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Rapporteur: Mr. Valery Kuznetzov

CHAPTER V

DIPLOMATIC PROTECTION

Addendum

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B. Consideration of the topic at the present session (*continued*)

3. Article 14

(a) Futility (article 14 (a))[1]

(i) Introduction by the Special Rapporteur

1. In introducing article 14, the Special Rapporteur noted that he was proposing an omnibus provision which dealt with exceptions to the exhaustion of local remedies rule. It responded to the suggestion made both in the Commission and the Sixth Committee of the General Assembly that it was only "all available adequate and effective local legal remedies" that ought to be exhausted. He could accept the suggestion that the general provision on the exhaustion of local remedies requires that local remedies be both available and effective, provided that a separate provision was devoted to the ineffectiveness or futility of local remedies. The main reason was that, as stated in his proposed article 15, the burden of proof was on both the respondent State and the claimant State, the former having to show that local remedies were available, whereas the latter had to prove that local remedies were futile or ineffective.

2. He suggested that the generic term "ineffective" should be discarded as being too vague. Instead, he submitted three tests, grounded in judicial decisions and the literature, for determining what an "ineffective" local remedy was. Local remedies were ineffective where they were "obviously futile", offered "no reasonable prospect of success" or provided "no reasonable possibility of an effective remedy".

3. It was noted that the first test, "obvious futility", which required the futility of the local remedy to be immediately apparent, had been criticized by authors, as well as by the International Court of Justice in the *ELSI* case,[2] as being too strict. Similarly, the second test,

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[1] Article 14 (a) reads:

Article 14

Local remedies do not need to be exhausted where:

(a) the local remedies:

- are obviously futile (option 1)
- offer no reasonable prospect of success (option 2)
- provide no reasonable possibility of an effective remedy (option 3);

…

[2] 1989 *I.C.J. Reports*, p. 14.

that the claimant should prove only that local remedies "offer no reasonable prospect of success", had been deemed too weak. The third test, a combination of the first two, under which local remedies "provide no reasonable possibility of an effective remedy", was, in his view, the one that should be preferred.

4. In support of his position, he cited circumstances in which local remedies had been held to be ineffective or futile: where the local court had no jurisdiction over the dispute (for example, in the *Panevezys-Saldutiskis Railway* case[3]); where the local courts were obliged to apply the domestic legislation at issue, for example, legislation to confiscate property; where the local courts were notoriously lacking in independence (for example, in the *Robert E. Brown* claim[4]); where there were consistent and well-established precedents that were adverse to aliens; and where the respondent State did not have an adequate system of judicial protection.

(ii) Summary of the debate

5. General support was expressed for the referral of paragraph (a) to the Drafting Committee. In particular, support was expressed for the third option, whereby a remedy must be exhausted only if there was a reasonable possibility of an effective remedy.

6. It was noted that the futility of local remedies was a complex issue because it involved a subjective judgement and because of its relationship to the burden of proof; it raised the question of whether a State of nationality could bring a claim before an international court on the sole assumption that local remedies were for various reasons futile. It was important to prevent extreme interpretations in favour of either the claimant State or the host State. As such, it was suggested that the third option was preferable as a basis for drafting a suitable provision, since it covered an adequate middle ground and offered a balanced view.

7. At the same time, it was observed that the test of ineffectiveness must be an objective one. Such was the case, for example, where local remedies were unduly and unreasonably prolonged or unlikely to bring effective relief, or where local courts were completely subservient to the executive branch.

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[3] 1939 *P.C.I.J. Series A/B,* No. 76, p. 4.

[4] (1923), 6 *U.N.R.I.A.A.*, p. 120.

8. The view was expressed, however, that whatever option was adopted, the terms proposed left very considerable scope for subjective interpretation, whether of the term "futile" or of the term "reasonable". The criterion of reasonableness was vague and related to the problem of the burden of proof, and was thus related to the Special Rapporteur's proposal for article 15. However, it was noted that article 15 failed to provide a limitation to the apparent arbitrariness of the criterion adopted in article 14. Furthermore, it was pointed out that "effective remedy" and "undue delay" were relative concepts, in respect of which no universal standards were possible. As such, they must be judged in the light of the particular context and circumstances, and on the basis of other equally important principles: equality before the law, non-discrimination, and transparency. It was also suggested that for an individual to be deemed to have exhausted local remedies, it was not enough for a case to have been brought before the competent domestic court; the claimant must also have put forward the relevant legal arguments.

9. Several drafting suggestions were made, including, referring to "remedy" in the singular, in the chapeau of paragraph (a), so as to avoid general statements about whether all remedies were available; deleting the reference to the term "reasonable" which was superfluous, and implied *a contrario* that people would behave unreasonably unless specifically instructed to behave reasonably; that reference be made to all "adequate and effective" local remedies; and that the words "reasonable possibility" be scrutinized since they denoted a subjective assessment by the claimant State. It was also noted that article 14 (a) seemed to overlap somewhat with paragraphs (c), (d), (e) and (f), which dealt with specific situations for which there might be no possibility of an effective remedy.

10. Support was also expressed for a combination of options two and three. In terms of another view, the exhaustion of local remedies rule should be respected unless local remedies were obviously futile (i.e. option one). However, it was stated that the test of obvious futility would be too stringent.

(iii) Special Rapporteur's concluding remarks

11. The Special Rapporteur recalled that it had been suggested at the 2001 session of the Commission, and subsequently at the meeting of the Sixth Committee later that year, that the concept of effectiveness should be dealt with only as an exception. He hoped that the Commission's silence on that subject indicated support for that position.

12. He observed that there had been unanimous support for referring article 14 (a) to the Drafting Committee; and that most members had favoured option three, although there had been

some support for a combination of options two and three; with little support for option one. He therefore suggested that article 14 (a) should be referred to the Drafting Committee with a mandate to consider both options 2 and 3.

(b) Waiver and estoppel (article 14 (b))[5]

(i) Introduction by the Special Rapporteur

13. In introducing paragraph (b), which dealt with waiver and estoppel, the Special Rapporteur observed that since the local remedies rule was designed to benefit the respondent State, it could elect to waive it. Waiver might be express or implied or it might arise as the result of the conduct of the respondent State, in which case it might be said that the respondent State was estopped from claiming that local remedies had not been exhausted. He noted further that an express waiver might be included in an ad hoc arbitration agreement to resolve an already existing dispute; it might also arise in the case of a general treaty providing that future disputes were to be settled by arbitration. Such waivers were acceptable and generally regarded as irrevocable.

14. Implied waivers presented greater difficulty, as could be seen in the *ELSI* case where the International Court of Justice had been "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so". Hence, there must be clear evidence of such an intention, and some jurists had suggested that there was a presumption, albeit not an irrebuttable one, against implying waiver. But when the intention to waive the local remedies rule was clear in the language of the agreement or in the circumstances of the case, it must be implied.

15. He observed that it was difficult to lay down any general rule as to when such a waiver could be implied, but he referred to the four examples, cited in his third report, in which special considerations might apply, namely: the case of a general arbitration agreement dealing with

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[5] Article 14 (b) reads:

Article 14

Local remedies do not need to be exhausted where:

…

(b) the respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

…

future disputes - silence in such an agreement did not imply waiver; the question whether the filing of a declaration under the Optional Clause implied waiver - the practice of States suggested that that could not be the case (in accordance with the *Panevezys-Saldutiskis Railway* decision); the case of an ad hoc arbitration agreement entered into after the dispute and where the agreement was silent on the local remedies rule - silence could be interpreted as waiver because the ad hoc agreement had been entered into after the dispute had arisen; and the situation in which a contract between an alien and the host State impliedly waived the local remedy rule and the respondent State then refused to go to arbitration - if the State of nationality took up the claim in such circumstances, the implied waiver might also extend to international proceedings, although the authorities were divided on that point. It could thus be concluded that waiver could not be readily implied, but where there was clear evidence of an intention to waive on the part of a respondent State, it must be so implied. For that reason, he suggested that reference to implied waiver should be retained in article 14 (b).

16. Similar considerations applied in the case of estoppel. If the respondent State conducted itself in such a way as to suggest that it had abandoned its right to claim the exhaustion of local remedies, it could be estopped from claiming that the local remedies rule applied at a later stage. The possibility of estoppel in such a case had been accepted by a Chamber of the International Court of Justice in the *ELSI* case and was also supported by human rights jurisprudence.

17. In addition, the Special Rapporteur noted that waiver of the local remedies rule created some jurisprudential difficulties and the procedural/substantive distinction came into play. If the exhaustion of local remedies rule was procedural in nature, there was no reason why it could not be waived. It was simply a procedure that must be followed and the respondent State could therefore dispense with it. The international wrong was not affected and the dispute could be decided by an international tribunal. If, on the other hand, the exhaustion of local remedies was one of substance, it could not be waived by the respondent State, because the wrong would only be completed after a denial of justice had occurred in the exhaustion of local remedies or if it was established that there were no adequate or effective remedies in the respondent State. Admittedly, some substantivists took the view that that could be reconciled with the substantive position.

(ii) Summary of the debate

18. Support was expressed for the referral of article 14 (b) to the Drafting Committee in the form proposed by the Special Rapporteur.

19. It was noted that waiver played different roles in the field of diplomatic protection. Article 45 (a) of the articles on the Responsibility of States for internationally wrongful acts considered waiver by an injured State, whereas proposed article 14 (b) of the present draft referred to waiver by the respondent State. In practice, the respondent State's waiver usually related to the obligation to exhaust local remedies, but it could also concern other aspects of admissibility of claims, such as the nationality of claims. Therefore, it was proposed that a more general provision be formulated to provide for waiver in the field of diplomatic protection, either by the claimant State or by the respondent State, as well as for acquiescence or estoppel. In addition, it was maintained that if the Commission nevertheless considered that a specific - rather than a general - provision on waiver was necessary, it would be better to separate that provision from those relating to the effectiveness of local remedies or the presence of a significant link between the individual and the respondent State, as the latter dealt with the scope and content of the rule, whereas waivers mostly concerned the exercise of diplomatic protection in a specific case.

20. It was also observed that waivers should not be confused with agreements between the claimant State and the respondent State to the effect that exhaustion of local remedies was not required, for such agreements had the same function, but were instances of *lex specialis*, and should not be considered when codifying general international law.

21. The view was expressed that article 14 (b) could be further improved by a closer study of the issues of implied waiver and estoppel. As for implied waivers, concern was expressed that even when unequivocal, they might give rise to confusion. It was observed that waiver was a unilateral act which should be irrevocable and should not easily be assumed to have taken place. It was noted that there were few unambiguous cases of implied waiver. This was corroborated by the fact that one of the few treaties on general dispute settlement, the 1957 European Convention on the Peaceful Settlement of Disputes, had an express provision indicating that local remedies must be exhausted. It was, instead, suggested that the provision indicate that the respondent State must expressly and unequivocally waive the requirement that local remedies should be exhausted.

22. Conversely, the view was expressed that the possibility of implicit waiver should not be rejected out of hand. The causal approach should be given priority, stressing the criteria of intention and clarity of intention and taking into account all pertinent elements.

23. Doubts were expressed concerning the advisability of including a reference to the concept of estoppel. It was stated that it was a common law notion and was viewed with some suspicion by practitioners of civil law, and that estoppel was covered by the broader concept of implied waiver. It was further observed that the examples cited by the Special Rapporteur with regard to estoppel were, without exception, cases in which an award or a judgement had stated that, since the respondent State had been silent regarding the failure to exhaust local remedies, it could not invoke that failure at a later stage. As such, there was some overlap between article 14 (b) and (f).

24. Others, while accepting the principle set out in the paragraph, had reservations about its formulation. It was suggested that it be stated that the waiver must be clear and unambiguous, even if it was implicit. Serious doubts were also expressed regarding the reference to the "respondent State", which seemed to imply contentious proceedings, which did not appear in the articles referred to the Drafting Committee or in articles 12 and 13. It was considered preferable to refer to the terminology used in the articles on Responsibility of States for internationally wrongful acts.

(iii) Special Rapporteur's concluding remarks

25. The Special Rapporteur observed that, while strong support existed for the inclusion of express waiver as an exception to the exhaustion of local remedies rule, many speakers had been troubled by implied waivers and had expressed the view that a waiver should be clear and unambiguous. However, even those members had not denied that the Drafting Committee should consider the question. He therefore suggested that article 14 (b) should be referred to the Drafting Committee with a recommendation that the Committee should exercise caution regarding implied waiver and should consider treating estoppel as a form of implied waiver.

(c) Voluntary link and territorial connection (article 14 (c) and (d))[6]

(i) Introduction by the Special Rapporteur

26. The Special Rapporteur, in introducing articles 14 (c) and (d), suggested that the Commission should consider the provisions together as they were closely linked. He noted that while there was support for those rules, it could also be adduced that the existing rule on the exclusion of local remedies might cover those two paragraphs. He also recalled that when the Commission had considered the matter in respect of article 22 of the draft on State responsibility on first reading, it had been decided that it was unnecessary to include such provisions.

27. In his report, he had raised the question of whether the Commission needed one or more separate provisions dealing with the absence of a voluntary link or a territorial connection. The debate on the subject had largely grown out of the *Aerial Incident* case,[7] where there had been no voluntary link between the injured parties and Bulgaria. He noted that in all the traditional cases dealing with the exhaustion of local remedies rule, there had been some link between the injured individual and the respondent State, taking the form of physical presence, residence, ownership of property or a contractual relationship with the respondent State. Furthermore, diplomatic protection had undergone major changes in recent years. In the past, diplomatic protection had been concerned with cases in which a national had gone abroad and was expected to exhaust

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[6] Article 14 (c) and (d) reads:

Article 14

Local remedies do not need to be exhausted where:

…

(c) there is no voluntary link between the injured individual and the respondent State;

(d) the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

...

[7] 1959 *I.C.J. Reports*, p. 146.

local remedies before proceeding to the international level. However, more recently, there was the problem of transboundary environmental harm, arising, for example, from the Chernobyl accident.

28. The Special Rapporteur observed further that those who supported the adoption of a voluntary link or territorial connection exception to the local remedies rule emphasized that, in the traditional cases, there had been an assumption of risk on the part of the alien in the sense that he had subjected himself to the jurisdiction of the respondent State and could therefore be expected to exhaust local remedies. However, there was no clear authority on the need to include a separate rule. The Special Rapporteur, in illustrating the point that the judicial decisions on this point were largely ambiguous, referred to several such decisions, including the *Interhandel* case,[8] the *Salem* case,[9] the *Norwegian Loans* case,[10] and the *Aerial Incident* case. Similarly, cases involving transboundary harm tended to suggest that it was not necessary to exhaust local remedies. For example, in the *Trail Smelter* case,[11] local remedies had not been insisted upon. But the decision in that case could also be explained by saying that it was dealing with a direct injury by the respondent State (the United States) of the claimant State (Canada) and that there thus had been no need to exhaust local remedies in that situation. In his view, the proponents of the voluntary link/territorial connection requirement had made out a strong case.

29. It was noted further that proponents of the voluntary link requirement had never equated it with residence. If residence were the requirement, that would exclude the application of the exhaustion of local remedies in cases of the expropriation of foreign property and contractual transactions where the injured alien was not permanently resident in the respondent State. He observed further that, where a State had been responsible for accidentally shooting down a foreign aircraft, in many cases it had not insisted that local remedies must first be exhausted. The same applied to transboundary environmental harm; for example the

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[8] 1959 *I.C.J. Reports*, p. 6.

[9] (1932), 2 *U.N.R.I.A.A.*, p. 1165.

[10] 1957 *I.C.J. Reports*, p. 9.

[11] (1935), 3 *U.N.R.I.A.A.*, p. 1905.

Gut Dam Arbitral Agreement,[12] in which Canada had waived that requirement, and the 1972 Convention on International Liability for Damage caused by Space Objects, neither of which required exhaustion of local remedies.

30. The Special Rapporteur remarked that early codification efforts had usually focused on State responsibility for damage done in the State's territory to the person or property of foreigners and on the traditional situation in which an alien had gone to another State to take up residence and do business. The Commission had refrained from including an exception to the local remedies rule on the existence of a voluntary link, because, as neither State practice nor judicial decisions had dealt with it, the Commission had felt that it was best to let it be addressed by existing rules and to allow State practice to develop.

31. In his view, there was good reason to give serious consideration to including the exceptional rules in articles 14 (c) and (d). It seemed impractical and unfair to insist that an alien be required to exhaust local remedies in the four situations: transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects; the shooting down of aircraft outside the territory of the respondent State or of aircraft that had accidentally entered its airspace; the killing of a national of State A by a soldier of State B stationed on the territory of State A; and the transboundary abduction of a foreign national from either his home State or a third State by agents of the respondent State.

32. It was for the Commission to examine whether such examples required a special rule exempting them from the scope of the local remedies rule or whether they were already covered by existing rules. In many such cases, the injury to the claimant State by the respondent State was direct. That was true, for example, of most cases of transboundary environmental harm, the accidental shooting down of aircraft and the transboundary abduction of a national. As such, he left it to the Commission to decide whether it wished to follow the course taken in 1996 and to allow the matter to develop in State practice, or whether it felt there was a need to intervene *de lege ferenda*.

(ii) Summary of the debate

33. Support was expressed for the view that, in the absence of a voluntary link between the individual and the respondent State or when the respondent State's conduct had taken place outside its territory, it might be unfair to impose on the individual the requirement that local

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[12] Reproduced in (1965) 4 *I.L.M.*, p. 468.

remedies should be exhausted, and that it was justifiable to provide for such exceptions to the exhaustion of local remedies rule in the context of progressive development. It was further observed that the underlying principle seemed to be a matter of common sense and equity.

34. However, issue was taken with the tentative tone of the Special Rapporteur's report. It was maintained that, regardless of the paucity of clear authority for or against the voluntary link, it was open to the Commission to engage in the progressive development of international law if it so wished. It was thus suggested that the Commission could look more directly at questions of policy underlying the local remedies rule.

35. However, it was cautioned that the text of articles 14 (c) and (d) went too far in categorically stating that both the absence of a voluntary link and the fact that the respondent State's conduct had not been committed within its territorial jurisdiction were per se circumstances that totally excluded the requirement that local remedies should be exhausted. It was suggested that a single provision be formulated allowing for an exception to the exhaustion of local remedies rule in either of those two cases, where the circumstances justified it.

36. In terms of a further view, the issue was not one of an exception to the rule, but rather concerned the very rationale for the rule itself.

37. Others observed that the problem with the concept of voluntary link was that the "link" was a physical concept, a nineteenth century view of the physical movement of people. However, in an era of economic globalization individuals are increasingly able to influence entire economies extraterritorially. As such, the local remedies rule could also be viewed as protecting the respondent State, whose interests must be taken into consideration.

38. It was noted that the exhaustion of local remedies did not involve the assumption of risk but was a way in which issues between Governments were resolved before they became international problems. Hence, to focus on certain aspects of the rule that tended to distort it into an assumption of risk on the part of the individual would be misleading. While there was room for the notion of "voluntary link" as part of the concept of reasonableness or other concepts espousing distinctions based, inter alia, on the activity of the individual and the extent to which the burden of exhaustion was onerous, it was in that subsidiary capacity that the notion should be examined rather than as a primary consideration.

39. Caution was also expressed against confusing diplomatic protection with general international claims. While the concept was useful for explaining why local remedies should be exhausted, it would be wrong to conclude that when there was no voluntary link, diplomatic protection should not be invoked.

40. Doubts were also expressed as to the aptness of the examples cited in the Special Rapporteur's report in support of the voluntary link requirement. It was noted, for example, that in cases involving the shooting down of foreign aircraft, referred to in paragraph 79 of the report, generally speaking, the States responsible insisted that the act had been an accident, refusing to accept responsibility for a wrongful act, and offering ex gratia payments to compensate the victims. Disagreement was also expressed with the reference to the example of the 1972 International Convention on Liability for Damage caused by Space Objects, since it concerned a special regime.

41. As regards the Special Rapporteur's view that it was unreasonable to require an injured alien to exhaust domestic remedies in such difficult cases as transboundary environmental harm, while support was expressed for that view, others observed that the concept of transboundary damage had its own characteristics, which did not necessarily match those of diplomatic protection.

42. Concerning the example of the Chernobyl incident, it was pointed out that plaintiffs in the United Kingdom, for example, would have been required to exhaust local remedies in the courts of the Ukraine. Requiring groups of people that were not well-funded to exhaust local remedies in such circumstances was considered oppressive.

43. Others expressed doubts about the appropriateness of describing cases such as *Trail Smelter*, Chernobyl and other incidents of transboundary harm and environmental pollution as falling under the rubric of diplomatic protection. Such cases were typically dealt with as examples of direct injury to the State. To do otherwise might be to expand the scope of diplomatic protection too far. Furthermore, it was not clear that the Chernobyl accident had amounted to an internationally wrongful act. While it may have been an issue of international liability, it was not clearly one of international responsibility. It was also maintained that it would be artificial to consider that the measures taken in response by the United Kingdom and other countries as constituting an exercise of diplomatic protection.

44. Conversely, it was observed that the Chernobyl incident did raise issues of international responsibility arising out of the failure to respect the duty of prevention. It was also pointed out

that all that was novel in that case was the number of victims; the risk of nuclear accidents had been envisaged in several major European multilateral conventions which had the very purpose of limiting liability as between the contracting parties in the event of such an accident.

45. Still others recalled that the Commission had included a provision on equal access in its draft articles on Prevention of transboundary harm (art. 15).[13] Such provisions, which were found in most environmental treaties, encouraged the individuals who were affected and lived in other countries to make use of the remedies available in the country of origin of the pollution. However, the impact of article 14 (c) was to discourage people from doing that unless their connection to the country of origin was voluntary. It was thus cautioned that when the Commission did something in the field of general international law, it should keep in mind developments in more specific areas that might diverge from what it was doing.

46. The Commission considered various options as to the drafting of article 14 (c), including not treating the voluntary link requirement as an exception to the rule of exhaustion of local remedies, but locating it as a provision on its own, or considering it together with article 14 (a) or articles 10 and 11. Some members regarded the requirement of a voluntary link as a sine qua non, instead of an exception. Still others preferred to view it as merely a factor to be taken into account.

47. As regards article 14 (d), some speakers professed confusion at the examination of the concept of "voluntary link" together with the concept of "territorial connection". The view was expressed that there was no merit in article 14 (d), because it seemed to be only a sub-concept of the concept dealt with in article 14 (c). It was thus proposed that article 14 (d) be deleted.

(iii) Special Rapporteur's concluding remarks

48. The Special Rapporteur remarked that the conclusions to be drawn from the debate were not clear. There had been general agreement that, whatever became of article 14 (c), article 14 (d) was one of its components and did not warrant separate treatment. Many members had expressed the view that, while article 14 (c) embodied an important principle, it was not so much an exception as a precondition for the exercise of diplomatic protection. Others had maintained that those issues could be dealt with in the context of reasonableness under

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[13] *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), Chap. V.E.1.

article 14 (a). Several members had argued that cases of transboundary harm involved liability in the absence of a wrongful act and should be excluded completely. His preliminary view was that it was unnecessary to include article 14 (c) and (d) because, in most cases, they would be covered by article 11 on direct injury or article 14 (a) on effectiveness.

49. At the request of the Commission, the Special Rapporteur subsequently circulated an informal discussion paper summarizing his recommendation for action to be taken on article 14 (c). He was persuaded that the voluntary link was essentially a rationale for the exhaustion of local remedies rule and that, as such, it was not suitable for codification, as confirmed by the changing nature of State responsibility. In his view, if the Commission wanted to codify the voluntary link, there were a number of ways of doing so, such as amending article 10 to read: "A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, who has a voluntary link with the responsible State, before the injured national has exhausted all available local legal remedies." Alternatively, the voluntary link could be retained as an exception, along the lines suggested in draft article 14 (c). If there were objections to the term "voluntary link", article 14 (c) could be replaced by "(c) Any attempt to exhaust local remedies would cause great hardship to the injured alien [/be grossly unreasonable]". In terms of a further suggestion, article 14 (c) would be simply deleted as being undesirable, particularly in the light of developments in the law relating to transboundary harm.

50. His preference was not to provide expressly for a voluntary link, but to include it in the commentary to article 10 as a traditional rationale for the exhaustion of local remedies rule, in the commentary to article 11 with a discussion of direct injury to a State where local remedies need not be exhausted and in the commentary to article 14 (a) in the discussion of whether local remedies offered a reasonable possibility of an effective remedy.

51. Referring to the hardship cases which had been discussed in paragraph 83 of his third report on diplomatic protection, and in which it was unreasonable to require an injured alien to exhaust local remedies, he pointed out that, in the first case, namely, transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects, if the injury resulted from an act which was not an internationally wrongful act, the context was not

that of diplomatic protection, but that of liability. If the injury resulted from an internationally wrongful act it was a direct injury. He was therefore of the opinion that there was no need for a separate provision requiring a voluntary link as a precondition for the application of the local remedies rule. In the second type of situation, i.e. the shooting down of an aircraft outside the territory of the responsible State or an aircraft that had accidentally entered its airspace, there really was a direct injury and State practice showed that, in most cases, the responsible State would not insist on the need for the exhaustion of local remedies. As regards the third type of situation, involving the killing of a national of State A by a soldier from State B stationed in the territory of State A, in most circumstances, there would normally be an international treaty provision for the possibility of a claim against State B. If there was no such agreement, however, there was no reason why the individual's heirs should not be required to request compensation in the courts of State B, provided that there was a reasonable prospect of an effective remedy. That situation was already covered by draft article 14 (a) and there was no need for a separate provision. With regard to the transboundary abduction of a foreign national from either his home State or a third State by agents of the responsible State, there were two possible options: either there had clearly been a violation of the territorial sovereignty of the State of nationality of the foreigner, which could give rise to a direct claim by him against the responsible State, or the injured party might have the possibility to sue in the domestic courts of the responsible State and there was no reason why he would not avail himself of that remedy. If that possibility was not available, the situation was that covered by draft article 14 (a).

52. In his opinion, the Commission should not obstruct the development of international law on the question, particularly as the practice of States continued to evolve, especially in the field of damage to the environment. He suggested that the Commission should say nothing about the voluntary link in the draft articles, but should simply refer to it in the commentary on several occasions and deal with it in the context of the topic of international liability for damage caused by activities not prohibited by international law.

(d) Undue delay and denial of access (article 14 (e) and (f))[14]

(i) Introduction by the Special Rapporteur

53. The Special Rapporteur observed that article 14 (e), on undue delay, was supported in various codification efforts, human rights instruments and judicial decisions, such as the *El Oro Mining and Railway Co.*[15] and the *Interhandel* cases. Nevertheless, such exception to the exhaustion of local remedies rule was more difficult to apply in complicated cases, particularly those involving corporate entities. While it could be subsumed under the exception set out in article 14 (a), it deserved to be retained as a separate provision as a way of serving notice on the respondent State that it must not unduly delay access to its courts.

54. He remarked further that article 14 (f), dealing with prevention of access, was relevant in contemporary circumstances. It was not unusual for a respondent State to refuse an injured alien access to its courts on the grounds that the alien's safety could not be guaranteed or by not granting an entry visa.

(ii) Summary of the debate

55. Satisfaction was expressed with both article 14 (e) (undue delay) and 14 (f) (denial of access). Others maintained that the two provisions did not constitute specific categories, inasmuch as a proper reading of article 14 (a), whether drafted in the form of option 1 or of option 3, would encompass both exceptions. It was thus suggested that the two provisions could be recast in light of the amendment to article 14 (a). It was also proposed that article 14 (e) be combined with article 14 (a), or at least be moved closer to that provision.

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[14] Article 14 (e) and (f) read:

Article 14

Local remedies do not need to be exhausted where:

…

(e) the respondent State is responsible for undue delay in providing a local remedy;

(f) the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.

[15] [1931] British-Mexican Claims Commission, 5 *U.N.R.I.A.A.*, p. 191.

56. In terms of another view, article 14 (e) was not rendered superfluous in the light of article 14 (a). The cases covered by articles 14 (a) and (e) were in a sense consecutive in time: an existing local remedy which might at first appear to be a "reasonable possibility" from the standpoint of article 14 (a) might subsequently not need to be further pursued, in the light of undue delay in its application. The view was also expressed that the text should refer not to "delay in providing a local remedy", but to the court's delay in taking a decision with regard to a remedy which had been used.

57. While it was agreed that a decision had to be obtainable "without undue delay", it was suggested that the text specify what was abusive. It was also noted that what constituted undue delay would be a matter of fact to be judged in each case. It was proposed that the provision be reformulated to read "Local remedies do not need to be exhausted where the law of the State responsible for the internationally wrongful act offers the injured person no objective possibility of obtaining reparation within a reasonable period of time". It would then be explained that "The objective possibility of obtaining reparation within a reasonable period of time must be assessed in good faith [in the light of normal practice] or [in conformity with general principles of law]".

58. Conversely, doubts were expressed about the validity of the exception set out in article 14 (e), since undue delay might simply be the result of an overburdened justice system, as was often the case in countries faced with serious shortages of resources, and, in particular, of qualified judges to deal with cases. Others disagreed and pointed out that a State should not benefit from the fact that a national judiciary had allowed a case to be unnecessarily delayed.

59. As regards article 14 (f), it was observed that, if access to a remedy was prevented, it would be concluded that there was no remedy at all. As such the proposed wording did not correspond to what was intended. Instead, the Special Rapporteur's proposal referred to a different situation, one in which an alien was refused entry to the territory of the allegedly responsible State or where there was a risk to the alien's safety if he entered the territory. Those elements would rarely be decisive in the context of civil remedies. Normally, the claimant's physical presence in the territory of the State in which he wished to claim a civil remedy was not required. It was noted that, in most legal systems, it was entirely possible to exhaust local remedies through a lawyer or a representative.

60. It was proposed that the exception be limited to cases in which presence appeared to be a condition for the success of the remedy. It was also suggested that there should be some reference, even if in the commentaries, to the problem posed where the individual or lawyer was

dissuaded, by means of intimidation, from taking up the case. Likewise, it was queried why the provision was limited to cases where it was the respondent State that denied the injured individual access to local remedies. Other non-State actors might similarly constitute obstacles to such access.

61. Others expressed doubts and were of the view that the provision might be regarded as covered by article 14 (a). If the respondent State effectively prevented the injured alien from gaining access to the courts, then in practice there was certainly no reasonable possibility of an effective remedy. It was thus proposed that it could be included in the commentary as part of the more general test of effectiveness as stated in paragraph (a).

(iii) Special Rapporteur's concluding remarks

62. The Special Rapporteur noted that opinions differed on article 14 (e) on undue delay. While some members had opposed it, others had suggested that it might be dealt with under article 14 (a). The majority had preferred to deal with it as a separate provision. He therefore proposed that it should be referred to the Drafting Committee, bearing in mind the suggestion that it should be made clear that the delay was caused by the courts.

63. As regards article 14 (f), the Special Rapporteur pointed to the division between common and civil law systems. In the common law system, the injured individual might have to give evidence in person before the court, and if he or she was not permitted to visit the respondent State, then no claim could be brought. He observed that there had been some support for referring article 14 (f) to the Drafting Committee. However, the majority of members had taken the view that it would be better to deal with that issue under article 14 (a). He therefore recommended that article 14 (f) should not be sent to the Drafting Committee.
