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Summary record of the 1466th meeting

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text", in the chapter "Settlement of disputes", in connexion with the jurisdiction of the law of the sea tribunal to be established under the convention on the law of the sea.[6] That article had, however been omitted in the "informal composite negotiating text" currently under consideration.[7] He mentioned that fact to indicate the need for caution in developing a theoretical assumption, and on that basis a substantive rule, that no question of responsibility would arise, irrespective of the facts of the case, unless the local remedies had been exhausted. It was always dangerous to go to extremes. For instance, as Mr. Reuter had questioned, would the rule of exhaustion of local remedies also apply in the case of responsibility towards a third party in a third country? Recent examples of State practice indicated that it would be going too far to say that no responsibility would be generated until all the local remedies had been exhausted. Possibly, therefore, the best solution would be for the Commission to state the principle without taking a final position on the matter.

28. In conclusion, he considered that the Commission should devote one or two meetings to a substantive discussion of the question before referring it to the Drafting Committee.

29. The CHAIRMAN pointed out that the Commission had very little time. If the general debate was prolonged by more than one day, the Commission could not physically complete its work before the closing of the session on 29 July 1977. In view of the importance of the article, he considered that two meetings would be required for the general debate. He suggested that they take place the following day so that the matter could be referred to the Drafting Committee before the end of the week.

30. Mr. ŠAHOVIĆ said that, although he shared Mr. Reuter's concern, he thought the Commission had reached a point where it had to take a decision on the inclusion of the rule of exhaustion of local remedies in the draft articles. Article 22 was the logical consequence of the two preceding articles. The Commission therefore might discuss the exhaustion of local remedies but it should express a general reservation in the commentary to the article.

31. Article 22 raised the question of the nature of the rule of exhaustion of local remedies. On that point the Commission was on solid ground. As clearly shown in the report under consideration, there was no doubt that the rule was one of customary international law. The Special Rapporteur had dealt with the question of the limits of the rule, paying due regard to the literature, international jurisprudence and State practice. The text he proposed was perfectly in keeping with his analysis, and the limits he placed on the rule of exhaustion of local remedies reflected accurately the present stage of development of international law.

32. It was obvious that the article proposed by the Special Rapporteur left a number of questions unanswered, but he saw no danger in that. For the time being, it was important for the Commission to produce a draft article and a commentary which would give Governments an opportunity to indicate their views on the question. If the Commission became involved in a long and thorough discussion of all the problems to which the article could give rise, it might be unable to take a decision on the article at the current session and would thus fail in its duty.

33. In formulating draft article 22, the Special Rapporteur had endeavoured to reconcile the sovereign interests of the State charged with responsibility and those of the State of which the injured private persons were nationals. In addition, he had taken into consideration the various legal solutions which had recently been devised, particularly in the area of human rights, and which might one day be part of customary international law.

34. As a whole, the proposed article was therefore acceptable, having regard to the drafting problems involved in a provision of that kind and the theoretical difficulties which the Commission would not fail to encounter if it now tried to solve all the problems which the article posed.

35. Mr. SCHWEBEL said that he was unwilling to express his views on such an important article until he had had time to digest in full the Special Rapporteur's report. He therefore considered that members should be allowed time to study the report.

36. Mr. TABIBI too thought that members should be given time to read and reflect on the Special Rapporteur's report. The Commission should, however, devote as many meetings as necessary to the formulation of an article that would be acceptable to the Sixth Committee of the General Assembly.

37. Mr. USHAKOV, Mr. SETTE CÂMARA and Mr. QUENTIN-BAXTER agreed with the procedure outlined by the Chairman.

38. After an exchange of views, the CHAIRMAN suggested that the Commission devote two meetings on the following day to the general debate on draft article 22, and that the morning meeting be postponed until 11 a.m. to give members a little more time for reading. He further suggested that, on conclusion of the general debate, draft article 22 should immediately be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 6.15 p.m.

1466th MEETING

Thursday, 21 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-

[6] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 185, document A/CONF.62/WP.9/Rev.1.

[7] *Ibid.*, vol. VII (Sales No. E.77.V.10), document A/CONF.62/WP.10.

Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Draft report of the Commission on the work of its twenty-ninth session (*continued*)

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (*concluded*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

B. Draft articles on treaties concluded between States and international organizations or between international organizations (*concluded*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXT OF ARTICLES 19, 19*bis*, 19*ter*, 20, 20*bis*, 21-23, 23*bis*, 24, 24*bis*, 25, 25*bis*, 26-34, AND OF ARTICLE 2, PARAGRAPH 1 (*j*), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (*concluded*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLES 19-26 (*concluded*)* (A/CN.4/L.261)

*Commentary to article 19*bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) (*concluded*)*

Paragraph (6) (*concluded*)*

1. The CHAIRMAN announced that paragraph (6) of the commentary to article 19*bis* would remain as amended at the 1464th meeting.[1]

*The commentary to article 19*bis, *as amended, was approved.*

State responsibility (*continued*) (A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 22 (Exhaustion of local remedies) [2] (*continued*)

2. Mr. AGO (Special Rapporteur) said that articles 20, 21 and 22 formed a whole and that the rule in article 22 simply represented the application to a special case of the fundamental principle stated in article 21, paragraph 2. There were, of course, two categories of international obligation: obligations which required a State to adopt a particular course of conduct, either an action or omission—for example, an obligation to refrain from entering the territory of another State by armed force or from sending police into the premises of an embassy—and obligations which required a State to achieve a certain result, while leaving it free to choose the means of doing so.

3. Obligations relating to the treatment of aliens usually belonged to the second category. If there was an assault on a foreign official dignitary, the State had a duty to arrest and punish the perpetrator. If the local police failed to arrest him but the national police later intervened and succeeded in doing so, there was no breach of the obligation for the required result was achieved. Similarly, if the guilty party was acquitted by a lower court but subsequently, on appeal by the government authority charged with prosecution, was convicted by a higher court, the obligation was discharged. Likewise, in the case of an obligation to extradite, the result was achieved and there was no breach if, after a lower court had refused extradition, a higher court granted it. On the other hand, the fact that the first organ to deal with the matter acted in a manner consistent with the required result did not suffice to discharge the obligation, for a second body might overturn its decision. If, for instance, a lower court inflicted a penalty and its decision was subsequently quashed and the culprit acquitted by a higher court, there would be a breach of the obligation if the required result had been the punishment of the guilty party, and it would be the decision of the higher court which would mark the commencement of the process of breach. In that particular case, the State acted through a number of organs and it was not until the last body competent in the matter had given its decision that it could be said definitively that the obligation had been either discharged or breached.

4. In such an instance, the action of the State came within the category of complex acts mentioned in article 18, paragraph 5 [3] for it comprised a series of separate actions by various of the State's organs in the same specific case. It would therefore be a mistake to equate the act of the State with its first or last action in a case of that kind. It was not true that everything came down to the action of the first or the last organ to intervene in the matter. It was the totality of the acts of the State which constituted the performance or the breach of the obligation. Clearly, therefore, if it was concluded in a given case that there had been a breach of the obligation because the State had failed to achieve the required result by any of the means at its disposal, the wrongful act in question was one which extended over a period of time and embraced both the first and the last of the State's actions in the matter, with all the consequences which that might entail.

5. He would return to the notion of the complex act when he took up the question of the duration of the wrong. The content of the article he intended to devote to that question would necessarily derive from the content of article 18, paragraph 5, and article 22. It was obvious, in fact, that for a complex wrongful act the *tempus commissi delicti* was the entire duration of the breach, from the first to the last act.

6. Article 21, paragraph 2, took account of that situation and showed that, when an international obligation required the State to achieve a particular result, a breach of the obligation could not be said to be complete so long as an organ of the State could still act to achieve that result. Only when no organ of the State could take any further action to ensure the performance of the obligation could it be said that a breach definitively existed and that responsibility was generated.

* Resumed from the 1464th meeting.

[1] See 1464th meeting, paras. 15 and 16.

[2] For text, see 1463rd meeting, para. 1.

[3] See 1454th meeting, foot-note 2.

7. What marked the situation contemplated in article 21, paragraph 2, was the fact that the initiative in bringing in a new organ to correct the result produced by the conduct of the first organ lay with the State. It was obvious that, if a lower court acquitted the murderer of a foreign dignitary who had been on an official visit to the country, it was the State itself which must take steps to obtain the reversal of that verdict by a higher court. In such a situation, it was for the State to choose the means of producing the required result, as it was for it to correct the action of a lower body by that of a higher one.

8. The obligation to which article 22 referred constituted a special case of the obligations of result discussed in article 21. It required the State to ensure certain treatment for private persons. It might, for example, require that foreigners be permitted to exercise a certain profession or activity within the territory of the State, that they be granted recourse to domestic courts under the same conditions as nationals, that there be no interference with their property, and that they be given adequate compensation if subjected to measures of expropriation in the public interest.

9. The principle requiring the exhaustion of local remedies took precisely into account the fact that obligations of that nature were established for the benefit of certain persons and that it was normal for such persons to co-operate in achieving the result required by the international obligation. Thus, if a foreigner wished to exercise a profession or work a mining concession in a given State, he would have to begin by seeking permission from the competent authority. If such permission was refused, he would have to go to a higher authority to obtain a reversal of the decision of the first. Thus, the beneficiaries of the obligation must collaborate in the State's action to ensure its discharge. The principle of exhaustion of local remedies was therefore designed to ensure the intervention of all the organs of the State which actually had the possibility of securing the result required by the obligation. That principle however only derived logically from the principle which lay at the basis of the distinction between obligations of conduct and obligations of result.

10. If it was accepted that the principle of exhaustion of local remedies was related above all to the performance of the obligation, it became clear that a breach of the obligation could not be said to exist so long as the result which the obligation required could still be achieved. Consequently, international responsibility could not be said to exist and could not be invoked in an international forum or asserted through diplomatic protection. That was why, when opposing diplomatic claims, the respondent State generally relied on the principle of the exhaustion of local remedies to show that the obligation had not been breached because not all the available means of recourse had been exhausted.

11. He reminded the Commission that neither in practice nor in jurisprudence was there a single case justifying an assertion that the rule of exhaustion of local remedies was not linked mainly with the performance of international obligations of result concerning the treatment of private persons and, consequently, with the requirement that the breach be complete. In some cases, practice and jurisprudence had shed light on the effects of that rule on the generation of responsibility, while in others, as was natural in the case of international courts, they had shown its effects on the admissibility of a claim. But in no instance had they called in question the link which existed between the exhaustion of local remedies and the breach of the obligation.

12. Accordingly, all the practical problems which arose had to do with the limitation of the scope of the principle. There was a temptation to restrict the value of the condition of exhaustion of local remedies to the breach of obligations pertaining to aliens residing in the territory of the State and injured by acts committed in that territory. However, to do that would be to exclude all the other cases of application of the principle, thereby imposing on the State excessive responsibility and transforming in effect a whole series of obligations of result into obligations of conduct.

13. It was, of course, necessary to exclude cases in which the State had caused injury to aliens because they were aliens or because they were nationals of a particular country. For example, if a State decided to expel all the nationals of a certain country from its territory without warning, it was clear that the requirement of exhaustion of local remedies would not come into play for the remedies would have no effect. In such a case, the breach of the obligation existed and the responsibility of the State was engaged from the moment the measure in question was taken and applied.

14. The real problem arose with aliens who had no voluntary link with the State or who were victims of an act which occurred outside the State's territory. However, whatever the situation in question, there were always marginal cases in which the application of the chosen criterion would fail to produce satisfactory results—that of course was why there were so many appeals to international courts and arbitral settlements. In his view, it would be impossible to select a criterion which would eliminate all those marginal cases. He did not think that a limitation of the scope of the principle of exhaustion of local remedies to acts committed in the territory of the State was logically justified. Moreover, in neither the *Finnish Vessels* case nor the *Ambatielos* case [4] had either the arbitrators or the parties themselves attempted to oppose the application of the rule of exhaustion of local remedies by invoking the fact that the act complained of had occurred outside the territory of the State.

15. On the other hand, in the case of the vessels stopped and searched by France during the Algerian war, mentioned by Mr. Reuter,[5] the problem of the applicability of the condition of exhaustion of local remedies had arisen, the reason having been that, in the eyes of the French authorities, the war had not been a legitimate one between two subjects of international law and the efficacy of recourse to the French courts had therefore been in doubt. Similarly, it was perfectly obvious that, when a foreigner was the victim of an assault in the territory of a State

[4] For references, see A/CN.4/302 and Add.1-3, foot-notes 148 and 195.

[5] 1465th meeting, para. 16.

with which he had no link or when he was brought by force into the territory of a State, there could be no question of requiring the exhaustion of local remedies since it was already certain that those remedies would be ineffective. In every case, however, the criterion to be applied was that of the real efficacy of the internal remedies, which must not be merely formal but capable of actually bringing about the required result.

16. He considered that in the special situation cited by Mr. Reuter, where there was infringement both of the rights of a State and of the rights of foreign private persons, it was generally the infringement of the rights of the State which took precedence. That explained why he had not mentioned that situation in his report. For example, if a foreign warship carrying private individuals was sunk in a State's territorial sea, the infringement of the rights of the State would take precedence over that of the rights of the individuals, and it was probable in such a case that the parties would settle the whole affair, including the question of possible compensation of the individuals, as a single matter. However, it was not impossible that the settlement reached in a case of that kind would dissociate the two aspects of the affair and provide for the application of the principle of exhaustion of exhaustion of local remedies to the individuals.

17. He believed, however, that it would not be wise to make provision for cases of that type in the context of the general problem of determining the conditions of breach of international obligations, and to attempt to settle them in article 22. It would be better, in his view, to lay down a fundamental rule and not try to take into account all the possible special cases. The main thing was to stress that the principle of the exhaustion of local remedies, which was the fundamental condition for the co-operation of private persons in achieving the result required by the international obligation, was applicable only if those remedies were effective. If the local remedies were not effective—in other words, if it was in effect impossible to obtain the required result by their use—the principle would not apply for it would be clear that the result could not be achieved. When that was so, the non-performance of the obligation became definitive and international responsibility was generated.

18. Mr. FRANCIS expressed his appreciation of the Special Rapporteur's further clarifications.

19. After seeing the wealth of examples which the Special Rapporteur cited in his sixth report in connexion with article 22, it became impossible to deny his conclusion that the rule of exhaustion of local remedies was firmly established and universally recognized. He was gratified by the Special Rapporteur's recognition of the fact that the rule had procedural aspects, for in his opinion they were obvious: for example, the State whose nationals alleged that they were victims of a breach of an international obligation might wish to know what remedy they had employed, the State accused of the breach might reply that adequate local remedies had existed but had not all been exhausted, and the international tribunal to which the matter was ultimately referred might want to know whether in fact the local remedies had all been tried. The Special Rapporteur was absolutely right to assert that the rule was also a substantive one and that international responsibility was engaged from the point when recourse to the last locally available remedy had failed to produce the required result. Given the new material which had become available since the 1930 Conference for the Codification of international Law, in the form of practice and jurisprudence, the Commission would be failing in its duty if it did not move forward from the position adopted on the subject then and accept the Special Rapporteur's view.

20. The Special Rapporteur had emphasized in his report the importance of co-operation by the private victim in setting in motion the machinery for remedying the situation. With regard to the operation of that machinery, article 22 must be seen in conjunction with article 21, and particularly paragraph 2 of the latter, which afforded the State whose initial conduct had been at fault the time to choose new means of fulfilling its obligations and—a point which was of particular importance in relation to article 22—to assess the likely efficacy of such means. Consequently, the relationship of the rule of the exhaustion of local remedies to the rationale behind article 22 made inescapable the Special Rapporteur's conclusion that the rule of exhaustion of local remedies was a substantive one, generating State responsibility at the international level.

21. Despite the Special Rapporteur's comments at the present meeting in response to the points made by Mr. Jagota about article 22 (1465th meeting), he continued to feel that the last sentence of the article might be dangerous if adopted without qualification. He had in mind in that connexion, on the one hand, the fact that, as the Special Rapporteur had acknowledged in discussing article 21, States might deliberately attempt to frustrate the fulfilment of an international obligation incumbent upon them and, on the other, the conclusion the Special Rapporteur had drawn in his report to the effect that a remedy should not be used unless it held out genuine prospects of producing either the result originally required by the obligation or an equivalent outcome. In the light of those considerations, there seemed to be a clear need for an exception to the rule stated in the last sentence of article 22, which might otherwise open the way to international disputes by leaving a State free to argue that its international responsibility did not arise until local remedies—the success or use of which it might itself be preventing—had been exhausted.

22. The Special Rapporteur had quoted several instances in which the rule of exhaustion of local remedies had been applied in respect of events which had occurred outside the jurisdiction of the State which had been under an international obligation, but he wondered whether the cause for action in those cases might not have rested on a conventional basis or some express provision of municipal law. It was, after all, a fact that, in many countries, the moving of a court on an issue rested on the jurisdictional basis of the cause. Since the matter of jurisdiction was delicate, it might be best to seek the views of Governments before attempting to formulate a progressive and positive rule in that respect.

23. Similarly, it would seem prudent to examine the extent to which multilateral instruments such as the International Convention on the Elimination of All

Forms of Racial Discrimination and the International Covenant on Civil and Political Rights had been ratified and were applied before taking the step, in a codifying instrument, of extending the rule of exhaustion of local remedies to nationals of a State to which responsibility for the breach of an obligation might be attributable.

24. He had no objection to the referral of article 22 to the Drafting Committee.

25. Mr. RIPHAGEN said that, the Special Rapporteur's excellent report and impressive statements notwithstanding, he doubted whether the Commission could deal adequately with the question of exhaustion of local remedies in the time remaining to it. It seemed to him that, if the Commission was to adopt an article such as article 22, the limits of application of the rule should be dealt with, at least in the commentary. Perhaps, indeed, the question posed by the rule was so important as to require a number of articles.

26. So far as he could see, article 22 was based both on the notion that international obligations requiring a State to accord certain treatment to private persons were always obligations of result, and on the notion that it was the duty of the victims of improper treatment to co-operate in achieving the result required by the obligation in question by exhausting local remedies. It seemed to him that the second of those ideas went much further than the civil law concept of contributory negligence from the victim. There were also other questions which arose out of the dual conceptual basis of the article.

27. For example, the Special Rapporteur had given the impression that he felt the rule of exhaustion of local remedies was not applicable to cases falling under article 20. His own view, however, was that there could conceivably be obligations which came under that article but, at least to some extent, had a connexion with the treatment of private persons. Perhaps that point could be discussed in the commentary. Another question which necessarily arose from the dual conceptual basis of the article and which it might also be appropriate to clarify in the commentary was that of the relationship between article 22 and the subject dealt with in article 19, namely international crimes and international delicts. Not only had Mr. Reuter mentioned the matter at the previous meeting in relation to environmental damage, but there had already been discussion elsewhere of the question whether equal access for foreign interests to national procedures and substantive rules relating to the prevention of and reparation for environmental damage would entail the need to exhaust local remedies in cases of transboundary pollution.

28. With regard to the question of the duty of the victim to co-operate in ensuring the achievement of a result required by an international obligation, he said that he had some difficulty in seeing why there would be such a duty to co-operate where a State had acted outside the scope of its jurisdiction under international law. Although the limits of such jurisdiction were not entirely clear, it was generally agreed that they did exist. It therefore seemed to him that, if a State acted outside the scope of its jurisdiction, the victim of such action could not reasonably be asked to co-operate, through the exhaustion of local remedies, in ensuring the fulfilment of the State's obligation. Indeed, there was a clear analogy between cases in which a State cated outside the scope of its jurisdiction and cases in which the action of one State damaged the interests of another State which, because of State immunity, was not required to exhaust local remedies, even though such remedies existed.

29. Another aspect of the duty of the victim to co-operate had attracted his attention when he had read the last sentence of paragraph 108 of the Special Rapporteur's report, which stated: "It should be emphasized that, if the individual fails to advance in the course of the internal proceedings an argument which might have won him the case and if that omission is later revealed by the use of that argument before an international court, the court may find that the requirement for exhaustion of local remedies has not been duly met". In his opinion, that statement went a bit far for in a case of that kind it could be said that the individual had in fact co-operated by employing local remedies. Moreover, the arguments advanced in an international court would, of course, be arguments advanced by the State involved. In addition it would be pure speculation for an international court to say that, if the arguments in question had been advanced in the internal proceedings, they would have won the case. Indeed, it would have been more the fault of the lawyers in the case than of the victim if the best arguments had not been advanced in the internal proceedings. Thus, if the Commission carried the duty of the victim as far as the Special Rapporteur had indicated in his passage of his report, it would be overstepping the limits of what could reasonably be asked of the victim of an action by a State.

30. Another point of concern to him was that, in a case where a private person had a duty to co-operate in ensuring the achievement of an internationally required result, there could be no certainty that the result to be achieved through the exhaustion of local remedies would be the same as the result originally required by the international obligation. For instance, account had to be taken of the fact that, in most cases, the result achieved through international litigation would be only the economic equivalent of the originally required result. Account also had to be taken of a purely practical consideration, namely, that local remedies might be useless in cases where local courts were not empowered to apply the rules of international law, particularly if such rules were contrary to municipal law. In such cases, the exhaustion of local remedies could hardly be expected to produce exactly the same result as the one required by an international obligation. He was not therefore in favour of the broad application of the rule of exhaustion of local remedies.

31. Mr. EL-ERIAN said he had no difficulty in agreeing with the Special Rapporteur that the rule of exhaustion of local remedies was a rule of customary and conventional international law. With regard to the question whether it should be regarded as a substantive rule or as a rule of procedure, however, some doubts had formed in his mind when he had first read paragraph 51 of the report because he belonged to the school that considered it to be a rule of procedure relating to the international law

of claims, under which an individual must have sought redress before the municipal courts of the State before his claim could be espoused by his own State at the international level.

32. On reflection, however, he had decided that his initial doubts were unfounded. He could therefore accept the Special Rapporteur's approach to the particular situations with which article 22 was designed to deal and agree with him that the rule of exhaustion of local remedies was a substantive rule of international law, which applied in cases where a State was required to produce a particular result in the treatment of private persons, whether natural or legal, and where an action or omission leading to a situation incompatible with the required result would entail the international responsibility of the State if the person in question had previously exhausted local remedies without success.

33. His support of article 22, in its present form and in its present place in the draft articles, would nevertheless depend on whether the Commission was given another opportunity to consider the relationship between article 22 and all the other articles of the draft. In that connexion, he noted that the question of the existence of international responsibility was closely linked to the question of exhaustion of local remedies as had been shown in the Special Rapporteur's discussion, in paragraph 56 of his report, of the formula adopted by the 1930 Hague Codification Conference concerning the question whether international responsibility came into being before or after the exhaustion of local remedies. The Special Rapporteur had also discussed the relationship between those two questions in paragraph 71 of his report, in which he had described the background to the decision by the European Commission of Human Rights to the effect that "... the responsibility of a State under the Human Rights Convention does not exist until, in conformity with article 26, all domestic remedies have been exhausted ...".

34. Also, the Commission should consider the relationship between article 1, which provided that "Every internationally wrongful act of a State entails the international responsibility of that State", and the principle of exhaustion of local remedies since, in cases of a breach of the rules of international law governing the treatment of private persons, it was conceivable that international responsibility might exist even before local remedies had been exhausted. Indeed, in such cases, the State which had committed the breach might decide to compensate the person whose rights had been infringed even before he had resorted to the local courts. There were thus three possibilities: the wrongful act could be remedied either by the State, through the payment of immediate compensation; by the local courts, through the exhaustion of local remedies; or, failing those two means, through an international claim.

35. Mr. SCHWEBEL said that he fully agreed with the Special Rapporteur that the rule of exhaustion of local remedies was, and should continue to be, a rule of customary and conventional international law, even though it offered both advantages and disadvantages, as the Special Rapporteur had noted in paragraph 111 of his report. Such disadvantages could, however, be overcome by special arrangements that expressly or tacitly precluded the application of the requirement of exhaustion of local remedies. In that connexion, the Special Rapporteur had referred to the example of the inclusion in contracts between States and foreign private companies of arbitration clauses in place of provision for recourse to local courts. Generally speaking, however, both the sensitivity of States about the use of their internal legal processes and the desirability of settling disputes without raising them to the international plane were powerful arguments for maintaining the rule of exhaustion of local remedies. There was moreover no doubt, as the Special Rapporteur had so clearly shown in his commentary, that the rule had behind it a great weight of practice and that there were many cogent considerations of principle in support of its maintenance.

36. It was generally agreed that, where effective local remedies existed, an alien must exhaust them before the State of which he was a national could espouse his claim. Indeed, the Special Rapporteur had stressed the importance of the effectiveness of local remedies, noting, for example, that, in a legal system where the decrees enacted by a State were not subject to challenge, there would be no effective local remedies which the alien could be required to exhaust if, for example, the State enacted a decree violating the rights guaranteed to aliens under customary or conventional law. In that case, the international responsibility of the State which had enacted the decree would be engaged and the State of which the alien was a national could, if it so wished, espouse the alien's claim. In that connexion, he noted that the concept of "espousal of a claim" had been clearly explained in the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case.[6]

37. He was, however, of the opinion—and he hoped that the Special Rapporteur would agree with him—that the alien's Government might legitimately address the problem of an alleged violation of the alien's rights under international law at an earlier stage, before it was entitled to espouse the alien's claim and before international responsibility had been engaged. An example of such a situation could be found in the case of *Asakura* v. *City of Seattle*,[7] which had arisen out of a treaty of friendship, commerce and navigation between the United States and Japan, providing that the nationals of those two countries could engage in certain professional activities in the territory of both States. In that case, the city of Seattle had enacted an ordinance which had had the effect of preventing Mr. Asakura from exercising a professional activity guaranteed by the treaty in question. Although the ordinance had not been an *ad hominem* law, it had still not been very attractive because its purpose had been clearly xenophobic, if not racist. There had nevertheless been ample room for resort to local remedies, which Mr. Asakura had successfully exhausted, and the ordinance had been overturned. However, he did not think that, at the time when the city of Seattle had enacted the ordinance, the Government of Japan

[6] For reference, see A/CN.4/302 and Add.1-3, foot-note 189.

[7] *Annual Digest of Public International Law Cases, 1923-1924* (London, 1933), vol. 2, case No. 182, p. 314.

could not have reminded the Government of the United States of the relevant treaty provisions, which the action by the city of Seattle had plainly contravened. Thus, an expression by Japan of concern, and of confidence that the United States authorities would take the appropriate steps to remedy the situation, would not have amounted to espousal of Mr. Asakura's claim.

The meeting rose at 1 p.m.

1467th MEETING

Thursday, 21 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović ,Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 22 (Exhaustion of local remedies) [1] (*continued*)

1. Mr. SCHWEBEL, continuing his statement said that another example of a situation such as that in the case of *Asakura* v. *City of Seattle*, could be found in the case of the refusal of the New York Port Authority to grant landing rights to the Concorde. In that case, the very highest officials of the United Kingdom and France, although not espousing the claims of their nationals on the ground of a United States breach of an obligation engaging its international responsibility, had voiced great concern at what they regarded as the infringement of a treaty right given to their nationals. He hoped that the Special Rapporteur would agree that such expressions of concern were legally permissible. The question to be decided was whether there had been, in the case of *Asakura* v. *City of Seattle*, or whether there was, in the Concorde case, a breach of international law by violation of a treaty. Assuming, *arguendo*, that there was such a violation, was there then a breach of international law even before the exhaustion of local remedies and before international responsibility arose, with the resultant right to espouse a claim? The Special Rapporteur seemed to argue that, even if there was an apparent or actual breach of a treaty, there was no violation of international law until local remedies had been exhausted, because until that time there was an act which a State might correct. The Special Rapporteur argued that the State should not be held responsible until it had been definitely established that it would not correct its transgression.

2. He had no quarrel with that argument. Where he had a doubt was on the question whether there was not a breach of international law when the breach of a treaty took place, even though State responsibility had not been incurred. The Special Rapporteur said that there was no such breach and the reasons he had marshalled in support of his argument were plausible. Nevertheless, at the current stage of the Commission's consideration of the subject, his (Mr. Schwebel's) doubts persisted.

3. In the Concorde case, for example, local remedies had clearly not been exhausted; clearly, nationals of the United Kingdom and France had certain landing rights in New York by treaty; clearly, the United Kingdom and French Governments were of the view that those treaty rights comprehended the Concorde; and, clearly, Air France and British Airways argued a current violation of treaty rights. Did that not suggest that, from the point of view of the individual who set about exhausting his local remedies, the Special Rapporteur's analysis was not wholly satisfactory? The Special Rapporteur argued that, in exhausting local remedies, the alien was acting simply on the internal plane. Could he also argue that there could not be a breach of an international obligation without incurring international responsibility? Did that not also suggest that, if British Airways and Air France lost in the United States courts, and the United Kingdom and France brought a claim for damages as well as specific performance, their claim might date from the time of initial denial, not from the time of the Supreme Court's decision.

4. The individual, in exhausting local remedies, was, of course, acting on the internal plane, but was that the same as saying that he sought to bring about observance only of internal law? When a treaty between two States gave rights to the individual, were not those rights his rights, as well as being the rights of the State in certain circumstances? In the *Asakura* v. *City of Seattle* case, Mr. Asakura had been able to show that the treaty of friendship, commerce and navigation between Japan and the United States gave him rights that he could assert. Those rights became part of the internal law of the United States because in the United States international law was part of the law of the land. Thus, as Mr. Asakura had shown, treaty law overrode municipal ordinances. Mr. Asakura had also argued that municipal as well as international law was being transgressed. Surely, persons the world over, finding themselves in a situation similar to that of Mr. Asakura, could also argue that they were invested with rights by treaties. Would such an argument be premature? Was it premature to maintain that breach of a treaty was a breach of international law even though, by subsequent internal acts precipitated by the exhaustion of local remedies, the breach might be cured? The Special Rapporteur argued that it would be premature, because it was impossible to conceive of a wrongful act not engendering responsibility. He wondered, however, whether there could not be an act which was wrongful under

[1] For text, see 1463rd meeting, para. 1.