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Summary record of the 2768th meeting

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strategic view, singling out knowledge, language, money and need as the key elements which, if combined, could lead to the creation of projects.

57. Mr. Galicki had asked about the current status of the proposal regarding the Commission secretariat. The Advisory Committee on Administrative and Budgetary Questions had examined the proposal, and it had been forwarded to the Fifth Committee. To what extent the Fifth Committee would consult the Sixth Committee remained to be seen. In any case, a decision on the matter would be taken at the next General Assembly.

The meeting rose at noon.

2768th MEETING

Thursday, 5 June 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Diplomatic protection¹ (*continued*)* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,² A/CN.4/L.631)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of diplomatic protection (A/CN.4/L.631), said that the Committee had held five meetings from 8 to 14 May and on 28 May 2003. The Committee had begun its work on the topic at the Commission's fifty-fourth session and had adopted, on first reading, articles 1 to 7 covering Parts One and Two of the draft articles. At the current session, the Committee had turned its attention primarily to the draft articles on the rule on the exhaustion of local remedies. It had also discussed several draft articles on the diplomatic protection of legal persons, but, owing to the

lack of time, had been able to work only on one such provision. It had therefore decided to postpone the referral of the provision to the plenary until the next session so that all the provisions on legal persons could be submitted in a single package.

2. With regard to the structure of the draft articles, he recalled that draft articles 1 to 7, which had been adopted at the preceding session, dealt with general provisions (Part One) and natural persons (Part Two). At the current session, the Committee had decided to include the articles on the exhaustion of local remedies in a separate part so that they would apply both to the part on natural persons and to the future part on legal persons. The structure of the draft articles would thus include Part Three on legal persons, followed by Part Four on the exhaustion of local remedies rule. When the Committee had considered the three draft articles on that rule, it had not yet had before it the draft articles constituting the future Part Three, and it had therefore renumbered the draft articles it had considered to follow on those already adopted on first reading (1 to 7). The three draft articles previously proposed by the Special Rapporteur as articles 10, 11 and 14 thus became articles 8, 9 and 10, respectively. A footnote to the Committee's report nevertheless explained that those three provisions would again be renumbered when Part Three of the draft articles had been completed. As to the title of Part Four, the Committee had decided on "Local remedies" rather than "Exhaustion of local remedies" so that that part and article 8 [10] would not have the same title.

3. The titles and texts of the draft articles adopted by the Drafting Committee read as follows:

DIPLOMATIC PROTECTION

Article 8 [10]. Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8]* before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Article 9 [11]. Classification of claims

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].*

Article 10 [14]. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible, or the circumstances

* Resumed from the 2764th meeting.

¹ For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

² Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.**

* The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles.

** Subparagraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver".

4. Article 8 [10] was intended to codify the customary rule that local remedies had to be exhausted as a prerequisite for the presentation of an international claim. It had been clear from the Commission's discussions that that was an accepted rule of customary international law. With regard to paragraph 1, the Committee had retained the basic thrust of the Special Rapporteur's proposal, but had streamlined its formulation. It should be noted that, in the articles adopted at the preceding session, reference was made to the "presentation" of the claim, but the Committee had considered that, in the context of article 8 [10], the word "bring" more accurately reflected the process involved, since the word "present" suggested a formal act to which consequences were attached and could best be used to identify the moment when the claim was formally presented. As to the term "bring an international claim", alternative formulations had been considered, such as "exercise diplomatic protection in respect of an injury". The Committee had nevertheless taken the view that such wording would cover a much longer time frame, including the time of the initial presentation of the claim, while, in the context of the provision under consideration, the relevant moment was that when the requirement of the exhaustion of local remedies was provided for. The Committee had therefore been of the opinion that, while earlier articles referred only to a "claim" and not to an "international claim", it was clear in those cases that reference was being made to the exercise of diplomatic protection. However, in the context of the local remedies rule, there were various possible types of claims, and a more specific reference to "international claims" was therefore necessary. The Committee had also decided to bring the text more into line with draft article 1, as adopted at the preceding session, by replacing the words "international claim arising out of an injury" by the words "international claim in respect of an injury".

5. The Committee had also decided to amend that provision in the light of exceptions to the nationality rule introduced by article 7 [8] on stateless persons and refugees by adding the words "or other person referred to in article 7 [8]". As was indicated in the corresponding footnote, the Committee had left the door open to the possibility of amending that provision in the light of any further exceptions to the nationality rule that the Commission might see fit to include in the draft articles. The Committee had decided to delete the words "whether a natural or legal person", contained in the text proposed by the Special Rapporteur as being unnecessary, since the draft articles as a whole dealt with both natural and legal persons. The text of paragraph 1 had been further aligned on the texts adopted at the preceding session by replacing the words "injured national" by the words "injured person".

6. With regard to the words "all local remedies", the Committee had first discussed whether the original ver-

sion, namely, "all available remedies", did not set too high a standard for an injured national. However, the prevailing view had been that the provision should be read in the light of draft article 10 [14], so that the injured national was required only to exhaust all available local remedies which provided a reasonable possibility of an effective remedy. The original version as proposed by the Special Rapporteur referred to "legal" remedies in order to encompass both judicial and administrative remedies, but not to remedies as of grace or favour. The Committee had also streamlined the text by reducing the number of words modifying the word "remedies". It had taken note of suggestions made in the Commission and in the Sixth Committee that article 8 [10] should contain a reference to local remedies' being adequate and effective. It had observed, however, that the principle of effectiveness was dealt with in draft article 10 [14], and it had therefore preferred not to deal with it in draft article 8 [10], mainly because the onus of proof was on the respondent State to show that there were available remedies within the meaning of article 8 [10], whereas the onus of showing that there were no adequate and effective remedies within the meaning of article 10 [14] was on the applicant State. The Committee had therefore preferred to provide for the principle of effectiveness in a separate article.

7. Paragraph 2 defined the scope of the words "local remedies" used in paragraph 1. It reflected the principle embodied in various judicial decisions that remedies should be judicial or administrative in nature or before authorities which recognized a right that might lead to a remedy. It did not matter whether the courts or authorities were ordinary or special. The emphasis was on the fact that the remedies must be open to the injured persons as of right and not as of favour or grace. The original version referred to "legal" remedies. The Committee had considered the possibility that limiting the text to "legal" remedies might exclude other types of remedies, such as access to an ombudsman as a form of administrative remedy. It had also been realized that ombudsmen had different powers in different jurisdictions, thereby making it difficult to draft an appropriate provision. In some jurisdictions, there were "authorities", such as ombudsmen, which had only recommendatory powers. It was unnecessary for such remedies to be exhausted in order to satisfy the exhaustion of local remedies requirement in paragraph 1. That conclusion also arose out of the application of article 10 [14], in that such non-binding remedies would not provide a reasonable possibility of effective redress. The commentary would make it clear that, when local remedies could not result in a binding decision, they should not be considered to be local remedies that had to be exhausted. Instead, what was being referred to was the normal legal system—in other words, remedies that had binding consequences. The Committee had decided to replace the term "authorities" by the term "bodies" because "authorities" could have a discretionary connotation, while "bodies" implied some sort of structure. Following the deletion of the reference to "legal" remedies in paragraph 1, the same deletion had been made in paragraph 2, but, as had already been mentioned, largely for stylistic reasons, in order to limit the number of adjectives modifying the term "remedies" and without prejudice to what he had just stated about the type of local remedies that had to be exhausted. In other words, what he had said also applied to the term "local

remedies". The other amendments related to the words "natural or legal" persons, which had been replaced by the words "the injured person", and the addition at the end of paragraph 2 of the words "of the State alleged to be responsible for the injury", which added further precision to the concept of "local remedies". The Committee had also decided that article 8 [10] should be entitled "Exhaustion of local remedies".

8. Article 9 [11] was concerned with the classification of claims for purposes of the applicability of the exhaustion of local remedies rule. It was the "Mavrommatis principle", according to which an injury to a national was an injury to a State. The draft articles dealt with such "indirect" injury to the State, and the exhaustion of local remedies rule therefore applied in such circumstances. It did not apply when a direct injury was caused to the State, whence the need for a provision indicating when an injury to the State was "indirect" for the purpose of determining whether the local remedies rule was applicable and, indeed, whether the act in question was governed by the draft articles at all. With regard to wording, it should be noted that the terms "direct" and "indirect" did not appear in article 9 [11], largely to take account of the concerns expressed by some members of the Commission about the use of those terms in languages other than English. The problem at hand was to draft a provision that required the exhaustion of local remedies only in the context of indirect injury. However, in some cases it was not clear from the facts whether the injury was to the State directly or to the State through the individual. The Committee had considered two possible tests for determining whether an injury was direct or indirect: first, the preponderance test, approved in both the *ELSI* and the *Interhandel* cases, whereby the injured individual was obliged to exhaust local remedies where the claim was preponderantly the one that related to the injured individual, as opposed to the State. The second test was the *sine qua non* test—in other words, whether the claim would have been brought if there had been no injury to the national.

9. The Committee had proceeded on the basis of the Special Rapporteur's proposal, which used the two tests to emphasize that the injury to the national must be the dominant factor in the bringing of the claim if local remedies were to be exhausted. However, the Committee had observed that, in the *Interhandel* case, ICJ had resorted only to the first of the two tests and that, in the *ELSI* case, it had noted the existence of both tests but had not required that they should be exhausted in combination. It had been proposed that the two tests should be used as alternatives, but the prevailing view had been that the preponderance test had received the most attention in judicial decisions. It had thus been agreed that only the preponderance test should be retained in the article and that the other test should be dealt with in the commentary. It had also been maintained that the "but for" test raised difficult issues of the onus of proof. The Special Rapporteur's original proposal contained an exposition in square brackets of the various factors that could be taken into account in determining whether the claim was preponderantly weighted in favour of an injury to a national or whether the claim would have been brought if such injury had not occurred. The Committee had nevertheless taken account of the prevailing view in the Commission that it was not desirable

to legislate by example and had therefore decided that examples should be discussed only in the commentary to the article.

10. As in the case of article 8 [10], the Committee had decided to align the provision on the draft articles adopted at the preceding session by recognizing the exceptions to the nationality rule introduced by article 7 [8] and including the words "or other person referred to in article 7 [8]". In this connection, the Committee had considered the possibility of including a separate provision, in an earlier part of the draft articles, that would provide that the term "national" included, *mutatis mutandis*, the persons referred to in article 7 [8], but that proposal had not been adopted. The Committee had considered two options for the title of article 9 [11], namely, "Claims of a mixed character" and "Classification of claims", and had settled for the latter.

11. Article 10 [14] on exceptions to the local remedies rule was the one on which the Drafting Committee had spent the most time, because of its length and the complexity of some of the issues it raised, particularly that of the "voluntary link". It was structured in the form of a chapeau followed by a list of four situations regarded as exceptions to the basic rule. There had been some discussion in the Drafting Committee on whether the last exception in subparagraph (d) relating to waiver was really an exception or not. The Committee had based itself on the Special Rapporteur's fundamental proposal (contained in what had then been article 14), but had reduced the number of exceptions from five (the sixth proposed by the Special Rapporteur had not been referred to the Committee) to four, primarily on the basis of the Commission's discussions at its preceding session. The exceptions had been reordered to group the provisions relating to the effectiveness and nature of local remedies together, with the provision dealing with the unique situation of waiver coming last.

12. Subparagraph (a) dealt with the situation where, even though local remedies existed, they did not provide any reasonable possibility of effective redress. The text proposed by the Special Rapporteur contained three options: local remedies were obviously futile; they offered no reasonable prospect of success; or they provided no reasonable possibility of an effective remedy. Acting on the strong support expressed in the plenary debate, the Drafting Committee had decided to adopt the third option, which was based on the wording of the separate opinion of Judge Lauterpacht in the *Norwegian Loans* case. In so doing, the Committee had noted that the first option of obvious futility had been considered as being too high a threshold and that, conversely, the second option of no reasonable possibility of success was too low a threshold. In order to avoid the awkward situation of saying, in the English text of the new subparagraph (a), that the remedies provided a remedy, the Committee had decided to replace the words "of an effective remedy" by the words "of effective redress". As to the scope of the provision, the Committee had considered whether it would cover the situation where a remedy might be technically available, but at a prohibitive cost beyond the means of the injured national. It had noted, however, that there was no authority supporting such an interpretation of subparagraph (a). It had also noted that that issue might arise in the context of subparagraph (c), in connection with situations where it

might be unreasonable to want to exhaust local remedies. It had therefore considered that situations of that kind, which were not only of a financial nature, would best be covered by subparagraph (c).

13. The exception provided for in subparagraph (b), the former subparagraph (e), on undue delay had been considered uncontroversial. The Committee had noted that authority for the exception existed in case law, but it had limited itself to expounding the basic principle without going into what constituted undue delay, which the court would be in a better position to evaluate. It had also been noted that the plenary had supported the inclusion of such an exception, by way of codification. The original version proposed by the Special Rapporteur stated that the delay was “in providing a local remedy”, but that was inaccurate because the remedy already existed, and what was delayed was its implementation. The Committee had next considered an alternative formulation whereby the State was responsible for undue delay in providing redress. However, the reference to “redress” was itself considered inaccurate because it assumed that the process would end with the injured individual obtaining redress. The Committee had then considered leaving the wording simply as “is responsible for undue delay”. However, it had subsequently decided to bring the text into line with article 8 [10] by replacing the reference to “respondent State” by “State alleged to be responsible”, but the provision would then contain the word “responsible” twice. After having considered various possible formulations, the Committee had decided that a clear-cut link must be established between the delay and the remedies, and that it should also be clearly indicated that the undue delay was attributable to the State alleged to be responsible. It had therefore finally settled for “There is undue delay in the remedial process which is attributable to the State alleged to be responsible”. The Committee had found the words “remedial process” to be preferable because they were broader than just the end product of “local remedies” and included the various processes through which local remedies would be channelled.

14. With regard to subparagraph (c), which provided that the local remedies did not have to 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”, the Special Rapporteur had initially included two separate exceptions in subparagraphs (c) and (d) of what had then been article 14 dealing with the so-called voluntary link and the absence of a territorial connection, respectively. Those issues had taken up a substantial proportion of the debate in plenary, and the Drafting Committee had also spent most of its time on them. At the beginning, the issue had been whether a provision on the voluntary link should be included in article 10 [14]. At the conclusion of the plenary debate at the previous session, the Special Rapporteur had also proposed that a provision on the voluntary link might not be necessary, and that it could be considered instead in the context of the commentary to article 8 [10], where it could be pointed out that frequently the voluntary link was a rationale for the local remedies rule and a precondition for the exercise of diplomatic protection in many cases; and that another possibility was to refer to it in the commentary to arti-

cle 9 [11], given that in most cases there would be a direct injury, and the need to exhaust local remedies would therefore not arise. In addition, the issue could be considered in the commentary to article 11 [14], subparagraph (a), explaining that there might not be the possibility of effective redress. The Commission had been strongly divided on the subject, and support had been expressed for all the options he had mentioned, as well as for the option of reformulating the provision as a general provision dealing with unreasonableness.

15. At the end of the plenary debate at the previous session, the Special Rapporteur had submitted 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]”.³ The proposed text would have covered the situations initially envisaged in subparagraphs (c) and (d) of the earlier text, although it would set a higher threshold. It would also have covered the situation where the costs involved would be exorbitant, as well as the situation, in what was then article 14, subparagraph (f), of denial of access to institutions which could provide remedies. That proposal by the Special Rapporteur had laid the foundation for the Drafting Committee’s approach. The Committee had had three options: to do nothing and have the Special Rapporteur deal with the issue in the commentary; to draft a provision referring to the voluntary and territorial link, thereby merging former subparagraphs (c) and (d); or to include a general provision on unreasonableness.

16. The Committee had first concluded that a provision was necessary in the text, since the issue was too substantive to be left to the commentary. It had also felt that the kind of examples being considered would not be aptly covered by the concept of “effectiveness” in subparagraph (a). In addition, the Committee had been of the view that the concept of “voluntariness” did not adequately solve the problem in the cases of hardship being dealt with. What was decisive was the degree of reciprocity and reciprocal expectations of the individual when the link was being established. The questions were therefore how substantive the link between the injured person and the State was and how much the individual gained from that link. The Committee had considered various options. The first option was to include the words “or substantial commercial relations” in the version proposed by the Special Rapporteur, although the Committee had considered that option too narrow, since injury could occur in other contexts. The second option was to delete the former subparagraph (c) on the voluntary link and to prepare a text based on the territorial link connection in subparagraph (d). The third option was to qualify the words “voluntary link” in order to elucidate the concept by focusing on its rationale, which was the acceptance of the risk that the injured person should exhaust local remedies first. Accordingly, the Committee had considered a proposal that would contain the following definition of the voluntary link: “The voluntary link must amount to a form of conduct which constitutes acceptance of local remedies in the event of injury caused by the respondent State.” However, it was considered preferable to draft a more objective pro-

³ *Yearbook ... 2002*, vol. I, 2729th meeting, p. 124, para. 2.

vision and to avoid any possible suggestion that the validity of the rule was based on its acceptance by the persons concerned. It was also considered that the interpretation of conduct as constituting acceptance might be too difficult to prove. The fourth option was to reformulate 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 had considered the “material” connection test to be too inaccurate. The fifth option was to reformulate the text as a general provision relating to situations where it would be unreasonable to exhaust local remedies; it might read: “where in the circumstances it would be unduly harsh or unreasonable to require the exhaustion of local remedies”. That proposal had been considered to have the virtue of more fully encompassing all the possible situations that might arise. At the same time, such a formulation could be regarded as vague. The Committee had therefore questioned whether such general wording should be more rigorous, and it had been proposed that reference should be made to “the relationship between the injured person and the respondent State”. A further proposal had 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. The Committee had then moved in the direction of abandoning the reference to the “voluntary” link in favour of a more general provision. It had nevertheless been agreed that the commentary would explain that the provision would deal with the voluntary link, the assumption of risk and extraterritoriality.

17. The Committee had focused on several formulations combining the concept of a material connection between the injured person and the respondent State, together with the more general concept of “unreasonableness”. It had concluded that it would be better to place the burden of proof on the injured individual, despite the problems that would create for that person, since placing the burden on the respondent State could have the effect of eliminating the local remedies rule entirely. In considering the various options before it, the Committee had borne in mind the possible impact such an exception might have on the rule itself, since the objective was not to weaken the rule but to provide an adequate exception to cover hardship cases. The Committee had therefore preferred wording that would place the onus of proof on the applicant State in order to show that the situation warranted an exception to the general rule of the exhaustion of local remedies. Conversely, the respondent State would have an interest in showing that the individual in question had such a relationship with the host State and had accepted its internal legal system and therefore had to exhaust any remedies offered by that system. Such an approach implied a certain balance between the rights of the individual and the interests of the respondent State.

18. The Committee had reached the conclusion that a provision to that effect should be included in the article; that the provision should refer to the fact that, in some circumstances, it would be unreasonable or unduly harsh to expect the individual to exhaust local remedies; and that wording capturing the concept of the “voluntary link” should be included, without using the phrase itself.

It had 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 had settled for the first option, without the reference to “gross” unreasonableness, which had been considered unnecessary. It had considered that that wording was broader and covered more aspects of unreasonableness, such as acts by third persons (including threats by criminal conspiracies).

19. In reaching that conclusion, the Committee had considered the difference between the terms “relevant” and “substantial” and had discussed using both those terms or the term “material”. The term “relevant” referred to the connection between the injured individual and the responsible State in relation to the injury suffered, on the understanding that the term would be explained in the commentary. As to the word “substantial”, the Committee had considered that the 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 test was, however, not one of quantity but one of quality. By including the word “relevant” instead, the Committee had attempted to include some elements of the concept of assumption of risk within a more general provision.

20. The Committee had considered other formulations in order to add more precision to the provision, but, except for adding the word “otherwise” in the second half of the sentence, had been unable to agree on one such formulation and had decided that only the reference to the “relevant” connection would be included in the commentary.

21. With regard to other drafting changes, the Committee had decided to ensure consistency with formulations adopted in the past by replacing all references to “respondent State” by “responsible State” or “State alleged to be responsible” and had settled for the latter formulation, in line with the wording of article 8 [10], paragraph 2.

22. The Committee had first considered article 10 [14], subparagraph (d), on the basis of the Special Rapporteur’s original proposal, namely, draft article 14, subparagraph (b), as contained in his third report and discussed in 2002. It had been agreed early on that the words “expressly or implicitly” should be deleted as superfluous. During the plenary debate, the bulk of the discussion had focused on implied waiver. In the light of the position adopted by ICJ in the *ELSI* case, namely, that the waiver of the local remedies rule was not to be readily implied, the Commission had considered that waiver should be clear and unambiguous. It had agreed that there might be circumstances where waiver might be implied and that such a possibility should be acknowledged, but the question was whether it was advisable to introduce that element into the provision or not. The Committee had also noted that the provision set out the application of a principle of general international law, which would apply even if there were no provision along

those lines. As to estoppel, the Committee had noted that, according to some sources, estoppel might give rise to the finding that the respondent State had waived the local remedies rule. Some members of the Commission had argued in plenary that estoppel might be read into the concept of implied waiver. However, the Committee had decided that it was not necessary to include a reference to estoppel in the provision, since it could give rise to problems as to what estoppel was meant to cover. It had been decided that the Special Rapporteur would deal with the issue in the commentaries.

23. In order to bring the wording into line with that of article 8 [10], the words “respondent State” had been replaced by the words “State alleged to be responsible”.

24. The Committee had decided to place the provision on waiver at the end of article 10 [14]. However, the Committee had considered the possibility of placing the paragraph on waiver in its own provision, since it was different from the other exceptions provided for in article 10 [14]. Some of the problems the Committee had faced related to the title of the provision, namely, “Exceptions to the local remedies rule”. The Committee had questioned whether the provision on waiver could really be seen as an exception to the local remedies rule in the normal sense or as a “condition” for the application of the rule. According to one of the viewpoints expressed, waiver was not an “exception”, but arose by virtue of the application of a principle of international law. Nevertheless, placing the provision on waiver, as now drafted, in its own article would have resulted in repetition and in the question why provisions dealing with situations where the local remedies rule was not applicable were not included in one text. The Committee had even briefly considered the possibility of reformulating the paragraph on waiver entirely so as to place it in its own provision, but, in the end, had decided against doing so. As was indicated in footnote 3, the Committee had left open the possibility of reconsidering the issue later on, perhaps on second reading, and drafting a separate provision, which might be entitled “Waiver”.

25. Several amendments had been made to the text of article 10 [14] in order to bring it into line with texts previously adopted. For example, the words “the injured individual” had been replaced by the words “the injured person”. On behalf of the Drafting Committee, he recommended that the Commission should adopt the articles submitted.

26. Mr. MELESCANU said that he did not understand the use of the words “declaratory judgment” in article 9 [11]. He pointed out that the Statute of the International Court of Justice referred to “advisory opinions”, not “declaratory judgments”. Article 9 [11] seemed to be based on the practical consideration that a party could apply to an international court not in order to request a decision resulting in an action or compensation, but simply in order to request it to take note of a factual situation or a rule of law. In the event of success, the party might then submit an application for redress. In any case, he thought that the commentary to article 9 [11] should explain in greater detail what that term meant, and that practical examples should be provided.

27. Mr. ECONOMIDES said that the title and contents of article 9 [11] (“Classification of claims”) were not clear. Moreover, if the Commission was to deal with classical diplomatic protection, the claim must be based exclusively, not “preponderantly”, on an injury, as was stated in the article. In the *Mavrommatis* case, PCIJ had created a fiction when it had stated that an injury to an individual must be regarded as an injury to the State. In his own opinion, however, the question with which the Commission should deal related not to the injury a State might inflict on another State, but only to classical diplomatic protection. Moreover, the thrust of the provision was already contained in the definition of diplomatic protection and in article 8 [10], paragraph 1.

28. The term “effective redress” in article 10 [14], subparagraph (a), should not be used because it was not clear what it covered. Reference was made to fair, adequate, equitable or reasonable compensation or compensation commensurate with the injury, but not to “effective redress”. On a less important point, the term “There is ... delay” in subparagraph (b) was not appropriate. In his view, however, subparagraph (c) involved a substantive problem. Since exceptions to the exhaustion of local remedies rule were blatant restrictions on State sovereignty, each one must be very carefully weighed. That paragraph was also very vague and ambiguous because it referred to two separate cases, not to one, as was shown by the use of the term “or”. If it was to be retained, the word “or” should be replaced by the word “and”.

29. The CHAIR reminded the members of the Commission that they could no longer discuss the substance of the articles, which had already been considered at the previous session. The comments by Mr. Melescanu and Mr. Economides would be reflected in the summary record of the current meeting.

30. Mr. KATEKA (Chair of the Drafting Committee), referring to the term “declaratory judgment” in article 9 [11], recalled that the *ELSI* decision stated: “The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment” [para. 51]. That excerpt showed that ICJ had used that term.

31. With regard to Mr. Economides’ comment on the word “preponderantly”, he pointed out that ICJ had referred to the preponderance criterion in the *ELSI* and *Interhandel* cases.

32. Mr. DUGARD (Special Rapporteur) said that article 10 had created a number of problems when the Commission had considered it at the previous session and had discussed it in depth. He regretted that Mr. Melescanu and Mr. Economides had not been present at that time.

33. Not only was “declaratory judgment” a recognized expression, as Mr. Kateka had indicated, but it should also be dealt with in article 9 because otherwise a State might simply request a declaratory judgment and would then not be bound to exhaust local remedies, thereby defeating the purpose of the rule. He had dwelt at length on that question in his third report but was prepared to give further explanations in the commentary.

34. With regard to the title of article 9 [11], he agreed that the words “direct or indirect claims” could have been used, but at the previous session Mr. Pellet had pointed out that they were not suitable in French and they had therefore been ruled out. Since the cases covered by article 9 [11] involved both direct and indirect claims, the scope of the provision, which related only to indirect claims, as Mr. Economides had rightly pointed out, must be restricted.

35. Referring to article 10 [14], he recalled that the Drafting Committee had used the words “effective redress” in subparagraph (a) because it had not wanted to repeat the term “remedy”. The term “redress” was broader than the term “remedy” because it included elements of compensation and was therefore more accurate. Subparagraph (b) had given rise to a lengthy debate in the Commission at the previous session, as had subparagraph (c), in which the Committee had decided that the two concepts should be included. It had therefore chosen the term “or” rather than the term “and”.

36. In any event, he assured the Commission that all the comments made on those questions would be included in the commentary.

37. Mr. MELESCANU said that, in the *ELSI* case, the United States had wanted to show that it was unnecessary to exhaust local remedies in order to bring a claim in an international court. In his opinion, paragraph 51 of the judgment by ICJ referred to that very specific aspect of the question, namely, that the United States had requested the Court to find that there had been a breach of a treaty obligation and that, consequently, the company which had enjoyed the diplomatic protection of the United States had not been required to exhaust local remedies. The purpose of article 9 was, however, entirely different, since it provided that local remedies must be exhausted. There was thus a contradiction between article 9 and paragraph 51 of the Court’s judgment, and it would be well to explain what “declaratory judgement” meant.

38. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the Drafting Committee’s report on diplomatic protection (A/CN.4/631), as well as draft articles 8 [10], 9 [11] and 10 [14].

It was so decided.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531⁴)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

39. Mr. OPERTTI BADAN welcomed the quality of the Special Rapporteur’s report (A/CN.4/531), which

contained a number of issues on which it was difficult to reach a consensus at the present time. He endorsed the Special Rapporteur’s method, which was to use concepts, such as that of significant harm, that the Commission had already discussed during its consideration of the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.⁵

40. One such concept was that of the liability of the State as an active or passive subject of rights and obligations. At present, private agents were involved in international trade and were investing more and more in services, port infrastructures and telecommunications—essential areas that had previously been under State control. The situation had changed enormously during the second half of the twentieth century and it was now much more widely accepted that some major activities were not controlled by the State. The challenge the Commission faced was thus to formulate guidelines that would reconcile the two elements of a sharp decline in State-controlled activities and the continuing existence of State liability in those areas.

41. With regard to the problem of classical civil liability, which lay at the very heart of contract law, the Special Rapporteur had rightly acknowledged that the existence of a causal link between the harm and the activity had to be proved. That was one of the key points of the Commission’s work.

42. Other international agencies were also dealing with the topic under consideration, and the Commission should try to ensure better coordination between its work and theirs. The Special Rapporteur himself referred in his report to Bernasconi’s work, which was very useful because it stated a number of rules *de lege ferenda* on the question.⁶ It should also be noted that, in his statement in the Commission, the Observer of the Inter-American Juridical Committee had indicated that one of the topics on which the Committee was now working was that of extracontractual liability (see 2764th meeting, para. 31), a basic question which was not only part of classical private law (conflicts of laws) but also part of the much broader subject of efforts to formulate criteria and material rules to serve as guidelines for solving the problem of compensation for loss or injury. The Commission must therefore take account of the fact that other international bodies were dealing with the topic. Accordingly, its first task should be to define the exact limits of its own work in order to avoid any conflict with other bodies.

43. The question of extracontractual liability had been discussed at the Sixth Conference on Private International Law held in Washington, D.C., from 4 to 8 February 2002. The Conference had defined a number of criteria from which the Commission might draw inspiration and which might include access by applicants to the courts, the possibility of benefiting from a favourable legal system and the right not to be tried by courts or under laws which did not have a reasonable link with the purpose of the ap-

⁵ See 2762nd meeting, footnote 7.

⁶ See C. Bernasconi, “Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?” Hague Conference on Private International Law, Preliminary Document No. 8 of April 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference.

⁴ See footnote 2 above.

plication or with the parties. As far as compensation was concerned, those criteria applied not only to relations between private individuals but also, for example, when a State formulated a claim as a result of harm attributable to a subject of private law.

44. The Special Rapporteur raised the question of the applicable law and the court to be applied to in order to obtain compensation, and in reply he proposed classical criteria, namely, the place where the harm had occurred and the place where the harm had been suffered. Following the *Mines de Potasse d'Alsace* case, court decisions had confirmed those criteria, thereby providing for dual jurisdiction. In other words, the liability of the State also gave rise to the problem of a conflict of jurisdiction, since there was not necessarily only one international court which had jurisdiction. The criterion adopted in the above-mentioned decision had thus been in the victim's favour.

45. The Special Rapporteur recognized that the topic did not easily lend itself to codification, that States should be allowed the necessary freedom to establish systems of liability suited to their particular needs and that a general and residual model of allocation of loss should be adopted. In his own view, the Commission's codification work, however limited, should be carried out in a coordinated manner, and the Special Rapporteur should define the framework more clearly in his next report, using as a basis, for example, the work of other bodies on the topic. For example, there were many bilateral agreements between Latin American countries on the question of liability that the Commission could use to give its work a regional dimension.

46. Mr. BROWNLIE said that he agreed with the idea of setting up a working group because he had the feeling that, until now, he and the other members of the Commission, except perhaps for Mr. Momtaz, had given the Special Rapporteur only limited assistance. Having been entrusted with an extraordinarily difficult task, the Special Rapporteur had done what was necessary and had provided a panorama of options. He proposed some formulations in paragraph 153 of his report, but they were of a very general nature, like the study itself. Before advancing much further, however, the Commission had to face up to some specific legal issues, including structural relations. The first issue was the overlap with State responsibility. Several delegations in the Sixth Committee had taken the view that there really was not much overlap. The point had been made that it was indeed far from clear whether the duty to compensate for harm arising from lawful harmful activities by the State which had in fact performed its duty of prevention existed in positive law. It had also been asserted that, while the principle of strict liability was accepted for certain specific regimes, such as damage caused by space objects, there was no evidence that the principle was part of customary international law.

47. The general approach of courts was to rely on the principle of objective responsibility, which was very close to that of strict liability, and to link obligations under State responsibility to fault only in exceptional cases. When it came to compensating for loss or injury, the regime of State responsibility was much more relevant than some delegations in the Sixth Committee thought. In his own view, such overlap was not necessarily antagonistic, and

he urged the members of the Commission to make sure that there was no antagonistic or colliding relationship. In the case of State responsibility, the Commission had merely codified something that had already existed in customary international law. In contrast, there were no existing principles of general international law on State liability. It was therefore up to the Commission to prevent overlap. In paragraph 153 (b) of his report, the Special Rapporteur recalled the recommendation by the Working Group established by the Commission at its fifty-fourth session that a regime of liability should be without prejudice to issues of State responsibility.⁷ That general precaution would not be sufficient in practice, for a number of reasons. For example, it could be asked whether the local remedies rule would be applied or, in other words, whether the civil claims system in the municipal courts of States Parties which had acceded to the future instrument would replace that rule. A related question was whether remedies available under civil liability in municipal courts would qualify as another available means of settlement.

48. Liability must be absolute, not just strict. As the Special Rapporteur indicated in paragraph 153 (e) of his report, it should be dependent upon strict proof of the causal connection between the harm and the activity. In that connection, the standard of proof must be questioned. He was not convinced that the Special Rapporteur had settled that question by invoking the threshold of "significant harm". If the issue of social cost was taken into account, the whole structure would founder in the sense that the Sixth Committee might be satisfied with the work done, but States would not accede to the draft. For all those reasons, it was necessary to establish a working group which would refocus the topic.

49. Mr. KOSKENNIEMI said that he was still puzzled about how Mr. Brownlie's suggestions could help clarify the work still to be done. With regard to the overlap between State responsibility and liability that Mr. Brownlie was concerned about, he himself was not sure that it was easy to determine because the boundaries of State responsibility were not clearly demarcated. Consequently, the Commission had more leeway than some members thought.

50. He was completely in agreement with Mr. Brownlie's suggestion that some specific legal issues should be given further attention, but Mr. Brownlie had referred to four extremely difficult issues which were partly issues of internal civil law, partly issues of comparative law, but not so much issues of public international law. He himself was not sure whether the Commission was in a position to go into that level of detail. Perhaps it should stick with generalities and simply draw attention to potential problems while concentrating on its main objective, which was to ensure that the victims of harm obtained compensation.

51. Mr. PELLET said that on the whole he fully agreed with Mr. Brownlie's concerns and feared that the Special Rapporteur might become the "García Amador of liability". Mr. García Amador had not been able to complete his work on responsibility because he had tried to approach the subject from the most controversial angle. Now, the

⁷ See the report of the Working Group in *Yearbook ... 2002*, vol. II (Part Two), paras. 442–457.

subject entrusted to the present Special Rapporteur was also a very “hot” topic and the focus of many basically political, economic, financial and technical controversies which could not be settled by legal experts, but required political negotiations. Without refusing to deal with the problems, the Commission must have the clear awareness of what it could and could not do. The topic of responsibility had been “saved” by Mr. Ago, one of whose strokes of genius had been to place himself in the area of general rules. It could be in the Commission’s interest to do the same for the topic under consideration, because it would then be staying within the realm of the law and would be in a position to make a contribution with every ounce of skill it possessed.

52. In the first place, the title of the topic was a problem because the Commission’s concern was primarily compensation for harm arising out of transboundary activities. According to the basic principle on which a consensus seemed to have been reached during the discussions by the members of the Commission, operators were liable and must provide compensation. Requesting States to encourage the establishment of insurance mechanisms and compensation funds was not within the Commission’s competence, and it would be better to deal with that question by drafting a model clause. The third key point of the study of the topic was that States were liable only on a conventional basis.

53. In any event, the Commission must not follow as dangerous a course as the one that had led to the “García Amador deadlock”.

54. Mr. Sreenivasa RAO (Special Rapporteur) said that he had tried to indicate in his humble way which options were available to the Commission, without advocating any of them, because he had wanted to know the preferences of the members, who would all be able to choose what suited them best. Mr. Pellet’s proposal, which was, of course, welcome, might be discussed in the working group whose establishment had rightly been suggested by several members, including Mr. Brownlie.

55. The purpose of his study was to find ways of ensuring that an innocent victim could obtain compensation without running into legal problems unless he wanted to. With regard to ways of supplementing limited liability, he had suggested in paragraph 153 of his report that a State should have “an obligation to earmark national funds”, and that was very different from having to pay as a party to the damage under some kind of liability. Of course, the State would then only be helping to compensate the loss or injury caused to the victim, and that corresponded to the principle of social cost, as seen from another point of view. He wondered why the Commission could not deal with that question from the viewpoint of primary rules of law, without worrying about international law or politics.

The meeting rose at 1 p.m.

2769th MEETING

Friday, 6 June 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

later: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Tributes to Mr. Robert Rosenstock, outgoing member of the Commission

1. The CHAIR announced that, for personal reasons, Mr. Rosenstock, who had served the Commission for the past 12 years, was resigning with effect from the present meeting. Mr. Rosenstock had been the Special Rapporteur for the topic of the law of non-navigational uses of international watercourses, and his legal expertise, diplomatic skills and leadership had been instrumental in ensuring the final completion of the work on that topic¹ and its adoption as an international convention.² He had been a dedicated member of the Commission, participating in every drafting committee, working group and planning group on every subject. There was no aspect of the Commission’s work that he had not seriously studied and commented on.

2. Those members who had known Mr. Rosenstock from other international conferences and Sixth Committee meetings over the years had come to admire him as a man of impeccable dignity, with a wonderful sense of humour and a unique New York accent, one who liked a good fight, but always remained professional and looked for a solution to the problem at hand. On behalf of the Commission, he thanked Mr. Rosenstock, who would be remembered as a remarkable and productive colleague, and conveyed to him the Commission’s best wishes for his future endeavours.

3. Mr. PELLET said that, contrary to custom, he would address Mr. Rosenstock directly rather than through the Chair, and in the second person singular, for Mr. Rosenstock’s inimitable mastery of Shakespeare’s language did not preclude a thorough familiarity with the language of Molière. With characteristic dignity, courage and dis-

¹ At its forty-sixth session the Commission adopted the final text of 33 draft articles on the law of the non-navigational uses of international watercourses and a resolution on transboundary confined groundwater (*Yearbook ... 1994*, vol. II (Part Two), para. 222).

² Convention on the Law of the Non-navigational Uses of International Watercourses.