transboundary environmental harm occurred and foreign victims had the necessary financial resources and legal assistance, they were discriminated against as foreigners and were often unable to get local remedies for such reasons as jurisdic-

tion, applicable law, and recognition and enforcement of foreign judgements. All those legal barriers prevented foreigners from getting local remedies. Hence the need for the principle of non-discrimination. The point was not that victims should first exhaust local remedies: they were unable to do so. In the *Trail Smelter* case, American citizens injured by fumes could not go through the Canadian courts, and local laws did not provide any remedies for them. In order to achieve a just and fair result, the two Governments had also agreed to apply American case law on interstate waters, which showed that diplomatic protection should not be confused with general international claims. The growing number of situations involving transboundary harm was all the more reason to treat the matter separately.

69. Diplomatic protection was one of the oldest and most sensitive areas of international relations. The Commission should go with the times and work towards the progressive development of the law, but to classify all international claims as diplomatic protection was inconsistent with international practice as perceived by States. The voluntary link theory could be elaborated on the basis of the exhaustion of local remedies rule rather than being considered an exception.

70. Mr. DUGARD (Special Rapporteur) noted that Mr. Brownlie had been largely responsible for making the idea of voluntary link a basic element of diplomatic protection.

71. The Chair and Mr. Yamada had endorsed his view that the Commission should not include such a provision; other members had argued that it should not be included as an exception but should be treated as a separate provision or made the subject of a separate study. Did members feel that the matter should not be referred to the Drafting Committee, or did they want it to go to the Committee with instructions to make sense of it all?

72. Mr. MANSFIELD said that he agreed with the point made by Ms. Xue about cases of transboundary harm, most of which were cases of direct injury to the State. To that extent, he supported the Special Rapporteur. Mr. Brownlie had, however, rightly noted that the issue of voluntary link was really a question of fairness or reasonableness in a broad context. The Chair had said that that could be covered in the context of reasonableness, presumably under subparagraph (a) of article 14. Personally, he failed to see how. He was happy to have the Drafting Committee consider where the issue of fairness and reasonableness should be placed, but did not want to see it left aside. If the Commission did not follow the idea of voluntary link, which incorporated part of that concept, albeit not very well, then it must address it separately and specifically; perhaps that was a matter for the Drafting Committee.

73. Ms. XUE said her point was that, as an exceptional rule, the voluntary link clause should be left out. The idea was useful for explaining why local remedies should be exhausted, but it would be wrong to conclude that when there was no voluntary link, diplomatic protection should be invoked. If the Commission wanted further arguments in favour of the rule on the exhaustion of local remedies,

it could add voluntary-link reasoning in the commentary, but not as an exceptional clause.

74. Ms. ESCARAMEIA endorsed the view of those members who felt that the question of voluntary link was a substantive question on which the Commission was very divided, and she agreed with Mr. Mansfield and others that it could not be included in subparagraph (a) of article 14. She did not think that the Drafting Committee was the appropriate place to resolve substantive differences of opinion. In any case it had a limited membership and did not necessarily reflect the differences of opinion in plenary. Was there not some mechanism for informal consultations in such cases?

75. The CHAIR said that informal consultations could be held, but that normally the matter was sent to the Drafting Committee which, although limited in membership, was open to all members of the Commission. If members did not endorse the Special Rapporteur's suggestions, another means of reaching agreement would have to be found.

76. Mr. PAMBOU-TCHIVOUNDA said that the comments by members had shown how difficult it was to achieve progressive development of law on such an old question. He did not think that the Commission should take the risk of considering something other than diplomatic protection. He was in favour of a traditional approach to the subject and was thus strongly opposed to including the so-called concept of voluntary link in the draft articles.

77. Mr. SIMMA said he shared Mr. Brownlie's view that the voluntary link concept did not belong in the list of exceptions to the rule on the exhaustion of local remedies. He therefore suggested submitting article 14 on two exceptions to the Drafting Committee and giving further thought to the question of voluntary link, either by holding informal consultations or by mandating the Special Rapporteur to produce a report incorporating the various views on the subject for the upcoming session. The Commission could still add something after article 10 or 11 if the preponderant view turned out to be in favour of voluntary link. The Commission could proceed with article 14, because voluntary link did not constitute an exception to the rule on the exhaustion of local remedies.

78. Mr. CHEE, noting that paragraph 83 (b) referred to the case of the shooting down of an aircraft outside the territory of the respondent State or of aircraft that had accidentally entered the respondent State's airspace as an exception to the rule on the exhaustion of local remedies, asked what happened if there were no relations between two States because of lack of recognition. When Korean Airlines flight 007 was shot down, the case had been taken up by ICAO, but as the Soviet Union and the Republic of Korea had not recognized each other, even if the injured persons had wanted to exhaust local remedies, it would not have been possible. Hence the need to take into account that recognition of a State was a precondition for the exhaustion of local remedies.

79. Mr. TOMKA said that the Commission should be careful about including the issue of voluntary link in the discussion of the justification of the rule on the exhaustion of local remedies, because it might then be argued that if there was no voluntary link, the rule did not apply. He was opposed to including the concept of voluntary link as an exception, because the rationale for the exhaustion of local remedies was to give a State an opportunity to redress an injury; only when it failed to do so could a local claim be transformed into an inter-State one. All other exceptions listed in article 14 had to do either with a State's legal system or with its behaviour, whereas the non-voluntary link exception as proposed was not related to the State, but to a person. The rule on the exhaustion of local remedies protected a State from international claims by giving it an opportunity to redress the injury caused to aliens. For that reason, there was no justification for including the absence of voluntary link as an exception.

80. Mr. OPERTTI BADAN said that he endorsed Mr. Simma's proposal that the Special Rapporteur should be asked to report on the subject at greater length and agreed with Mr. Brownlie that if the subject of voluntary link was referred to the Drafting Committee, the Commission first had to define what the concept meant.

The meeting rose at 1 p.m.

2719th MEETING

Tuesday, 14 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.
