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Summary record of the 2806th meeting

Topic:
Diplomatic protection

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2806th MEETING

Friday, 28 May 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued)* (A/CN.4/537, sect. B, A/CN.4/538,² A/CN.4/L.647 and Add.1)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee), introducing the title and text of the draft articles adopted by the Drafting Committee on first reading (A/CN.4/L.647), said that, in accordance with its work plan, the Commission had decided to complete the first reading of the draft articles on diplomatic protection at the current session, thus paving the way for the completion of its work on the topic in the final year of the current quinquennium. The Drafting Committee was pleased to report that it had completed its consideration on first reading of the entire set of articles on diplomatic protection, on which it had held seven meetings from 4 to 21 May.

2. He thanked the Special Rapporteur, Mr. Dugard, for his guidance and his cooperation with the Drafting Committee and expressed appreciation to the other members of the Committee for their active participation and cooperation.

3. The Commission had before it the completed first reading of the draft articles on diplomatic protection, as adopted by the Drafting Committee. In addition to the draft articles adopted by the Commission in the previous two years, the Drafting Committee had also completed work on several other draft articles referred to it in 2003 and at the current session. Furthermore, it had undertaken a review of the draft articles as a whole and had made several consequential changes, including to the draft articles adopted in previous years. His introduction would therefore cover both the work done recently and the amendments that it had been necessary to make to provisions adopted in previous years. In most cases, they had involved minor stylistic refinements to ensure consistency.

* Resumed from the 2796th meeting.

¹ For the text of articles 1 to 10 of the draft articles on diplomatic protection provisionally adopted by the Commission at its fifty-fourth and fifty-fifth sessions, see *Yearbook ... 2003*, vol. II (Part Two), pp. 34–35, para. 152.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

4. Giving a brief overview of the structure of the draft articles, which were divided into four parts, he said that Part One dealt with general provisions and consisted of two articles; Part Two was entitled “Nationality” and was divided into three chapters containing draft articles 3, 4 to 8 and 9 to 13, respectively. Part Three was entitled “Local remedies”, containing articles 14 to 16. Part Four was entitled “Miscellaneous provisions” and contained articles 17 to 19.

5. With regard to Parts One and Two, the provisions adopted on first reading had been slightly reordered. The draft articles adopted by the Commission at its fifty-fifth session in 2002 had contained an article 3 in the part on natural persons, paragraph 1 of which established the principle that the State entitled to exercise diplomatic protection was the State of nationality. That was the basic premise of the entire draft articles, to which certain exceptions were recognized. The Drafting Committee had felt that that provision was applicable to both natural and legal persons and that it should therefore be situated in a place that made that general applicability more evident. The initial idea had been to place it in Part One, either in article 2 or even in article 1. The Committee had decided to situate it at the beginning of Part Two, since it related only to the question of nationality which was covered in that part, and to make it article 3 in a new chapter I entitled “General principles”, which would accordingly be applicable to both chapter II and chapter III. In addition, it was decided that former paragraph 2 of article 1, which recognized the exception to the nationality rule as set out in article 8, would be better suited as paragraph 2 of article 3. It had thus been reformulated to read: “Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.” Paragraph 1 thus established the default position whereby it was the State of nationality of a person, whether natural or legal, that had the right to exercise diplomatic protection. Paragraph 2 recognized the exception to that rule: that there were some exceptional cases in which a State could exercise diplomatic protection over non-nationals.

6. In summary, Part One, entitled “General provisions”, remained substantially the same, except for the relocation of article 1 (2) to article 3. No other changes had been made to articles 1 and 2.

7. In Part Two, the articles had been organized into three chapters. Chapter I, entitled “General principles”, contained article 3, which had already been discussed. Chapter II, entitled “Natural persons”, contained articles 4 to 8, which had been adopted by the Commission in 2002 and which the Drafting Committee had changed very little. As already discussed, the former article 4 (1), had been moved into new article 3. In addition, the title of article 4 had become “State of nationality of a natural person”, so as to align it with what had been adopted for the equivalent provision for legal persons, namely article 9.

8. The only substantive change considered by the Drafting Committee for that group of articles related to the principle of continuous nationality set out in articles 5, 7 and 8. During the discussion on the equivalent provision

in the context of legal persons—article 10—the Drafting Committee had taken note of the fact that the Government of the United States had suggested, in its statements in the Sixth Committee and in a communication to the Commission, that the end point for the requirement of continuous nationality should be the date of “resolution” of the claim, not that of the “official presentation” of the claim. The suggestion had been based on the decision of an international arbitral tribunal acting in the context of the North American Free Trade Agreement (NAFTA)³ in the *Loewen* case, which had been handed down after the Commission had provisionally adopted article 5 in 2002. The tribunal had held that the rule of continuous nationality applied not only through the date of the presentation of the claim, but also through the date of the resolution of the claim.

9. The Drafting Committee had discussed the issue at great length and had agreed that there was sufficient case law in support of the proposition that, if a corporation changed its nationality after the date of the official presentation of a claim, but before the resolution of the dispute, in principle the State of nationality could no longer exercise diplomatic protection. However, the Committee had been of the view that the relevant articles dealt with the right of a State to exercise diplomatic protection and that the relevant date, in addition to the date of injury, could be only the date of the official presentation of the claim. As drafted, the article could not subject the exercise of diplomatic protection to some future date of resolution of the dispute. In addition, some members of the Committee had found the requirement of continuous nationality until the “resolution” of the dispute too restrictive and categorical. References had been made to situations when there was a change of nationality of a corporation by succession or partition of a State. In the case of natural persons, marriage could result in a change of nationality. That was why such a change of nationality after the date of the official submission of a dispute and before the resolution of the dispute should be considered in context. Questions had also been raised as to the meaning of “resolution” of a dispute, which would not be the same as the date of an award or a judgement. The Committee had, however, agreed that a change of nationality of a legal or natural person subsequent to the date of the official presentation of a claim, but before the resolution of the dispute or the date of an award or a judgement, could have an effect on the entitlement of the State of nationality to continue to exercise diplomatic protection. For that reason, the Committee had decided to retain the reference in the draft articles to the date of the official presentation of the claim, but to elaborate in the commentary on the effect of a change of nationality following that date. It had agreed that it was better to wait to hear Governments’ views on that issue and to consider the matter again on second reading.

10. Chapter III of Part Two was entitled “Legal persons” and contained draft articles 9 to 13, all of which had been considered and adopted by the Drafting Committee at the current session. He would therefore discuss each of them in turn.

³ See Canada–Mexico–United States: North American Free Trade Agreement, *International Legal Materials* (Washington, D.C.), vol. 32 (1993), p. 289.

11. Article 9 corresponded to article 17 proposed by the Special Rapporteur. It dealt with the question of the State of nationality for purposes of diplomatic protection of corporations. The Committee had first dealt with the situation of corporations, since they were the classic example of the type of legal persons on whose behalf diplomatic protection could be exercised. There were, of course, other types of legal persons that could seek the protection of their national States. That issue would be discussed in due course.

12. In considering article 9, the Commission had based itself on a proposal made by the Special Rapporteur in his fourth report,⁴ which had been considered at the 2003 session. Following the discussion in plenary, an open-ended working group had been established to consider the article, primarily with a view to the inclusion of the concept of an appropriate link between the corporation and the State of nationality. The working group had subsequently held two meetings and had agreed on the basic policy underlying the provision; it had prepared a revised draft of the article, including several alternatives, which had subsequently been referred to the Drafting Committee. It had been decided that the Drafting Committee would immediately consider the article in order to take advantage of the time available then and while the discussion of the working group was still fresh in the minds of members. However, it had been agreed not to transmit the text to plenary, so as to give the Drafting Committee an opportunity to refine the text further in the light of its subsequent work on other draft articles in the same chapter.

13. For article 9, the Committee had relied largely on what had been done the year before, working on the basis of the text formulated by the open-ended Working Group, which read: “For the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent] [administrative]/[formal] connection.” The new text was to replace the two paragraphs of the version proposed by the Special Rapporteur in his fourth report.

14. The opening phrase, “For the purposes of diplomatic protection”, had enjoyed general agreement in the Working Group, as it followed the formulation in the corresponding provision used in the context of natural persons, namely article 4. The Committee had seen no reason to deviate from that approach.

15. The first issue raised related to the words “in respect of an injury to a corporation”, which had been tentatively included in square brackets. The Drafting Committee had eventually settled for bringing the text into line with that of article 4 by simply speaking of diplomatic protection “of corporations”. It had felt that, while the two formulations had the same meaning, the more concise version was preferable, especially since the concept of “injury” to a national was covered in article 1, which applied equally to article 9. The Committee had also considered a proposal that reference should be made to “legal persons” instead

⁴ See 2791st meeting, footnote 10.

of “corporations”, but it had been tentatively agreed that the classic example was that of corporations and that the articles would be structured in such a way as to include a general provision applying the provisions on corporations to other legal persons as appropriate, as had now been done in article 13.

16. The next issue before the Drafting Committee related to the way in which the law under which the corporation was formed was to be described. The Working Group had proposed saying either “that according to whose law the corporation was formed” or “determined in accordance with municipal law in each particular case”. The Committee had had a general preference for the first of the two proposals, as it more clearly dealt with situations in which municipal law did not provide for the nationality of corporations. The Committee had considered two other options: “is the State under whose law the corporation was formed and with which it has sufficient connection” and “means a State under whose law the corporation was formed”. It had eventually settled for the latter formulation, which had the virtue of following the formulation in article 4. The provision was meant to be general in nature, since it had been decided that it was not possible to deal with all the “hard” cases that might arise; for example, where municipal law required additional criteria (such as majority shareholding) in order for a corporation to hold the “nationality” of the State.

17. The third and most difficult issue was how to describe the notion of an appropriate link. The Drafting Committee had various options before it: a “sufficient”, “close and permanent”, “administrative”, “formal”, “genuine and current”, “ongoing” or “clear” connection. That matter had taken up the bulk of the Committee’s work on the article. It had been recognized that the very act of incorporation, being an act of free choice, was itself an example of a voluntary connection, and the Committee had questioned the need to include an additional element of connection at all. Indeed, the Committee had considered a proposal that would limit the article to stating that “[f]or the purposes of diplomatic protection of corporations, a State of nationality means a State under whose law the corporation was formed”. The concern had been that, by adding cumulative conditions for nationality, it would either become more difficult for the corporation to have the nationality of the State, leading to Stateless corporations, or, if such additional criteria were broadly formulated, then even the State of nationality of the shareholders could be considered the State of nationality of the corporation itself. That being so, the Committee had been conscious of the need to maintain flexible formulations so as to avoid requiring a definitive determination of the nationality of the corporation, something which might be too difficult to do in practice. At the same time, the prevailing view had been that words such as “sufficient” were too vague and subjective and could not be supported by the majority of the Committee. Similarly, the Committee had felt that the phrase “close and permanent” was too high a standard to be applied and that it had been used in a purely descriptive manner in the *Barcelona Traction* judgment. Hence, turning it into a normative requirement would be going further than what ICJ had done. Lastly, the term “formal” had been viewed as not adding anything new to the requirement of incorporation.

18. The Drafting Committee had accordingly narrowed the proposals before it to two: the first would end the provision at the word “formed”, as already mentioned, and the second would retain the reference to a connection in the following form: “and with which it has an [appropriate/current] connection”.

19. In considering the first option, the Drafting Committee had discussed the need to actively discourage the practice of “tax havens” and whether to exclude the possibility for a State which was a “tax haven” to exercise diplomatic protection over one of its corporations. If so, then additional elements relating to the existence of some link to the State, more than just the formal act of incorporation in that State, would be required, and that would be analogous to the *ratio decidendi* in the *Nottebohm* case. However, the Committee had taken the view that the question of tax havens was not central to the provision and that it should not necessarily seek expressly to exclude that case. Indeed, it had been recognized that the real principle in the *Barcelona Traction* case had been the recognition of the act of free choice on the part of individuals that had incorporated the company; the other elements recognized by the Court had merely been offered as evidence of the exercise of such free choice, beginning with the act of incorporation itself. Yet the Committee had agreed that it was constrained by the decision of the Working Group, following the position taken by the plenary, to include some reference in the text to the need for an appropriate connection. It had accordingly considered a proposed formulation based on the second of the two approaches, which read: “and in whose territory it has its registered office or place of its management or another appropriate connection”. That formulation focused on examples of the most obvious connections of the formal kind which States generally required when allowing countries to be incorporated under their law. The various options were offered as alternatives, in addition to the basic criterion of where the corporation had been formed. It should be mentioned that the use of the word “and” was intentional, since, if it was replaced by “or”, that would significantly change the scope of the provision by making the exercise of diplomatic protection possible on the sole grounds of one of the “links”, regardless of the place of formation. That would potentially allow the State of nationality of the shareholders to exercise diplomatic protection, a situation which the Commission did not support as a general proposition, except in some rare exceptional situations, as provided for in article 11.

20. The Drafting Committee had thus proceeded on the basis of the second of the two proposals and, after refining it further, had arrived at the following formulation: “and in whose territory it has its registered office or the seat of its management or some similar connection”. The Committee had thought that the words “some similar” were more concrete than the word “appropriate”.

21. At the current session, the Committee had also added a further refinement to the text adopted in 2003 by replacing the indefinite article “a” by the definite article “the” in the definition, so as to eliminate the possibility that the text might be interpreted to mean that corporations could have dual nationality. In contrast, the indefinite article had been retained in article 4, since multiple

nationality was possible in the context of natural persons, as confirmed in article 6. The Committee had also considered the question of the title of the provision and had decided on “State of nationality of a corporation”, which followed the title of the equivalent article for natural persons. The title reflected the scope of the provision, which referred to corporations as the type of legal person that was the main subject of discussion in the context of diplomatic protection. The question of the State of nationality of other legal persons was covered in article 13.

22. Turning to article 10, which dealt with the continuous nationality of a corporation, he said that, before discussing the substance of the provision, he should say a few words about its location. The Special Rapporteur had originally placed the provision—which had then been article 20—after the provisions that constituted the current articles 11 and 12, but the Drafting Committee had decided to place it immediately after article 9. Whereas the original text had consisted of a single paragraph, the Committee had decided to split it into two paragraphs, of which the first established the basic rule and the second contained a proviso to the rule.

23. Paragraph 1 extended the criterion of continuous nationality to corporations. The Committee had decided that the paragraph was largely uncontroversial, since it was based on the corresponding provision relating to natural persons contained in article 5, which had already been adopted by the Commission.

24. As to the formulation of the paragraph, the Drafting Committee had aligned the text with that of article 9, which was not restricted to incorporation. That was why the article referred to the nationality of the corporation and not to that of the State in which and under whose law it had been incorporated. The Committee had also considered whether the phrase “was its national” might more appropriately be replaced by the phrase “had its nationality”, particularly because there was a risk that the word “national” might be taken to describe a State-owned corporation. Problems also arose with the translation of the text into some of the official languages in which the relevant term did not exist. The Committee had nonetheless decided that, since the word “national” was correctly used in article 1, it could also be used in article 10. It had therefore been decided to retain the word “national” in the English original and to leave it up to each of the other languages to find the most appropriate wording. The Committee’s decision to retain the date of the official presentation of the claim rather than that of its settlement had already been explained and did not call for any further comment.

25. Paragraph 2 of article 10 dealt with situations where an injury had been caused to a corporation which had ceased to exist before the end of the period of continuous nationality. The question had thus arisen as to whether a claim could be made even though the corporation no longer existed. In other words, it was a matter of deciding whether a claim could still be brought even though the continuous nationality rule did not apply owing to the fact that the corporation had already ceased to exist at the time of the official presentation of the claim. The Committee had noted that the separate opinions of several judges in

the *Barcelona Traction* case contained support for the principle that the State of nationality of the corporation ought to be entitled to present the claim. The same point had been made in the Special Rapporteur’s original proposal, which had taken the form of a savings clause with the following wording: “provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation”.

26. While endorsing that position in principle, the Drafting Committee had considered that the text should be aligned with the provision in article 11 (a), whereby the State of nationality of the shareholders was also entitled to exercise diplomatic protection. It had therefore decided to restrict the overlap between article 10, paragraph 2, under which the State of nationality of a corporation continued to be entitled to present a claim, and article 11 (a), which gave the State of nationality of the shareholders the right to make a claim in a similar situation. In the Committee’s view, it was in principle for the State of nationality of the corporation to continue to pursue the claim after the demise of the corporation. The question was to determine in what circumstances the State of nationality of the shareholders could also bring a claim. It was therefore clear that article 10 should be drafted in conjunction with article 11, the text of which had already been finalized.

27. After considering the matter, the Drafting Committee had decided to proceed on the basis of a “package” proposal whereby the former article 20 would be placed after article 9 but before article 11; article 10, paragraph 2, would be reworded to read: “Notwithstanding paragraph 1, a State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation”; article 11 (a) would be amended with the insertion of the words “for a reason unrelated to the injury”, while the words “had, at the time of the injury” would be inserted in article 11 (b). The basic thinking behind the proposed structure was to give the State of nationality of the corporation priority in exercising diplomatic protection in situations in which the injury that constituted an internationally wrongful act had resulted in the demise of the corporation. The phrase “as the result of the injury” had been inserted into the text both for that purpose and to establish the exceptional circumstances in which the State of nationality of a corporation could continue to seek to press a claim after the demise of the corporation in question. Article 11 (a), on the other hand, applied to a situation in which the corporation had ceased to exist for reasons unrelated to the injury, in which case the State of nationality of the shareholders would be permitted to intervene on their behalf.

28. The text of paragraph 2 had been further refined with the replacement of the phrase “a State is entitled” by the phrase “a State continues to be entitled”, so as to make it clear that a new basis for diplomatic protection was not being created and that, where a corporation ceased to exist, the State which had otherwise had the right to exercise diplomatic protection continued to have that right. Furthermore, the text at the end had been refined to read “according to the law of that State”—namely, the

State of incorporation—in the interests of greater clarity. The title of article 10 was “Continuous nationality of a corporation”.

29. The Drafting Committee had undertaken its work on article 11 on the basis of the proposal by the Special Rapporteur in his fourth report. No changes had been made to the chapeau, which set out the basic principle that the State of nationality of the shareholders was not entitled to exercise diplomatic protection on behalf of the shareholders in the case of injury to the corporation. That reflected the general position in international law as enunciated in the *Barcelona Traction* case. The main focus of the discussion had therefore been the two exceptions to that rule, which formed the content of paragraphs (a) and (b). The Committee had proceeded with caution, knowing that the inclusion of the exceptions had been a source of contention both in the plenary and among some delegations in the Sixth Committee. The Drafting Committee had had to strike a balance between recognizing the possibility that the State of nationality of the shareholders could intervene where it was the corporation that had been injured and, on the other hand, seeking to restrict such a possibility.

30. The discussion on paragraph (a) had focused on two key issues: the concern that the exception was too broad, and therefore subject to abuse; and the possible overlap between the situation provided for in paragraph (a) and that covered in the proviso contained in article 10, paragraph 2.

31. In dealing with the first issue, the Committee had begun by focusing on the scope of the expression “ceased to exist according to the law of the State of incorporation”. The concern had been that it was possible for a corporation to be wound up in the State of incorporation, thereby “ceas[ing] to exist” there, and then reincorporated in another jurisdiction. Unscrupulous shareholders could resort to such a device in order to claim that the corporation had “ceased to exist”, thereby founding a claim for intervention by their State or States of nationality. The Committee was in agreement that the ability of the State of nationality of the shareholders to intervene should be restricted in such cases. The concern was, however, that the provision as initially drafted was insufficient.

32. Various approaches had been considered. For example, it had been suggested that the text could simply read: “the corporation ceased to exist”. That would introduce an element of constructive ambiguity, thereby covering situations in which companies had ceased to exist *de facto*, but not legally. The provision would then be further explained in the commentary. However, such a formulation suffered from the fact that it failed to indicate the applicable law. In addition, it had been recognized that the vast majority of cases involved situations in which the corporation had ceased to exist in the State of incorporation. Hence the State of nationality of the shareholders would not have a right of action in cases in which, for example, the corporation had ceased to exist in a country where it did business, but not where it was incorporated. Indeed, it would be hard to say that a corporation had actually ceased to exist if it was still operational in its place of incorporation or, more precisely, where it was still “legally” in existence according to the law of the State of its incorporation. It

had thus been considered necessary to indicate that only the demise of the corporation under the law of the State of its incorporation would open the way for the State of nationality of the shareholders to exercise diplomatic protection on behalf of those shareholders. The issue before the Drafting Committee had therefore been how to draft a provision that would recognize such a possibility, while preventing the kind of abuse to which he had referred earlier. Various possibilities had been considered, including the retention of the proposed wording, or a variation thereof, but with a clear indication in the commentary that, in such a situation, even though legally a new entity had been created, the corporation could not be held to have “ceased to exist” because in substance it was the same entity. As a matter of policy, therefore, the State of nationality of the shareholders would not be granted the right to exercise protection in such cases. Another option had been to qualify the existing text by adding some further criterion, while recognizing that it was not feasible to provide for every kind of situation in which shareholders might be involved.

33. The Drafting Committee had proceeded on the basis of the second option and inserted the word “legally” after the words “ceased to exist”. Eventually, it had opted for a variant of that formulation, whereby the corporation had ceased to exist “according to the law of the State of incorporation”, without any reference to the “place/State of its incorporation”. Such phrasing had the advantage of greater accuracy by casting the issue in terms of the applicable law for determining when the corporation had ceased to exist and thus allowing the possibility of intervention by the State of nationality of the shareholders. In addition, by avoiding a reference to the place where the corporation had ceased to exist, the possibility of abuse would be limited. A more detailed analysis would appear in the commentary.

34. As for the second issue that had arisen in the context of the paragraph—the phrase “for a reason unrelated to the injury”—he recalled that the words had been a compromise formulation adopted in the context of the discussion on article 10 relating to the continuous nationality rule. The phrase had been included in article 11 (a) in order to delineate more clearly situations in which the State of nationality of the shareholders could exercise diplomatic protection on behalf of its nationals when the corporation had ceased to exist: it could do so only when the corporation had ceased to exist for a reason unrelated to the injury. The feeling had been that the State of nationality of the corporation might have less of an interest in intervening in such situations, with the result that their respective national States were the only avenue of redress available to shareholders. The Committee had considered that, in the context of all the articles on legal persons, the compromise was acceptable, especially because it further restricted the possibility of intervention by the State of nationality of the shareholders. He also noted that the Committee had not endorsed the suggestion that had been made in plenary that a time limit should be included or, in other words, that the claim should be brought within a reasonable time, since it had not been clear how such a provision could be formulated.

35. Article 11 (b) dealt with situations in which the corporation in question was injured by the State of

incorporation. The corporation was obviously without protection in such a case, since its State of nationality was the wrongdoing State. Therefore, on policy grounds, the provision recognized, as an exception to the general rule, that the State of nationality of the shareholders could exercise diplomatic protection on behalf of its nationals in such situations.

36. The Drafting Committee had recognized that although some authority, albeit limited, for such exceptions was to be found in the *Barcelona Traction* judgment, some difficulties remained. The proposed exception had been debated at some length in the plenary at the preceding session, where it had been a matter of some controversy. The Committee had, however, noted that a majority in the plenary had supported the principle set out in paragraph (b). That said, the Committee had had to find compromise language that would meet with the support of the entire Commission.

37. To that end, the Drafting Committee had adopted the suggestion made during the debate in plenary that the provision should be limited to situations in which the State of corporation required incorporation as a precondition for the corporation's doing business in that State. The rationale was that, if a corporation was voluntarily incorporated in the State, the shareholders had accepted the risk of investing in that State. On the other hand, where the corporation had, at the time of the injury, had the nationality of the State alleged to be responsible for causing injury and local incorporation had been "a precondition for doing business there", considerations of equity militated in favour of granting foreign shareholders the possibility of being protected by their national State or States against the State of incorporation. It had been suggested that the words "and the latter State required the corporation to incorporate in that State as a precondition for doing business there" should be added at the end of the provision. On that basis, the following, more complete wording had been suggested: "where incorporation was required by that State as a precondition for doing business in that State". Following several further refinements, the Committee had settled on the following wording: "and incorporation under the law of the latter State was required by it as a precondition for doing business there". The word "latter" had been included so as to make it clear that the reference was to the State alleged to be responsible for causing the injury and not to the State of nationality, which was mentioned in the chapeau. The phrase "under the law of the latter State" had been included in the interests of a more objective standard. The Committee had recognized that there might be situations in which the law of a State did not require incorporation in that State, although in reality it was clear that investors were required to incorporate in the State in question if they wished to do business there. However, it had been felt that the majority of cases involved situations in which there was a legal requirement of local incorporation. Furthermore, the phrase echoed the wording of article 9, which referred to the "State under whose law the corporation was formed".

38. There had also been some discussion in the Drafting Committee about the appropriateness of the phrase "doing business". Although the Commission had considered the

possibility of finding a formulation that would hold good for all the languages, it had finally been decided that the most appropriate phrasing should be adopted by each language group.

39. An element of the continuous nationality requirement had subsequently been included in the provision—as part of the overall "package" on articles 10 and 11—with the insertion of the reference to the corporation having "at the time of the injury" the nationality of the State allegedly responsible for the injury. The reference served as a reminder that, in accordance with the continuous nationality rule, the corporation had to have, at the time of the injury, the nationality of the State alleged to be responsible for the injury, in order for the exception in paragraph (b) to be applicable. Lastly, it should be noted that the Committee had further aligned paragraph (b) with the rest of the draft articles by inserting the phrase "alleged to be" before the word "responsible".

40. The title of article 11 was "Protection of shareholders". Other suggestions had been "State of nationality of shareholders" or "Claims by shareholders". It had also been suggested that the title should indicate that the article provided for exceptions to the general rule.

41. Turning to article 12, he recalled that the provision had been proposed by the Special Rapporteur as article 19, to be a savings clause designed to protect the interests of shareholders as opposed to the interests of the corporation. The article, which had been inspired by the *Barcelona Traction* case, had had general support in the plenary.

42. In considering the article, the Committee had agreed that there were instances in which an internationally wrongful act might directly injure the interests of shareholders, but have little or no effect on the economic viability and activities of the corporation itself. In such circumstances, the State of nationality of the corporation would have no motive or incentive to protect the interests of non-national shareholders and it was only reasonable to allow the State of nationality of the shareholders to intervene on their behalf. On that understanding, the Drafting Committee had been of the view that it was better to draft the article not in the form of a savings clause or as an exception to article 11, which dealt with the right to diplomatic protection of the State of nationality of the corporation, but as an affirmative provision dealing with the independent right of shareholders to diplomatic protection under certain circumstances.

43. Some members of the Drafting Committee had expressed concern that it was not always easy to distinguish between an injury to the interests of a corporation and an injury to the interests of its shareholders. They had felt that there might be situations in which an injury to the corporation could also constitute a direct injury to the shareholders. The Committee had finally agreed that the actual circumstances in each case would be of assistance in identifying situations in which a direct injury to shareholders would justify the application of the provision. It had, nevertheless, made a number of drafting changes to address those concerns. Thus, the opening clause of the article expressly stated that the provision applied "[t]o

the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such” and that such rights were “distinct from those of the corporation itself”. The second part of the article provided that “the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals”. The Committee had been aware that there might be situations in which shareholders of a corporation would have different nationalities and that, if each State of nationality exercised diplomatic protection, there would be multiple claims presented by different States. It had, however, been of the view that the article dealt with the entitlement of States to exercise diplomatic protection and not with the priority of claims or with complications in the case of multiple claims. The title of draft article 12 was “Direct injury to shareholders”.

44. Article 13 was the last article in the chapter on legal persons. It related to the applicability of the provisions on corporations to other legal persons. The Drafting Committee had agreed on the need for such a provision and had restricted itself to refining the text. The use of the term *mutatis mutandis* had raised two questions: one, concerning form, was the way in which the concept could be expressed other than by means of a Latin maxim; and the other, concerning substance, was the difficulty in extending the principles relating to corporations to other legal persons, which could vary greatly. The Committee had, however, considered that it was precisely because of the difficulty of ascertaining in what way the principles would apply to other legal persons that it was preferable only to state the basic point that the principles would have to be adjusted in order to take account of such diversity. It would be up to the courts to determine which of the principles applied to other legal persons.

45. Various proposals had been considered. One had been to limit the cross references to the draft articles that would be of the greatest relevance and not to cite those referring to the relationship between corporations and shareholders, for example. Another had been to recast the provision in the form of a savings clause stating that, in appropriate circumstances, the principles might apply to other legal persons or, alternatively, stating that the principles “may” rather than “shall” be applied. The Drafting Committee had, however, rejected that proposal, since the provision would then take rather the form of a recommendation, which would be of doubtful value. Yet another proposal had been to draft a provision that looked at diplomatic protection in a much broader way, whereby corporations would no longer be considered as the archetypal legal person, so that other, more traditional entities, not modelled on western corporate structures, could also be covered. Such a provision would take the form of a savings clause and would be followed by a further draft article relating to legal entities that were similar to corporations, to which the principles established for corporations could apply. The final proposal had been to reformulate the provision to read: “Nothing in the present draft articles prevents application, as appropriate, to the diplomatic protection of legal persons other than corporations of principles laid out in articles 9 and 10 in respect of corporations.” The Committee had not, however, accepted that approach, which did not sufficiently affirm that the principles applied to other legal persons.

46. It had eventually been decided to refer only to articles 9 and 10 in the provision, so as to exclude the provisions on shareholders, which were considered less relevant. The protection of board members, for example, who were analogous to shareholders, would be covered by the general rules on the protection of natural or legal persons. As for the drafting, there had been general support in the Drafting Committee for finding a more accessible term than *mutatis mutandis*. The proposals had included the use of the phrases “in appropriate circumstances” or “inasmuch as circumstances allow”. The suggestion that the phrase “with appropriate changes” should be used had not been accepted, since it implied that all the principles would always apply, and that was not necessarily the case. Moreover, the reference was not to the question of adapting to the structure of the entities in question, but, rather, to the fact that the principles might apply differently to different entities. The Committee had eventually settled for the phrase “as appropriate”, since it conveyed the idea that in some cases some of the principles might not apply at all because they were not appropriate. It had also been decided that the phrase “shall be applicable” was acceptable, given that the provision related only to the applicability to other legal persons of articles 9 and 10, which dealt with general principles. Lastly, it had been decided to specify that the reference was to diplomatic protection on behalf of other legal persons. The title of article 13 was “Other legal persons”. Part Three of the draft articles dealt with the exhaustion of local remedies rule and contained articles 14 to 16, which the Commission had adopted in 2003. During the current session, the Drafting Committee had simply tried to refine article 14. It had taken note of the fact that questions had been raised in the Sixth Committee about the phrase “as of right” in article 14, paragraph 2. The phrase was intended to limit the remedies which the injured person had to exhaust solely to those that existed “as of right”, thereby excluding discretionary mechanisms of conflict resolution which did not necessarily guarantee the possibility of resolving the issue, such as resort to ombudsmen. However, some speakers in the Sixth Committee had noted that the phrase seemed to exclude certain types of appeals which the court in question could make available, at its discretion, to the injured person, such as the *certiorari* process before the United States Supreme Court. The Committee had thus decided to delete the phrase. The commentary would elaborate on the meaning of the words “legal remedies”.

47. The fourth and last part of the draft articles, entitled “Miscellaneous provisions”, consisted of draft articles 17 to 19, which the Drafting Committee had considered at the current session. From the title of Part Four, it could be inferred that the three provisions were less concerned with the rules on the exercise of diplomatic protection and more with how such rules related to other areas of international law.

48. Article 17 had originally been proposed by the Special Rapporteur as a *lex specialis* provision dealing with special treaty regimes. During the debate in plenary at the preceding session, it had been suggested that the scope of the provision should be broadened to include human rights protection regimes. In his fifth report (A/CN.4/538), the Special Rapporteur had proposed two articles, of which the first, article 26, dealt with human rights

protection and the second, proposed as an alternative formulation for article 17, was formulated more broadly to cover both bilateral treaties and human rights protection regimes. After extensive debate in plenary, both articles had been referred to the Drafting Committee.

49. The Drafting Committee had had several options before it: firstly, to reach agreement on one article which would include a reference to both human rights treaties and to bilateral investment treaties and other investment agreements of that kind; secondly, to draft two separate articles, the first dealing with human rights treaties and the second on bilateral agreements; and, thirdly, to draft one article with two paragraphs covering both types of regimes. Some members of the Committee had spoken in favour of the more minimalist approach of the first option, on the grounds that having two articles, each of which tried to characterize a separate process, would be very complex and that a single article stating that the articles on diplomatic protection were without prejudice to those other procedures, as proposed in the alternative formulation for article 17, had the advantage of simplicity. Other members doubted whether it was feasible to cover those two aspects in a single article, since the goals of the two types of special regimes were different in nature: for bilateral investment treaties, the provision would be intended to recognize that they could preclude the application of diplomatic protection under general international law, whereas, in the context of human rights treaties, the point was to say that such treaties applied even though there was the possibility of diplomatic protection. Initially, the Committee had opted for having a single provision. However, it had eventually settled for the second option, resulting in the adoption of two articles, articles 17 and 18.

50. The Drafting Committee had considered article 17 on the basis of the first part of the alternative version proposed by the Special Rapporteur in his fifth report, which read: “The present articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.” The Committee had firstly considered whether the formulation might be inadequate to cover all possible “procedures other than diplomatic protection”. For example, it was not clear that the text would cover the rights of States other than the State entitled to exercise diplomatic protection, as contemplated in article 48 of the draft articles on responsibility of States for internationally wrongful acts.⁵ One suggestion had been to break the provision into two paragraphs, one to deal with rights which existed under general international law and which accrued to subjects other than the State attempting to exercise diplomatic protection, and a second dealing with treaty-based regimes, whether for human rights or for investment. However, the Committee had been of the view that it would be difficult to provide for all possible procedural permutations and that it would be better to draft a single omnibus provision based on the new text for article 17.

51. Various suggestions had been made to refine that text, including the addition of the words “rights as well

as” before the word “procedures” and adopting a broader and more comprehensive formulation such as “These articles are without prejudice to the rights of States, injured persons or other entities to have resort to action or procedures other than diplomatic protection ...” or “These articles are without prejudice to the rights of States or persons other than resort to the exercise of diplomatic protection to secure redress.” The Drafting Committee had eventually settled for a variation on the latter formula, together with a more comprehensive reference to “States, injured persons or other entities”, which it had subsequently refined by replacing the words “injured persons” by the words “natural persons”. The wording had been further aligned with that used in article 1 so as to refer to “resort to action”.

52. It had been understood that the text, although cast in general terms, applied to all the possible situations that might arise. Indeed, it had been felt that limiting the provision to a general reference to the existence of other procedures, as opposed to trying to provide for all possible scenarios, was the better approach. Strictly speaking, it was not necessary to determine whether the right in question was based on treaty, customary international law or some other procedure such as that provided for in article 48 of the draft articles on State responsibility. Those explanations would be given in the commentary. It would also be made clear that the provision should not be read as implying that a State was making a choice by resorting to procedures other than diplomatic protection.

53. The Drafting Committee had also been of the view that the article did not deal with domestic remedies, but, rather, with remedies under international law other than diplomatic protection. Even though it was understood to refer to the right of States to resort to actions or procedures which were permitted under international law, in order to be absolutely clear, the Committee had added the words “under international law” after the words “actions or procedures”. The Committee had also had in mind certain types of human rights which were protected by international law and for which States other than the State of nationality of the injured person could be permitted to intervene. The draft articles would have no effect on such other rights that States might have. Of course, international law included rights that were created under regional arrangements and explanations would be given on that point in the commentary. The title of the article was “Actions or procedures other than diplomatic protection”, which came from the text of the article itself.

54. On completing the text of article 17, the Drafting Committee had considered whether it sufficiently covered special treaty regimes like bilateral investment treaties. Again, a range of views had been expressed. Some members had felt that the provision adequately covered such treaties or, if not, that the text could be amended to include a reference to actions or “procedures” which might cover the matter. It had even been suggested that while it was useful to note that procedures other than the exercise of diplomatic protection existed, as had been done in article 17, it was not strictly necessary to say that diplomatic protection would be excluded by a treaty provision that prohibited States, implicitly or expressly, from resorting to diplomatic protection. Another option was to make it

⁵ See 2792nd meeting, footnote 5.

clear in the commentary to article 17 that the procedures set out in bilateral investment treaties would take priority over the general rules of diplomatic protection. Some members did not agree that bilateral investment treaties automatically precluded diplomatic protection. In their view, one must look at the terms of any specific bilateral investment treaty to see the relationship between the two regimes.

55. However, the prevailing view in the Drafting Committee had been that a provision had to be included to deal with bilateral investment treaties. It had been felt that article 17 was too general in that it did not adequately provide for the possibility of the application of special rules. Instead, it dealt with human rights protection regimes which were not specifically linked to diplomatic protection, but which operated in parallel with the general rules on diplomatic protection. It had also been felt that while article 17 focused on the existence of other rights, a provision covering special treaty regimes such as bilateral investment treaties would place emphasis on the obligation of the parties to resort to the procedures in those agreements, as opposed to the procedures for diplomatic protection under international law. In addition, it had been felt that since diplomatic protection operated in a context where thousands of bilateral investment treaties were specifically concluded to vary the general regime of diplomatic protection, it would be unwise to overlook that reality in the draft articles.

56. A dissenting opinion had nonetheless been expressed in the Drafting Committee on the inclusion of a further *lex specialis* provision dealing with bilateral investment treaties. It had been recalled that, during its debate on the article in plenary at the previous session, the Commission had considered that a special procedure was not always a *lex specialis*, insofar as it was always possible to exercise diplomatic protection if that procedure did not work. The idea was not to make an exclusion by way of *lex specialis*, but to leave the matter open by means of a “without prejudice” clause, which the Drafting Committee had adopted as article 17. It had been stated that the draft articles should not impose a certain interpretation on bilateral agreements concluded between States. It was up to the States which concluded bilateral treaties to include or exclude diplomatic protection completely or partially according to the terms of their agreement.

57. The Drafting Committee had subsequently considered a proposal for an additional provision stating that: “These articles do not apply where, and to the extent that, the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States, is governed by special treaty provisions.” The provision was specifically intended to cover bilateral foreign investment protection treaties. It had been recognized that, in some such treaties, recourse to diplomatic protection was not excluded altogether, whence the reference to “where, and to the extent that” in the text of the draft article. The Committee had agreed to the inclusion of such an additional provision in order to make it clear that, where bilateral investment treaties applied, the draft articles did not supersede or contradict the provisions of those treaties. It

had been proposed to refine the wording by saying that the draft articles would not apply where, and to the extent that, “they are inconsistent with any applicable special treaty provisions”. That phrase had been added to prevent the interpretation that, to the extent that a bilateral treaty applied, the draft articles would necessarily be excluded: they were excluded only to the extent that they were inconsistent with the treaty. Otherwise, they would continue to apply.

58. The Drafting Committee had also considered an alternative formulation for the draft article, based on article 73 of the Vienna Convention on Consular Relations, which read: “These articles shall not affect special treaty provisions dealing with the protection of corporations or shareholders of corporations, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.” It had been maintained that such a formula would be more prudent than a provision stating that diplomatic protection would *a priori* be excluded by a conflicting bilateral treaty. However, the prevailing view in the Committee was that it was preferable to adopt a text more in the form of an exclusionary clause, as had initially been proposed, subject to the mitigating language that had been introduced in stating that the draft articles would not apply “where, and to the extent that, they are inconsistent with special treaty provisions”.

59. As for the location of the new provision, the Drafting Committee had first of all considered having it as an additional paragraph to article 17, or even as the first paragraph to that article. However, it had opted in the end to have a separate article, article 18, to make the distinction between it and article 17 clearer, and had settled on the following text: “These articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions dealing with the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States.” The provision had initially been placed at the end of what was now chapter III of Part Two, which dealt with the diplomatic protection of legal persons. However, on reflection, that solution had been deemed too restrictive since it would not take into account the fact that bilateral investment treaties could include special rules relating to the exhaustion of local remedies or dealing with natural persons who were investors. The Committee had thus opted for moving the provision back into Part Four, after article 17, so as to give it a more general application. As a consequence, the reference to “the protection of corporations or shareholders of a corporation” had been deleted and the words “those concerning” had been inserted after the word “including”. The title of article 18 was “Special treaty provisions”.

60. Concerning article 19, he recalled that the Commission had held an extensive debate in plenary on an article 27 on the diplomatic protection of ships’ crews. It had eventually decided not to refer the draft article to the Drafting Committee, but had instructed the Committee to consider drafting a provision dealing with the connection between the protection of ships’ crews and diplomatic protection.

61. At the beginning of its work on the provision, the Drafting Committee had had to choose between the following four options: adopting the text of the draft article as proposed by the Special Rapporteur, but deleting the term “diplomatic”; drafting an article which would indicate that both the flag State and the State of nationality of the crew members had the right to exercise protection in respect of crew members; drafting an article giving priority to the flag State; and having a “without prejudice” clause similar to that proposed in paragraph 73 of the fifth report, which read: “These draft articles are without prejudice to the exercise of protection by the State of nationality of a ship [or aircraft] of the crew of such a ship [or aircraft], irrespective of whether the persons are its nationals.” Additional suggested options had included giving the State of nationality of the crew member the first option to exercise diplomatic protection, which would have to be done within a reasonable time and would give priority to the nationality principle; or dealing with the issue within the confines of the “without prejudice” clause in article 17.

62. The Committee had held an in-depth discussion on the matter. For some, the concern had been that there was no basis on which to establish a substantive rule giving priority to one or the other State in question. As such, the “without prejudice” clause was the safest solution. Others were of the view that a “without prejudice” clause was insufficient, and would not reflect the majority view during the plenary debate that some kind of protection by the flag State was possible. At the same time, it was true that the majority of members of the Commission had not considered the protection in question to be “diplomatic protection”, as envisaged in the draft articles. That being so, it had been felt that the compromise could be along the lines of making some affirmative statement that protection existed, without qualifying it as “diplomatic” protection. Others had been of the view that it was not appropriate to deal with other forms of protection in a set of articles dealing with diplomatic protection.

63. Initial drafting suggestions had included the following wording: “These draft articles are without prejudice to the protection that the State of nationality of a ship is entitled to exercise in respect of the crew of the ship irrespective of whether they are nationals of the State of nationality of the ship, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.” However, that wording had not been deemed satisfactory by members who had preferred the more affirmative statement to a simple “without prejudice” clause. The Drafting Committee had then considered a further proposal based on the different approach of drafting a provision that would indicate what the State of nationality of the ship could do, without making any reference to “diplomatic protection” or even to “protection”, thereby taking into account the different views expressed in the Committee. The emphasis would therefore be on formulating an affirmative provision listing all the things the State of nationality of the ship could do in the case of an injury, such as making some kind of representation and claiming reparation. That provision would be based primarily on the judgment handed down in the *Saiga* case. According to another suggestion, the proposed provision would also affirm that the rights of the State of nationality

of the ship did not prevail over the right of the State of nationality of a crew member to exercise diplomatic protection. The point was to ensure that no priority would be established in favour of the State of nationality of the ship.

64. The Drafting Committee had considered that proposal at length on the basis of the following working formulation: “Without prejudice to the exercise of diplomatic protection by the State of nationality of members of crew of a ship, the State of nationality of the ship is entitled to claim cessation of the wrongful act and reparation for injury caused to members of the crew irrespective of nationality when they have been injured in the course of an injury to a vessel as a result of an internationally wrongful act.” The “without prejudice” phrase had been included to indicate the basic relationship between the protection by the national State of the crews and whatever action that the State of nationality of the ship could take, without saying anything about priority. As a result of the debate, the following text for article 19 had been submitted to the Committee:

“1. The State of nationality of a ship is entitled to claim cessation of a wrongful act and reparation for the injury caused to members of the crew, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

“2. Paragraph 1 does not affect the right of the State of nationality of any such members to exercise diplomatic protection in respect of its nationals.”

65. It had been suggested that the text should be amended by replacing the words “is entitled to claim” by the words “is entitled to exercise diplomatic protection and as a consequence of it sees fit to claim” and by referring either in the text of the article or in the commentary to the context in which the right being referred to arose by adding the phrase “as recognized by the International Tribunal for the Law of the Sea”.

66. Since some members had expressed concern that the proposed text in fact established a system of priority, it had been suggested that paragraph 2 could be turned into an opening clause of paragraph 1. The text had therefore been reformulated to read: “The right of the State of nationality to exercise diplomatic protection on behalf of its nationals is not affected by any right of the State of the flag of a ship to seek redress for damage suffered by members of the crew, irrespective of nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.” Hence reference would first be made to the right of the State of nationality of the crew members to exercise diplomatic protection on their behalf, which was the subject of the draft articles, and, then, in the second half of the provision, it would be recognized that the State of nationality of the ship might also seek redress on behalf of crew members, irrespective of their nationality. Again, no reference was consciously made to any priority between the two States.

67. That formula, with some amendments, had served as a basis for the compromise text at which the Drafting Committee had finally arrived. For example, the reference to “any” right of the flag State had been considered too vague and had been replaced by more affirmative definite article, “the”. The words “seek redress for damage” had also been considered unduly restrictive and had been replaced by the words “seek redress”. Some other minor stylistic refinements had also been suggested. The Committee had finally confined itself to two possible versions: “The right of a State to exercise diplomatic protection on behalf of its nationals is not affected by the right of the State of nationality of a ship to seek redress on behalf of members of the crew, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act” or “The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.” The Committee had adopted the latter text as article 19. As for the title, the Committee had considered the options “Protection of ships’ crews” or “Ship crews”, but had settled for “Ships’ crews” which was more in line with the title of article 8 on stateless persons and refugees.

68. On behalf of the Drafting Committee, he recommended that the Commission should adopt all the draft articles on first reading.

69. The CHAIRPERSON invited the members of the Commission to adopt on first reading the titles and texts of the draft articles on diplomatic protection proposed by the Drafting Committee.

PART ONE (General provisions)

ARTICLE 1 (Definition and scope)

Article 1 was adopted.

ARTICLE 2 (Right to exercise diplomatic protection)

Article 2 was adopted.

PART TWO (Nationality)

Chapter I (General principles)

ARTICLE 3 (Protection by the State of nationality)

Article 3 was adopted.

Chapter II (Natural persons)

ARTICLE 4 (State of nationality of a natural person)

Article 4 was adopted.

ARTICLE 5 (Continuous nationality)

Article 5 was adopted.

ARTICLE 6 (Multiple nationality and claim against a third State)

Article 6 was adopted.

ARTICLE 7 (Multiple nationality and claim against a State of nationality)

Article 7 was adopted.

ARTICLE 8 (Stateless persons and refugees)

Article 8 was adopted.

Chapter III (Legal persons)

ARTICLE 9 (State of nationality of a corporation)

70. Mr. AL-BAHARNA requested clarification of the words “some similar connection” in the definition of the State of nationality of a corporation. He wished to know whether they had been chosen in preference to the words “other similar connection” and whether that choice would be explained in the commentary. He feared that those words were much too general. He also wondered whether the criterion of the corporation’s formation implied registration, since it was usually impossible to form a corporation without registering it, or whether the criterion was taken from the *Trail Smelter* arbitration, which specifically referred to the criterion of registration.

71. The CHAIRPERSON recalled that article 9 had triggered a lengthy debate on the differences between Anglo-Saxon and continental practice when a corporation was formed. In seeking to define the nationality of a corporation, it had proved very difficult to find a formula covering all potential scenarios, not only in Anglo-Saxon and continental law countries, but also in other countries. He assured Mr. Al-Baharna that the text of the article would form the subject of a detailed, explicit commentary.

72. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) said that the criterion of the State under whose law the corporation had been formed and that of the State on whose territory the corporation had its registered office or seat of management were cumulative. The third criterion of the State with which it had a similar connection was a broad enough compromise to cater for all eventualities. Detailed explanations of the reasons for selecting the three criteria in article 9 would be provided in the commentary.

73. The CHAIRPERSON said that, in the light of the explanations of the meaning of the article, which would be included in the relevant commentary, he took it that the Commission wished to adopt article 9.

Article 9 was adopted.

ARTICLE 10 (Continuous nationality of a corporation)

Article 10 was adopted.

ARTICLE 11 (Protection of shareholders)

74. Mr. AL-BAHARNA said that the words “the State of nationality of the shareholders” gave the impression that all the shareholders in a corporation were nationals of the same State. That was not what was intended in article 11.

75. Mr. DUGARD (Special Rapporteur) said that the same purpose could be achieved by adding the words “or States” in brackets after the word “State”.

76. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) said that the text was clear enough as it stood. The commentary would explain what was meant by “the State of nationality of the shareholders in a corporation”.

77. Mr. BROWNLIE, speaking on a point of order, said that now was not the time to start redrafting the draft articles, with or without the agreement of the Special Rapporteur or the Chairperson of the Drafting Committee. Even some of the proposals which looked harmless involved issues on which the Commission had already spent a great deal of time and which were not merely points of drafting.

78. The CHAIRPERSON said that Mr. Brownlie had raised an extremely relevant point of order. The normal procedure was not to reopen the discussion on the wording of draft articles in plenary because a brief and cursory examination of questions which might have far-reaching consequences was extremely difficult, even if they appeared to be only minor drafting issues.

79. Mr. AL-BAHARNA said that he accepted Mr. Brownlie’s point of order, on the understanding that the commentary would contain the necessary explanations and that the Commission could come back to the wording of article 11 on second reading.

80. The CHAIRPERSON assured the members of the Commission that the meaning of the words “the State of nationality of the shareholders in a corporation” would be clearly explained in the commentary.

81. Mr. ECONOMIDES said that, like Mr. Al-Baharna, he had many comments to make on a number of the articles under consideration. The Commission should make it clear in its report that it was adopting the text only on an entirely preliminary basis pending information to be provided by Governments and the second reading of the draft articles.

82. The CHAIRPERSON emphasized that the draft articles were being adopted on first reading and that, on second reading, each member would be free to suggest amendments to the adopted text.

83. Mr. KABATSI said that, although he basically agreed with the Chairperson and Mr. Brownlie, the adoption of a draft text on first reading did not mean that the members of the Commission should refrain from making any comments on the text submitted. The argument that a text submitted on first reading had to be accepted without discussion seemed too categorical.

84. Mr. DAOUDI said that he did not see the point of adopting draft articles without discussion following the introduction by the Chairperson of the Drafting Committee.

85. The CHAIRPERSON stated that the aim was to enable members of the Commission who had not taken part in the Drafting Committee’s work to express their opinions on the draft articles and, possibly, to vote against their adoption. No one was trying to force their hand. The Drafting Committee had been broadly representative, everyone had had a chance to speak and the wording that it had adopted was based on the lowest common denominator. Everyone was entitled to express an opinion, which would be reflected in the summary record of the meeting, but the time had come for the Commission to complete its work on the draft articles and the only way of doing so was to adopt them, by a vote, if necessary. The question as to whether the correct procedure was being followed did not arise, as it was the only procedure available to the Commission.

86. Mr. AL-BAHARNA said that he agreed that it was not the right time to amend the proposed draft articles, but thought that members were entitled to address their comments to the Special Rapporteur and the Chairperson of the Drafting Committee, so that they could take those comments into account when the text was considered on second reading. The fact that draft articles were adopted provisionally on first reading should not preclude debate.

87. The CHAIRPERSON said that he took it that all the comments that had been made would be reflected in the summary record and that the Commission accepted the wording proposed for article 11.

Article 11 was adopted.

ARTICLE 12 (Direct injury to shareholders)

Article 12 was adopted.

ARTICLE 13 (Other legal persons)

Article 13 was adopted.

PART THREE (Local remedies)

ARTICLE 14 (Exhaustion of local remedies)

Article 14 was adopted.

ARTICLE 15 (Category of claims)

Article 15 was adopted.

ARTICLE 16 (Exceptions to the local remedies rule)

88. Mr. Sreenivasa RAO wondered whether it was not self-evident, as stated in paragraph (c), that local remedies did not have to be exhausted when there was no relevant connection between the injured person and the State alleged to be responsible.

89. Mr. DUGARD (Special Rapporteur) said that there had been a very lengthy debate on that issue, on which it

had been necessary to hold informal consultations. The Commission had therefore taken the view that the point was not self-evident and needed to be included in the article.

90. The CHAIRPERSON said that he took it that, in the light of the Special Rapporteur's explanations, the Commission wished to adopt article 16.

Article 16 was adopted.

PART FOUR (Miscellaneous provisions)

ARTICLE 17 (Actions or procedures other than diplomatic protection)

ARTICLE 18 (Special treaty provisions)

ARTICLE 19 (Ships' crews)

91. Mr. MOMTAZ said that article 19 should immediately follow article 17. Article 17 embodied a general rule and the rule contained in article 19 must be seen as the corollary of the rule stated in article 18. Articles 18 and 19 should therefore be inverted. The provision now contained in article 18 would thus come at the end of the set of articles on *lex specialis*.

92. Mr. GAJA said that the French and English versions of article 17 were different. In his opinion, the French text was a more faithful reflection of the Drafting Committee's intention to stress that the right of States, natural persons or other entities to resort to actions and procedures was governed by international law. The English version gave the impression that it was the actions or procedures which were governed by international law. He therefore proposed that the English version should be brought into line with the French text by placing the words "under international law" immediately after the word "resort".

93. Mr. ECONOMIDES said that he had some difficulty with the grouping together of article 17 (entitled "Actions or procedures other than diplomatic protection") and article 18 (entitled "Special treaty provisions") because all actions or procedures other than diplomatic protection were a matter of special treaty provisions and the two titles were thus confusing. It was, moreover, a well-established legal rule that special treaty provisions took precedence over general provisions. Special treaty provisions should therefore take priority over the very general rules on diplomatic protection. In article 18, however, that priority was given only when the two kinds of provisions were inconsistent. That was contrary to the law. No matter whether it was compatible or incompatible with a general rule, a special rule always took precedence. The Commission was thus introducing an innovation *vis-à-vis* internal law and even *vis-à-vis* the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"). In his opinion, articles 17 and 18 should be reconsidered and merged into a single article. It was premature to discuss the articles' positioning. He would rather have article 19 come after article 8, for example, but that was a matter for discussion on second reading.

94. Mr. DUGARD (Special Rapporteur) said that he entirely agreed with Mr. Gaja's proposal. The words

"under international law" had been incorrectly placed after the word "procedures" in the English version of article 17.

95. Mr. AL-BAHARNA said that, in the English version of article 17, a comma should be added after the word "entities".

96. The CHAIRPERSON said that he took it that the Commission wished to adopt article 17, the French version being deemed the authentic text.

Article 17 was adopted.

97. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt article 18, having duly taken account of the comments by Mr. Momtaz and Mr. Economides.

Article 18 was adopted.

98. The CHAIRPERSON said that he took it that, account having been taken of the comments by Mr. Momtaz and Mr. Economides, the Commission wished to adopt article 19.

Article 19 was adopted.

99. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the draft articles on diplomatic protection, as proposed by the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2807th MEETING

Tuesday, 1 June 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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.4/537. sect. C, A/CN.4/540,¹ A/CN.4/543,² A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² *Ibid.*