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DIPLOMATIC PROTECTION

Statement of the Chairman of the Drafting Committee, Mr. James L. Kateka

Mr. Chairman,

I have the honour to introduce the second report of the Drafting Committee for the 55th session, dealing with the topic Diplomatic Protection. The report is contained in document A/CN.4/L.631.

The Committee held five meetings on the topic from 8 May to 14 May and on 28 May 2003, respectively.

Before proceeding to the introduction of the Committee's report, I would like to thank the Special Rapporteur for the topic, Mr. John Dugard, for his guidance and cooperative stance. His assistance has proved valuable to the Committee in its work this year. I would also like to express my appreciation to the other members of the Committee for their active participation and cooperation with the Chair.

Mr. Chairman,

If you recall, the Committee commenced its work on the topic Diplomatic protection last year, resulting in the adoption, on first reading, of articles 1 to 7 [8], covering Parts One and Two of the draft articles.

This year, the Commission turned its attention primarily to the articles which had been referred to it in the last two years concerning the exhaustion of local remedies rule. It also had before it several articles on the diplomatic protection of legal persons, transmitted to it this year, but, owing to a lack of time, was only able to work on the first such provision. However, it was decided to postpone the referral of

that provision to the plenary until next year's session, so as to allow the Drafting Committee the opportunity to present next year all the provisions on legal persons to the plenary in one single package.

Before turning to the individual articles themselves, allow me to say a few words about the structure of the draft articles. As already explained, the draft articles adopted last year covered Parts One and Two, dealing with general provisions and natural persons, respectively.

This year, the Committee decided to include the articles on exhaustion of local remedies in a separate part, so as to be applicable to both the part on natural persons and a future part on legal persons. Indeed, the Committee envisaged the eventual structure of the draft articles to include a Part Three on legal persons, followed by a Part Four on the exhaustion of local remedies rule.

As the articles on legal persons were only discussed at this year's session, a few weeks ago, the Drafting Committee did not have them in front of it at the time it considered the articles relating to the exhaustion of local remedies rule. Therefore, it renumbered the articles which were previously proposed by the Special Rapporteur as articles 10, 11 and 14, to follow on the numbers of the articles adopted last year. Hence, former article 10 is now article 8, former article 11 is now article 9 and former article 14 is now article 10. This is reflected in the usual manner by stating the previous number of the article in square brackets after the new article number.

However, having said so, it is anticipated that once the Drafting Committee completes its work on what will become Part Three on diplomatic protection of legal persons, new articles 8 [10], 9 [11] and 10 [14], will have to be renumbered as they will be incorporated into a new Part Four. Hence, footnote 1 places a marker for the future, with a view to ensuring that the articles will have to be renumbered once again.

As for the title of Part Four, the Committee considered the term "exhaustion of local remedies" or "local remedies". It decided on the latter, so as to avoid giving the

same title to the part and to article 8 [10], which would be entitled “exhaustion of local remedies”.

Article 8 [10]

Mr. Chairman,

The first article considered by the Drafting Committee was former article 10, now renumbered article 8 [10]. The provision seeks to codify the customary rule requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. There was no dispute during the plenary discussion that this is an accepted rule of customary international law. The Committee considered the provision on the basis of the text proposed by the Special Rapporteur.

Paragraph 1

As regards paragraph 1, the Committee retained the basic thrust of the Special Rapporteur’s proposal, but streamlined its formulation. Allow me to point out some aspects of the provision. First, it should be noted that reference was made in the articles adopted last year to the “presentation” of the claim, not to the “bringing of the claim”. However, it was felt that in the present context the word “bring” more accurately reflects the process involved, and that the word “present” suggested a formal act to which consequences are attached, and was best used to identify the moment in time when a claim is formally presented.

As for the reference to “bring an international claim”, alternative formulations were considered, such as “exercise diplomatic protection in respect of an injury”. However, it was felt that such a formulation would cover a much longer time frame, including the moment of the initial presentation of the claim, while in the present context, the relevant moment of time is that when the claim is presented. It is at that point that the requirement of the exhaustion of local remedies arises. The Committee was, furthermore, of the view that, while in previous articles reference is made solely to “claim”, not “international claim”, it was clear in those cases that one is dealing with an international claim, because reference is made there to the exercise of

diplomatic protection. However, in the context of the local remedies rule, there exist various possible types of claims, therefore necessitating the more specific reference to "international" claims. The Committee also decided to align the text closer with draft article 1 adopted last year, by replacing the reference to the claim "arising out of" an injury with "in respect of".

The Committee further decided to amend the provision in light of the inclusion of certain exceptions to the nationality rule in article 7 [8], dealing with the cases of stateless persons and refugees in certain circumstances, by adding the phrase "or other person referred to in article 7". As you can see from the footnote to the paragraph, the Committee has left the door open to the possibility of amending the provision in the case of any further exceptions to the nationality rule that the Commission might see fit to include in the draft articles in the future. The Committee decided to omit the phrase "whether a natural or legal person", contained in the original proposal by the Special Rapporteur, as being unnecessary since the draft articles will as a whole deal with both natural and legal persons. The text was further aligned with the texts adopted last year by replacing the reference to "injured national" with "injured person".

As for the concluding phrase "all local remedies", the Committee first discussed whether the original version, namely "all available" remedies, would impose too high of a requirement on the injured national. However, the prevailing view was that the provision should be read in light of draft article 10 [14], so that the injured national is required only to exhaust all available local remedies which provide a reasonable possibility of an effective remedy. Furthermore, the original version of the test, as proposed by the Special Rapporteur, made reference to "legal" remedies, so as to encompass both judicial and administrative remedies, but not including remedies as of grace or favour. The Committee further streamlined the text by reducing the number of adjectives attached to the word "remedies".

Finally, I might also mention that the Committee took note of suggestions made both in the Plenary and in the Sixth Committee, that a reference be included in article 8 [10] to the local remedies being adequate and effective. However, the Committee noted that the principle of effectiveness is dealt with as a separate provision in article 10 [14], and it preferred not to deal with the principle of effectiveness in article 8 [10].

The main reason for this relates to the onus of proof, which is on the respondent State to show that there are available remedies, as per article 8 [10]. Conversely, the onus of showing that there are no adequate and effective remedies, as envisaged in article 10 [14], is on the applicant State. Therefore, the Committee preferred to provide for the principle of effectiveness in a separate article.

Paragraph 2

Paragraph 2 defines the scopes of the phrase "local remedies" in paragraph 1. It reflects the principle, enunciated in various judicial decisions, that remedies should be judicial or administrative in nature or before authorities which do recognize a right which may lead to a remedy. It should not matter whether the courts or authorities are ordinary or special. The emphasis is on the fact that the remedies must be open as of right and not as of favour or grace to the injured person.

As was mentioned in the context of paragraph 1, the original version by the Special Rapporteur made reference to "legal" remedies. The Committee considered the possibility that limiting the text to "legal" remedies might exclude other types of remedies, such as access to an ombudsperson, as a form of an administrative remedy. At the same time, it was realized that ombudspersons have different powers in different jurisdictions, making it difficult to draft an appropriate provision. Indeed, the Committee noted that in some jurisdictions there exist "authorities", such as ombudspersons, which only have recommendatory powers. It was considered unnecessary for such remedies to be exhausted in order to satisfy the exhaustion of local remedies requirement in paragraph 1. Indeed, such conclusion also arose out of the application of article 10 [14], in the sense that such non-binding remedies would not provide a reasonable possibility of effective redress. The commentary will make it clear that when the local remedies cannot result in a binding decision, they should not be considered to be local remedies that have to be exhausted. Instead, what is being referred to is the normal legal system, i.e. remedies that have binding consequences. The Committee decided to replace the reference to "authorities" with "bodies", since "authorities" could carry with it a discretionary connotation, while the reference to "bodies" implies some sort of structure. I should note at this point that, following the deletion of the reference to "legal" persons in paragraph 1, the same deletion was

made in paragraph 2. However, as was already mentioned, such deletion was done largely for stylistic reasons, namely to limit the number of adjectives attached to the term "remedies", and does not affect what I have just stated about the type of local remedies that have to be exhausted. In other words, what I have said applies equally to the phrase "local remedies".

In terms of further modifications, the reference to "natural or legal" persons was deleted, and replaced with "the injured person", and the Committee further decided to add at the end of paragraph 2 the phrase "of the State alleged to be responsible for the injury" so as to add a further precision to the concept of "local remedies".

As I have already mentioned, the Committee decided on the phrase "Exhaustion of local remedies" as the title for article 8 [10].

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Article 9 [11]

Mr. Chairman,

Article 9 [11] is concerned with the classification of claims for purposes of the applicability of the exhaustion of local remedies rule. It is the "Mavrommatis principle", namely an injury to the national is an injury to the State. In these articles we are dealing with such "indirect" injury to the State, and the exhaustion of local remedies rule therefore applies in such circumstances. It does not apply in cases of "direct" injury to the State. Hence, the need for a provision indicating when an injury amounts to "indirect" injury to the State as opposed to "direct" injury, for purposes of determining whether the local remedies rule is applicable, indeed, whether the act in question is governed by these draft articles at all.

As for phraseology, no doubt the first thing you will notice is that the terms "direct" and "indirect" do not appear in the article, largely to take into account the concerns by certain members of the Commission about such terms in languages other than English.

The problem at hand was to draft a provision that requires exhaustion of local remedies only in the context of indirect injury. However, in some cases, on the facts it is not clear whether the injury is to the State directly or the State through the individual. The Committee considered two possible tests for determining whether an injury is direct or indirect: first, the preponderance test, approved in both the ELSI and Interhandel cases, whereby the injured individual is obliged to exhaust local remedies where the claim is preponderantly one that relates to the injured individual as opposed to the State. The second test, was the *sine qua non* test, i.e. whether the claim would have been brought were it not for the injury to the national.

The Committee proceeded on the basis of the proposal of the Special Rapporteur which, if you recall, employed both tests so as to emphasize that the injury to the national must be the dominant factor in the bringing of the claim if the local remedies are to be exhausted. However, the Committee observed that the International Court of Justice, in the Interhandel case, had only resorted to the first of the two tests. Furthermore, while the Court in the ELSI case had noted the existence of both tests, it had not required that they both be exhausted in combination.

One proposal was to use both tests in the alternative. However, the prevailing view was that the preponderance test had received most attention in judicial decisions. It was thus agreed to retain only the preponderance test in the article, and to deal with the other test in the commentary. It was also maintained that the "but for" test raised difficult issues of onus of proof.

Furthermore, the original proposal of the Special Rapporteur contained an exposition in square brackets of the various factors that may be taken into account in determining whether the claim is preponderantly weighted in favour of an indirect claim, or whether the claim would have been brought but for the injury to the national or not. The Committee, however, took into account the prevailing view of the Commission that it was not desireable to legislate by example, and therefore decided that it was not necessary to include the examples in the provision. Instead, these examples will be discussed in the commentary to the article.

As was done in article 8 [10], the Committee decided to align the provision with the draft articles adopted last year, by recognizing the exceptions to the nationality rule in article 7 [8]. It, therefore, decided to include the phrase "or other person referred to in article 7 [8]". I may mention at this point that the Committee did consider including an entire separate provision, in an earlier Part of the draft articles, that would provide that the term "national" includes, *mutatis mutandis*, persons referred to in article 7 [8]. However, this proposal was not adopted.

Finally, as regards the title for article 9 [11], the Committee considered two options, namely "claims of a mixed character" and "classification of claims", and settled for the latter.

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Article 10 [14]

Mr. Chairman,

I turn now to article 10 [14], concerning the exceptions to the local remedies rule. If you recall, this provision was proposed by the Special Rapporteur in his third report, considered by the Commission last year. The Drafting Committee spent the majority of its time on this article. This due to both the length of the article and to the complexity of some of the issues it raised, particularly in relation to the question of "voluntary link", which I will revert to shortly.

As you can see, the provision is structured in the form of a chapeau, stating simply that "[l]ocal remedies do not need to be exhausted where", followed by a list of four situations, which are posited as exceptions to the basic rule. I might mention here that there was some discussion in the Committee whether the last such exception in paragraph (d), relating to waiver, was really an exception or not. I will return to this issue when I get to that provision.

In adopting the four exceptions, the Committee based itself on the basic proposal of the Special Rapporteur (contained in what was then article 14), but

rationalized the text, from what were five exceptions[1] down to four, mostly along the lines suggested during the plenary debate last year. In addition, the exceptions were reordered so as to group those provisions related to the effectiveness and nature of the local remedies rule together, while placing the provision dealing with the more unique situation of waiver last.

Paragraph (a)

Mr. Chairman,

Paragraph (a) deals with the situation where, even though local remedies exist, they do not provide any reasonable possibility of effective redress. The Drafting Committee considered the paragraph on the basis of the text proposed by the Special Rapporteur in his third report, which, if you recall, contained three options: that local remedies need not be exhausted where they are obviously futile, or where they offer no reasonable prospect of success, or where they provide no reasonable possibility of an effective remedy. Acting on the strong support expressed in the plenary debate, the Committee decided to adopt the third option, which is based on the formulation in the separate opinion of Judge Lauterpacht in the Norwegian Loans case. In so doing, the Committee noted that the first option of obvious futility had been considered in the plenary debate as being too high a threshold, and that, conversely, the second option of no reasonable possibility of success being offered had been considered too weak.

In order to avoid the infelicity of saying that the remedies provide a remedy, when reading paragraph (a) together with the chapeau, the Committee decide to replace the phrase "of an effective remedy" with "of effective redress".

As for the scope of the provision, the Committee considered whether it would cover the situation where a remedy might be technically available, but the costs of pursuing the remedy are disproportionately prohibitive, and beyond the means of the injured national. However, it was noted that there was no authority supporting such an interpretation of paragraph (a). Indeed, the Committee noted that the issue may arise

[1] The sixth exception relating to denial of access, as contained in paragraph (f) of article 14, as proposed by the Special Rapporteur, was not referred to the Drafting Committee.

in paragraph (c) in the context of the notion of unreasonableness. Therefore, the Committee felt that such situations of hardship, including not only hardship of a financial nature, would best be covered by paragraph (c), not paragraph (a).

Paragraph (b) [e]

Mr. Chairman,

The Committee considered the exception in paragraph (b), concerning undue delay, to be uncontroversial. While it noted that authority for this exception existed in the case law, it limited itself to expounding the basic principle without passing on what constitutes undue delay. Instead, it considered such evaluation to be better the province of the tribunal before which the matter is being considered. It was also noted that the plenary had supported the inclusion of such an exception, by way of codification.

The original version proposed by the Special Rapporteur included a further phrase at the end of the sentence stating that the delay was "in providing a local remedy". However, such formulation was considered to be inaccurate because the remedy already exists, i.e. it did not have to be provided. Instead, what is delayed is the carrying out of the remedy. The Committee next considered the alternative formulation "is responsible for undue delay in providing redress". However, the reference to "redress" was itself considered inaccurate because it assumed that the process would end in the injured individual obtaining redress, which may not always be the case. The Committee then considered leaving the formulation simply at "is responsible for undue delay".

The Committee subsequently decided to align the text with article 8 [10], paragraph 2 by replacing the reference to "respondent State" with "State alleged to be responsible". However, doing so would leave the provision stating the word "responsible" twice. Therefore, the Committee considered alternative formulations including, "There is undue delay which is attributable to the State alleged to be responsible". However, such formulation was not clear that the delay related to the remedies. Therefore, a preference was had for language which more clearly linked the

delay to the remedies. Hence, alternative formulas considered included "there is undue delay in relation to the local remedies which is attributable to the State alleged to be responsible", or "there is undue delay in relation to the remedial process which is attributable to the State alleged to be responsible", or even "there is undue delay in the remedial process". The Committee settled for "there is undue delay in the remedial process which is attributable to the State alleged to be responsible". It was considered important to make it clear that the undue delay was attributable to the State alleged to be responsible.

Finally, I wish to bring the Commission's attention to the reference to "remedial process", which the Committee preferred and which is meant to be broader than just the end product of "local remedies". It would include the various processes through which local remedies would be channelled.

Paragraph (c)

Mr. Chairman,

I turn now to paragraph (c), which provides that local remedies need not be exhausted where "there is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable". If you recall, the Special Rapporteur had initially included two separate exceptions, in paragraphs (c) and (d) of then article 14, dealing with the so-called "voluntary link" and the absence of a territorial connection, respectively. Indeed, these issues took up a substantial proportion of the Commission's discussion in plenary last year. Hence, it should not come as a surprise that the Drafting Committee likewise spent most of its time on these issues this year.

Mr. Chairman, if you allow me, I intend to discuss the work on this paragraph in more detail, so as to give a full account of the Committee's work on it, which proceeded in a series of stages, each of which I will discuss in turn.

At the beginning of the discussion on the paragraph the issue before the Committee, put simply, was whether to include a provision on the "voluntary link" in

article 10 [14]. It also had before it the proposal of the Special Rapporteur, made at the conclusion of the plenary debate in 2002, that it might not be necessary to include a provision on voluntary link, and to consider it instead in the context of the commentary to article 8 [10], where it could be pointed out that frequently the voluntary link is a rationale for the local remedies rule, and that it is a precondition for the exercise of diplomatic protection in many cases; or to refer to it in the commentary to article 9 [11] where it would be stressed that in most cases of this kind there would be a direct injury, and so the need to exhaust local remedies would not arise. In addition, the issue could be considered in the commentary to article 11 [14], paragraph (a), saying that there might not be a possibility of effective redress.

However, the Committee recalled that the Plenary had been strongly divided on the subject, and that support had been expressed then for all the various options I have just mentioned, as well as for the option of reformulating the provision as a general provision dealing with unreasonableness.

Indeed, at the end of the Plenary debate last year, the Special Rapporteur had made a further proposal according to which local remedies would not be required to be exhausted where "any requirement to exhaust local remedies would cause great hardship to the injured alien[/be grossly unreasonable]." The difference between that proposal and the exception found in paragraph (a) was that it would operate in situations where, although there exists an effective remedy, it would still be grossly unreasonable or cause great hardship to the injured alien to exhaust local remedies. The proposed text would have covered the situations initially envisaged in paragraphs (c) and (d), as proposed by the Special Rapporteur, although it would set a higher threshold than in those provisions. It would also have covered the situation where, in the circumstances, it would be grossly unreasonable for the injured alien to exhaust local remedies on financial grounds, where the costs involved in exhausting local remedies would be grossly unreasonable and exorbitant; as well as the situation in then article 14 (f), as proposed by the Special Rapporteur of denial of access to the institutions which could provide remedies. That proposal of the Special Rapporteur was significant because it laid the foundation for the approach eventually taken by the Committee this year.

Mr. Chairman,

In short, on commencing its work on the provision, the Committee had three options: (1) to do nothing, and have the Special Rapporteur deal with the issue in the commentary; (2) to draft a provision referring to voluntary and territorial link (thereby merging former paragraphs (c) and (d)); or (3) to include a general provision on unreasonableness.

Focusing on those options, the Committee first concluded that a provision was necessary in the text, since it was too substantive an issue to be left entirely to the commentary. Also it was felt that the kind of examples being considered would not be aptly covered by the notion of "effectiveness" in paragraph (a). Furthermore, the Committee was of the view that the concept of "voluntariness" did not adequately solve the kind of cases of hardship that were envisaged. Instead, what was more decisive was the degree of reciprocity and reciprocal expectations that the individual has when the link is being established. The question therefore was one of how substantive the link between the injured person and the State was, and how much the individual gained from the link.

The Committee proceeded to consider various options for redrafting the provision, including:

- Inserting the phrase "or substantial commercial relations" into the version proposed by the Special Rapporteur, although the Committee considered this to be too narrow, since the injury to the national may arise in other contexts;
- Deleting the paragraph on voluntary link, former paragraph (c), and working on a text based on the territorial link connection, in paragraph (d);
- Qualifying the phrase "voluntary link" in a way which would provide greater elucidation of the concept, including focusing on its rationale, that is, the acceptance of the risk that the injured person should exhaust local remedies first. Along this line of thinking, the Committee considered a proposal that would provide a definition of voluntary link as follows: "the voluntary link must amount to a form of conduct which constitutes the acceptance of the local remedies in case of injury caused by the Respondent State". However, it was

considered that the proposal raised a series of questions, and the Committee considered it preferable to have a more objective provision, rather than the more subjective analysis of the person. The Committee was also concerned about the possible suggestion that the validity of the rule is based on its acceptance by the persons concerned. Furthermore, it was considered that the interpretation of behaviour as constituting acceptance may be too difficult to prove;

- Reformulating the provision to provide for a more objective test, by stating that "local remedies need not be exhausted where there is no material connection between the individual and the respondent State." However, The Committee considered the "material" connection test to be too inaccurate; or
- Reformulating the text into the form of a general provision concerning situations where it would be unreasonable to exhaust local remedies, which would then be discussed in the commentary. Under a further proposal, such a provision would be rendered as "where in all the circumstances it would be unduly harsh or unreasonable to require exhaustion of local remedies". Such proposal was intended to be a more general "catch-all" provision, rather than another formulation of paragraph (c). The proposal was considered to have the virtue of being more all-encompassing of all the possible situations that might arise. At the same time, it was recognized that such formulation could be qualitatively vague. The issue therefore was whether it was possible to make such a general formula more rigorous, and it was proposed that a reference to "of the relationship between the injured person and the respondent State" be accordingly added. A further proposal involved combining the material connection test and the formulation dealing with the situation where it would be unduly harsh/onerous or unreasonable to require the exhaustion of local remedies.

Mr. Chairman,

The Committee's work then moved in the direction of abandoning the reference to "voluntary" link, in favour of a more general provision. However, it was agreed that the commentary will explain that the final provision would be dealing with the

issue of voluntary connection, the assumption of risk and the question of extra-territoriality.

The Committee first focused on several formulations of combining the concept of a material connection between the injured person and the respondent State, together with the more general concept of "unreasonableness". At the same time, the Committee faced the concern that such a provision would place too high a burden of proof on the individual, but decided that that would be better than placing the burden on the Respondent State, which could have the effect of eliminating the local remedies rule entirely. Indeed, I might add that, in considering the various options before it, the Committee was of the view that it was important to keep in mind the possible impact such an exception may have on the local remedies rule itself, in the sense that the goal was not to adversely affect the rule itself, but to provide an adequate exception to cover hardship cases.

Hence, as the provision is dealing with an exception to the local remedies rule, the Committee felt it appropriate to work on a formulation that would place the onus of proof on the applicant State to prove that such a situation exists to warrant an exception from the general rule of exhaustion of local remedies. Conversely, the respondent State would have an interest in showing that the individual concerned had such a relationship with the host State and that he had accepted the respective domestic legal system, and therefore has to exhaust any remedies offered by that system. Such approach implies a certain balance between the rights of the individual and the interests of the respondent State.

On the basis of this discussion, the Committee reached the conclusion that some provision should be included in the article, that that provision should make reference to the fact that in certain circumstances it would be unreasonable or unduly harsh to expect the individual to exhaust local remedies, and that some formulation capturing the concept of voluntary link (without using the phrase itself) should be included. It subsequently narrowed its options to two formulations, namely: "[t]here is no relevant/substantial connection between the injured individual and the responsible State or the circumstances of the case make the exhaustion of local remedies [grossly] unreasonable" or "[i]t would be unreasonable to require the exhaustion of local

remedies because there is no material connection between the injured individual and the responsible State or the circumstances of the case so indicate".

Eventually the Committee settled for the first of the two proposals, albeit without reference to "gross" unreasonableness, which was considered unnecessary. It was felt that that formulation was better because it was broader and covered more aspects of unreasonableness, such as those situations where acts by third persons (including threats by criminal conspiracies) make it unreasonable to fulfil the local remedies requirement.

In coming to that conclusion, the Committee considered the difference between the terms "relevant" and "substantial", and discussed various options, including having both or "material". The word "relevant" is intended to refer to the connection between the injured individual and the responsible State in connection with the injury suffered; it being understood that the reference to "relevant" would be clarified in the commentary, including that it is both a connecting and a limiting/moderating factor. As for the word "substantial", the Committee considered that a lack of a "substantial" connection might unnecessarily modify the local remedies rule, in the sense that the provision could be read as requiring a substantial presence or time period for the local remedies rule to apply. The important point being that the test is not one of quantity but of quality.

Instead, by including the word "relevant", the Committee has attempted to include an element of the concept of assumption of risk within a more general provision, and which, if you recall, had been the focus of some of the earlier stream of proposals. In the view of the Committee, the word "relevant" would also address some of the elements involved in the notion of assumption of risk.

The Committee also considered further formulations in order to add more precision to the provision, but, except for adding the word "otherwise" in the latter half of the sentence, was unable to agree on one such formulation. Instead, it was decided that only a reference to "relevant" connection would be retained, with an appropriate explanation in the commentary.

As for other drafting changes, the Committee further decided to ensure consistency with formulations adopted in the past by replacing all reference to "respondent State" with "responsible State" or "State alleged to be responsible", and settled for the latter formulation, so as to be aligned with the formulation in article 8 [10], paragraph 2.

Finally, allow me to reiterate that the provision now contained in paragraph (c) is intended to cover what was previously in paragraphs (c) and (d) of the Special Rapporteur's proposal.

Paragraph (d)

Mr. Chairman,

I turn now to the last paragraph of article 10 [14], namely paragraph (d) on waiver as an exception to the exhaustion of local remedies rule. The Committee considered the provision on the basis of the original proposal of the Special Rapporteur, namely draft article 14 (b) contained in his third report, discussed last year. It was agreed early on to delete the phrase "expressly or impliedly", which was considered superfluous.

If you recall, during the debate in plenary, no difficulties were encountered concerning express waiver, with the bulk of discussion focusing on the idea of implied waiver. With regard to the latter, it was noted that the chamber of the ICJ in the ELSI case made it clear that waiver of the local remedies rule was not to be readily implied. The feeling in the plenary was therefore that waiver should be clear and unambiguous. There had been agreement that there may well be circumstances where waiver may be implied, and that such a possibility should be acknowledged, and the question was whether it was advisable to introduce that element into the provision or not. I might also mention that the Committee noted the expository nature of the provision, in the sense that it is setting out the application of a principle of general international law, that is that it would apply even if the provision were not there, but nonetheless considered it worth including in the draft articles.

As for estoppel, the Committee noted that there was authority that in certain circumstances estoppel may give rise to the finding that the respondent State has waived the local remedies rule. Indeed, some in plenary had argued that estoppel may be read into the concept of implied waiver. However, the Committee decided that it was not necessary to include the reference to estoppel in the provision, since it could give rise to difficulties of understanding what estoppel is meant to cover. It was agreed that the Special Rapporteur would deal with the issue in the commentaries.

The text was further aligned with article 8 [10], so as to replace the reference to "respondent State" with "the State alleged to be responsible".

As I mentioned at the beginning of my statement, the Committee decided to place the provision on waiver at the end of article 10 [14]. However, the Committee did consider the possibility of placing the paragraph on waiver in its own provision, since it is somewhat different from the other exceptions in article 10 [14]. Part of the difficulty the Committee faced related to the title of the provision, namely "exceptions to the local remedies rule". The question was whether the provision on waiver can really be seen as an "exception", in the normal sense, to the local remedies rule, as is the case with the exceptions in the other paragraphs, or as a "condition" for the application of the local remedies rule. Some doubts were expressed in the Committee on this. Under one view, waiver is not an "exception", but arises by virtue of the application of a principle of international law.

Yet, placing the provision on waiver in its own article would, as currently formulated, result in a certain amount of repetition and would perhaps lead to the opposite concern, as to why two provisions dealing with situations where the local remedies rule is not applicable were not included in one article. The Committee even briefly considered the possibility of reformulating the paragraph on waiver entirely so as to place it in its own provision. In the end, the Committee decided against this course of action.

Having said so, as you can see from footnote 3, while the Committee decided to retain the paragraph within article 10 [14], it did leave open the possibility of later on,

perhaps during the second reading, revisiting the issue with a view to moving it into its own provision, tentatively entitled "waiver".

General comments on article 10 [14]

Mr Chairman,

Allow me to state for the record that several miscellaneous modifications to the text of the article 10 [14] were made in order to align it with texts previously adopted. For example, the reference to "the injured individual" in an earlier version of what is now paragraph (d) was changed to read "the injured person".

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Mr. Chairman,

This concludes the report of the Drafting Committee. The Committee recommends to the Plenary the adoption of these articles.

Thank you for your attention.