Document:-
A/CN.4/SR.1467

Summary record of the 1467th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

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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.

international law but which did not give rise to responsibility until the exhaustion of local remedies. Surely local remedies could apply and realize international legal claims.

5. Similarly, he did not agree with the statement made by the Special Rapporteur in foot-note 100 of his report (A/CN.4/302 and Add.1-3), that international law would never provide for the generation of a responsibility without another State having the faculty to enforce it as soon as it became apparent. International law and life were littered with rights available to States under international law which the States were unable to enforce. The Special Rapporteur maintained that breach of an international obligation and the genesis of international responsibility must be concurrent and coincidental. For the reasons he had indicated, he had some doubts on that point. Could it not be maintained that, when a treaty right was in the first instance denied, there was a breach of an international obligation, but that international responsibility was not generated until local remedies had been exhausted? He recognized that article 21 had implications for article 22. He also recognized all the force of the Special Rapporteur's arguments on the point.

6. Textual expression could be given to his doubts if, in the text of article 22 proposed by the Special Rapporteur the word "definitive" was inserted before the word "breach" at the beginning, the words "be and would" were inserted between the words "would" and "continue" near the end of the first sentence, and the words "in violation of international law" were inserted after the word "omission" in the second sentence.

7. He wondered, too, whether provision should not be made in the text for limits on the rule of exhaustion of local remedies. In that connexion, he supported the points made by Mr. Riphagen, in the 1466th meeting.

8. Mr. TABIBI said that article 22 was the most important article before the Commission. The differences between it and articles 20 and 21 were set out in paragraphs 47 and 48 of the Special Rapporteur's report. The rule proposed covered both the breach and the fulfilment of obligations of result. The Special Rapporteur seemed to be arguing that the principle of the exhaustion of local remedies was closely bound up with the development of international obligations regarding the treatment to be accorded by States to foreign, natural or legal persons, and to their property, and that a breach of an international obligation could not be established until the individuals who considered themselves injured by being placed in a situation incompatible with a result which the State was internationally required to achieve, had failed to get the situation rectified, even after exhausting all local remedies. He supported that approach. He also supported the draft article proposed by the Special Rapporteur, for recognition of the principle of the exhaustion of local remedies would afford protection both to the injured individual and to the State in whose territory the injury had occurred, and would prevent a recurrence of the situation which had prevailed when, on the pretext of defending the rights of their citizens abroad, the colonial Powers had committed grave crimes in Asia, Africa and Latin America.

9. He realized, however, that situations could arise in which application of the principle would be difficult. For example, which local remedies would have to be exhausted by an individual suffering an injury on the high seas? It was also possible that the process of exhaustion of local remedies would be deliberately delayed, for political reasons, either by the State concerned or by the home State of the injured person. It would also be necessary to consider whether the principle could be applied to diplomatic or consular agents in cases where the activities of such agents were neither wholly official nor wholly personal. Finally, there could be cases in which a State enacted a law violating rights guaranteed to an alien under customary or treaty law; in such cases, there would obviously be no local remedies to exhaust.

10. Referring to paragraph 111 of the report, he observed that it was not only individuals from rich and strong countries who required protection. Individuals from third world countries—the OPEC countries, for example—made considerable investments abroad and it was essential that their rights and property be protected.

11. In conclusion, he suggested that, at the present stage, the Commission should concentrate on stating a clear, simple principle. Later, when the views of Governments were known, the principle could be amplified to take account of contemporary international law. It should be noted that the cases referred to by the Special Rapporteur dated mainly from the 1930s and 1940s. As Mr Riphagen had said, what was needed was a series of articles covering the interests of all the parties concerned and meeting the requirements of modern international law. He agreed that the text prepared by the Special Rapporteur should be referred to the Drafting Committee so that a rule on exhaustion of local remedies could be formulated. He hoped, however, that later it would be possible to amplify the rule.

12. Mr. SETTE CÂMARA said that in his report the Special Rapporteur had developed a rationale which proved beyond doubt that local remedies must be exhausted before State responsibility could be established, and that the rule of exhaustion of local remedies should appear in the Commission's draft articles.

13. The exhaustion of local remedies often appeared as an exception to the application of international law somewhat in the same way as the domestic jurisdiction exception. However, whereas the domestic jurisdiction exception completely excluded international jurisdiction, the exhaustion of local remedies exception proclaimed the subsidiary character of international jurisdiction, thereby affirming its existence. It was interesting to note that in many cases, including the *Certain Norwegian Loans* case,[2] the *Aerial Incident of 27 July 1955* case [3] and the *Interhandel* case,[4] parties had invoked both the exception of domestic jurisdiction and the exception of the exhaustion of local remedies. That approach was contradictory because to invoke the rule of exhaustion of local remedies implied acceptance of the existence of international jurisdiction, but it had been adopted

[2] *I.C.J. Pleadings, Certain Norwegian Loans*, vols. I and II.

[3] *Ibid., Aerial Incident of 27 July 1955.*

[4] *Ibid., Interhandel.*

by States. Both the exception of exhaustion of local remedies and the exception of domestic jurisdiction had originated as devices for safeguarding State sovereignty. From the point of view of international law, it was preferable to accept the solution of exhaustion of local remedies rather than that of domestic jurisdiction, which simply did away with international jurisdiction.

14. With regard to the Special Rapporteur's draft, he agreed that an article on the exhaustion of local remedies should be included. It would be for the Drafting Committee to examine the wording thoroughly and produce a clear formulation. A question to be decided was whether the Commission should depart from past practice, as the Special Rapporteur advocated, and assume that the principle of the exhaustion of local remedies was applicable not only to the treatment of foreigners but also to the treatment of nationals. It must be borne in mind that a question of codification was involved and that the practice advocated by the Special Rapporteur was completely contrary to the historical origins of the clause, which had been designed to protect national sovereignty. He did not think the notion that the nationals of a State should be subject to international jurisdiction in certain cases would find wide acceptance. Personally, he would recommend adherence to the traditional view that the principle was applicable only in cases relating to the treatment of foreigners.

15. If the Commission shared his view, the question of the position of the article would arise. As proposed by the Special Rapporteur, article 22 followed naturally on articles 20 and 21 but, if application of the principle was limited to the treatment of foreigners, the article should appear either in a special chapter or as a subparagraph to paragraph 1 of article 21. That was a matter to be decided by the Drafting Committee.

16. Mr. USHAKOV said that, despite the Special Rapporteur's oral explanations, there remained a certain number of difficult legal and political questions to be settled. The article under study concerned a special category of obligations of result. When the international responsibility of a State was engaged, it was generally towards another State which had been injured by the breach of an international obligation. In the event of a breach of a fundamental principle of international law, however, a State could be held responsible towards the whole international community. Thus, an act of aggression harmed not only the State against which it was directed but the international community as a whole. Article 22 concerned a particular case of responsibility of a State towards another: the breach of an obligation of result pertaining to the treatment of foreigners. There existed, in that sphere, a number of obligations deriving from rules which were of a primary nature and with which the Commission was therefore not concerned at the moment.

17. The institution of diplomatic protection had its origin in the link which bound a State and its nationals, even when the latter were in the territory or under the jurisdiction of another State. That other State, for its part, was bound by customary or conventional international obligations to accord certain treatment to foreign natural and legal persons. If the other State harmed foreigners, it was considered that the State of which they were nationals had also been harmed and that it had a subjective right to make a claim. Nevertheless, it was only as from a certain moment that a State could intervene to protect its nationals within the limits recognized by international law.

18. From the point of view of the State in whose territory the foreigners were, the situation was that those foreigners were protected by certain rules of international law and by the international obligations assumed by that State in regard to the treatment of foreigners. Nevertheless, since the events liable to injure the foreigners occurred in the territory and under the jurisdiction of that State, another principle came into play, namely, that of non-interference in the internal affairs of States. That was what explained, both politically and historically, the existence of the rule of the exhaustion of local remedies.

19. The rule derived from the fact that small and weak countries had felt the need to defend themselves against large and powerful ones, which had tried to protect their nationals by means which were now prohibited. The result was that a State could not take up the cause of its nationals as soon as they had suffered injury because an authority of another State had acted towards them in a manner incompatible with an international obligation incumbent on that State with respect to the treatment of foreigners. The injured party, whether a natural or a legal person, must first apply to a higher administrative or judicial authority. At that stage, the link between the State of which the injured person was a national and that person himself did not count.

20. One must not be led astray by the special case of international obligations relating to human rights. By those obligations, States undertook to adopt internal measures to accord certain treatment for their own nationals. When such persons instituted legal proceedings, they invoked an international obligation of the State of which they were nationals and it was the rule in article 20 which then applied. It was incumbent on that State to adopt the conduct required by the instrument relating to human rights from which the international obligation in question derived, or to remedy the situation created by its initial conduct if the obligation was one of result. The international responsibility of that State might be engaged, but another State would never be entitled to interfere in its internal affairs; special machinery existed for verifying the discharge of international obligations relating to human rights.

21. Presented in that way, the rule of exhaustion of local remedies was easy to understand; it was no doubt more difficult to state it in an article and even more difficult to enforce it. Clearly, there could only be internal remedies when the law of the accused State contained a rule relating to the treatment of foreigners and that rule had been broken by an organ of the State. No remedy was possible in the absence of such a rule. And it was only when the highest authority of the State in question had refused to give satisfaction to the injured person that the international responsibility of that State was engaged and the State of which the injured person was a national could intervene at the international level. If the latter

State took action earlier, it would be guilty of gross interference in the internal affairs of another State.

22. With regard to the wording of article 22, he intended to submit to the Drafting Committee a text reading:

> "A breach by a State of an international obligation requiring it to accord certain treatment to foreign individuals, whether natural or legal persons, exists only if, after conduct of that State not in conformity with the international obligation, the said individuals have exhausted without the desired result the remedies which were available to them under the internal law of that State to obtain the required treatment or appropriate compensation."

23. The text showed that the internal obligation must be considered as having been breached when no remedy was available to the individuals concerned under the internal law of the State in question. It was important to make it clear that, in the case covered by article 22, a rule of internal law had been broken but it was still possible to remedy the resultant situation by appealing to another authority.

24. The "desired result" referred to in the text he proposed could be partial. In the last analysis, the questions whether remedies were available and whether the desired result had been achieved should be decided according to the circumstances of each particular case but, for the moment, the Commission must avoid setting concrete cases.

25. Mr. JAGOTA reminded the Commission that, in his preliminary remarks at the 1465th meeting, he had emphasized that, in draft article 22, the Commission was required to deal with the application of State responsibility to a specific aspect of the obligations of States. It was not required to consider the substantive rules relating to the treatment of foreign individuals and their property, the enforcement of responsibility through diplomatic channels or adjudication, and the protection of human rights. He had therefore been concerned to ensure that the Commission's work on responsibility did not adversely affect or prejudge the law being developed on those matters in other forums and in other contexts. There was also the question of jurisdiction. In the case of human rights, for example, exhaustion of local remedies was still a matter for domestic jurisdiction, and in his view it was a little too soon to require countries to accept compulsory international jurisdiction. For those reasons, he considered that the expression "individuals, natural or legal persons", in draft article 22, which the Special Rapporteur had defined to mean not only foreigners but also nationals, should be modified so that it applied to foreigners only.

26. He fully agreed with the Special Rapporteur that the rule of exhaustion of local remedies was a part of general international law, whether customary or conventional, and that the application of the rule could be restricted, or even superseded, by provision for arbitration or by compensation agreements, as stated in paragraph 111 of his report.

27. With regard to the nature of the rule, the Special Rapporteur had stated, in paragraph 92 of his report, that the rule consisted of a main proposition and a corollary. The corollary was that, unless and until the local remedies had been exhausted without satisfaction, there could be no enforcement either at the diplomatic level or through adjudication. He accepted that aspect of the rule and the reason for it, namely, the sovereignty of the State. The beneficiaries under the rule had an obligation to respect the system which they alleged had violated international law and to seek a remedy under it, thereby giving the State a chance to rectify the allegedly unlawful act by compensation or some other means.

28. He could not altogether accept, however, although he did not reject it outright, the main proposition which related to the establishment of responsibility. The essence of draft article 22 was to be found in the last sentence: while he approved of the words "possibility of enforcing it", he considered that the provision that international responsibility for the initial act or omission was not established until after local remedies had been exhausted without satisfaction required further examination. It might happen that the initial act was not in conformity with the requirements of international law, in which case there would be a *prima facie* breach of the international obligation, entailing responsibility. If the rule of exhaustion of local remedies was then applied, the effect might be to extinguish or dilute the responsibility.

29. The Commission should guard against such an eventuality by providing for a clear exception, which would dispel much of his concern. The Special Rapporteur however, argued that there was no need for such an exception because of the twin elements of the rule, namely, availability of the remedy and effectiveness of the remedy: if the initial act was discriminatory or if the treatment of foreigners was prejudicial to them or if no remedy or forum was available, clearly the rule would not apply. That might indeed be so, but the rule could lend itself to interpretation as to the nature of the remedy available, which could in turn become a matter of dispute. Admittedly, assuming that a local court in a country which did not apply international law, acting under a statute by which it was bound, expropriated foreign interests without the payment of compensation, the application of the rule of exhaustion of local remedies would be a mere formality; consequently, no effective remedy would be available and the rule would not apply by virtue of its own terms. To avoid any controversy, however, it would be far better to provide expressly for an exception. He would therefore advocate some form of wording to ensure that the application of the rule did not dilute responsibility for a patently unlawful act. That element of responsibility, which was the corner-stone of co-operation in regard to the treatment of individuals, was the concern of the material law on the subject.

30. He considered that the question of the point at which responsibility should be established—whether before or after the exhaustion of local remedies—required further consideration. Should the Commission decide otherwise, however, he would not raise any objection.

31. Apart from the question of nationals, he agreed with the Special Rapporteur regarding the scope of the article and the question of territoriality. More attention could, however, be paid to the question of privileged persons, which was increasing in importance by reason

of the participation of State bodies and State funds in economic development and the advent of mutual co-operation agreements. The procedural aspects of questions relating to restricted immunity likewise required further examination: in such cases, the rule of exhaustion of local remedies must obviously apply where there was no immunity from local laws.

32. Lastly, he fully agreed with the Special Rapporteur's remarks, in paragraph 100 of his report, about the need to ascertain whether a person had entered a country by accident or against his will. However, in view of the questions of jurisdiction involved, he considered that those remarks should be qualified by a reference to the requirement of some nexus based, for example, on residence, location of property or a contract.

33. The CHAIRMAN said that, as he saw it, the draft article should state the central rule embodying the concept of exhaustion of local remedies and the need for those remedies to be available and effective, which was probably the essence of the matter. So far as limitations to the rule were concerned, they could either be stated in the draft article or explained in the commentary.

34. Mr. NJENGA said he had studied the Special Rapporteur's excellent report with great interest and endorsed much of its content.

35. The rule that local remedies must be exhausted before the State could intervene was certainly substantive and not procedural. It was based on sound and judicious principles, designed to prevent unnecessary intervention in the domestic affairs of States, and was borne out by State practice and jurisprudence. Two types of right were involved: private rights and rights of the State. The latter, however, could be infringed only as a result of an injury suffered by the private person; until that happened, and in the absence of other remedies, it could not be argued that the State should intervene to protect him. Any other attitude would mean that there would be no end to intervention by States on behalf of their nationals who, in most cases, voluntarily chose to live in a particular jurisdiction for their own benefit. By so doing, they placed themselves under the sovereignty of the State in question and could not therefore turn to their own State every time they suffered injury, instead of availing themselves of local remedies.

36. One point on which he had some misgiving, and which might perhaps be examined on second reading or possibly by the Drafting Committee at the present session, was that the rule was stated in such categorical terms. In his view, whenever it was clear that no effective remedies existed, a proviso should be available to meet the situation. There was no point in laying down a rule and making it subject to the existence of effective remedies for, in the proved absence of such remedies, there would have to be some mechanism for settling disputes.

37. For example, where an injurious act was performed outside the territory of the State, it would be difficult to apply the rule because the State's jurisdiction in the matter was limited. The Commission should therefore see whether an exception, or at least a qualified exception, could be made to cover cases where there was no jurisdiction.

38. A more serious situation arose where the subsidiary organs of a State were not in a position to provide local remedies. If, for example, there was discrimination against foreigners and their property as a matter of State policy, an attempt to exhaust the local remedies would be a meaningless exercise. That situation too should therefore be made the subject of an exception.

39. Another situation calling for an exception was where law and order had broken down in a country and foreign nationals suffered infringement of rights and serious loss as a consequence. If they were required to return to the country in question in order to exhaust the local remedies, they might well be in jeopardy. Kenyan nationals had been in that position and had not been required to exhaust the local remedies, because the Kenyan Government had felt that the States in question had broken their obligations, thereby incurring international responsibility, and it had decided that it was its duty to protect the rights of its nationals.

40. There was also the case of non-resident aliens, which the Special Rapporteur did not consider should be the subject of a specific exception. There were, however, cases known to him of seamen, hired in foreign ports to serve on ships sailing under a foreign flag or a flag of convenience, who had suffered an infringement of their rights, entailing international responsibility. It would obviously be quite impossible to require those seamen to go to the country where the vessel was registered and exhaust the local remedies there before their case could be taken up by the State. In such a situation, local remedies were ineffective and a proviso to the rule should be available.

41. Perhaps the Special Rapporteur might explain why he was so opposed to any proviso, since the rule would in fact be strengthened if it contained exceptions or restrictions instead of relying on the "necessary effectiveness" of the local remedies.

42. Lastly, he realized that it would be premature to extend the rule to nationals and that its application should therefore be confined to the treatment of foreigners.

43. Mr. QUENTIN-BAXTER said that he had derived great benefit from his reading of the Special Rapporteur's comprehensive report and such difficulties as he saw tended to be at the level of expression and drafting rather than at that of principle.

44. He had been struck by the enormous range of the subject; in his view, the Special Rapporteur's discussion of the authoritative opinions brought home the fact that the question was not ripe for detailed treatment. At the same time, the Commission had recognized that the rule of exhaustion of local remedies was a sub-rule; consequently, there was a problem of reconciling a particular and a general point of view. The very first lesson to be drawn from experience, or so it seemed to him, was that in such very general articles the Commission was, to a certain extent, adopting a negative technique and ensuring above all that the positive steps it took did not have unforeseen consequences for other aspects of the law. The primary purpose of the Special Rapporteur's study was not to enable the Commission to codify the

principles and issues that emerged from it but rather to make certain that what it did codify did not conflict with principles that properly belonged to a more detailed and specialized study of the rule.

45. Like most of his colleagues, he had no doubt that the rule was a substantive rule of law, which bulked quite large in the practice of States in their conception of their relationship to other States. In the final analysis, however, obligations were always measured in terms not of substance and procedure but rather of primary and secondary rules. For many, there was a substantive primary element in the rule of exhaustion of local remedies, and any reference to exhaustion of local remedies as the genesis of responsibility implied that the obligation was breached by a complex act which was not complete until the rule had been applied and had failed to produce the correct result. That was a perfectly valid point of view because, in certain cases, the whole conception of the rule of exhaustion of local remedies was, in a sense, a counterpart to the conception of State sovereignty and the responsibility of the State arising through the actions of each of its government organs; in other words, respect for the sovereignty of the State in matters linked to the internal order of that State permitted it to be judged not by what was done initially or by any one organ but only by the test of whether every means at the disposal of the State under its internal order had been applied.

46. There was another important corollary in comprehending the place of the rule in the draft. If he had understood the Special Rapporteur rightly, the rule was not intended to limit the obligations of States which arose in some other way. For example, the breach of a treaty obligation might immediately give rise to international responsibility vis-à-vis the other State concerned, regardless of whether nationals of that other State had suffered from the breach and whether, if they had pursued any local remedies available, the first State was liable on that count too. That seemed to be quite clear as a matter of doctrine and from the presentation of the report, but in the actual drafting of the rule care should be taken not to suggest that it evacuated some responsibility towards another State which existed independently of the rule.

47. He had no real difficulty regarding the relationship of the rule to article 20. Once it had been agreed, under a different kind of obligation, which might well be one of conduct, to carry out the specific terms of a treaty requirement, that obligation could exist quite independently of the question of responsibility to achieve a given result in regard to the private persons affected.

48. He was, however, a little concerned about the relationship of the rule to article 21. He noted in that connexion that the Special Rapporteur had referred to the rule as being in a sense a sub-aspect of article 21, as indeed it was. At the same time, he was pleased to see the the rule appear as a separate provision for he did not think it could appropriately form part of article 21. The Commission was bound to leave open the question of the moment at which international responsibility arose and, in that respect, there must be a significant difference in the drafting of the two articles.

49. With regard to the State itself, the Special Rapporteur had referred in paragraph 103 of his commentary to the modern tendency for States to participate more directly in commercial concerns. The Commission's discussions on succession to State property and debts suggested that it should go even further than was suggested there, since all members had apparently been willing to contemplate the circumstance that an international person —a sovereign State or international organization—could, if it chose, accept obligations at the domestic level under the internal law of another State and that, if it did so, the procedures applicable to its legal remedies were the same as for private persons. He saw no reason in principle why the rule of exhaustion of local remedies should not apply to a Government which, for example, chose to buy bonds issued by another Government on terms regulated by the latter's internal law. That seemed a perfectly reasonable extension of the application of the rule.

50. At the present stage, the rule had little to do with nationals, although the Special Rapporteur had rightly drawn attention to the treaty provisions relating to the rule.

51. He was somewhat concerned also about the statement in the commentary that obligations in regard to nationals were for practical purposes of a conventional nature only. It was necessary to bear in mind the shadowy borderline between what belonged to the treaty itself and what belonged to the common heritage of received law arising under the United Nations Charter. It was also necessary to recognize that the Commission was at present drafting secondary rules and was not advancing by one iota any obligations whatsoever of the State towards its own nationals but simply providing a matrix against which positive obligations could be measured.

52. Lastly, the distinction between aliens and nationals should not receive undue emphasis in the draft since that would simply lead the Commission back to some of the difficulties which had beset Mr. García Amador's draft long before. It would be wiser to rest on the general proposition that the Commission's work on the present draft had nothing to do with the making of primary rules and was solely concerned with drawing up a system of secondary rules which would not in any way constrain or prejudge developments in the primary field.

The meeting rose at 6.15 p.m.

1468th MEETING

Friday, 22 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-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.