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Chairman: Mr. Bennouna . . . . . (Morocco)
later: Mr. Dhakal (Vice-Chairman) . . . . . (Nepal)

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04-58839 (E)

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The meeting was called to order at 9.45 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Ms. Škrk** (Slovenia) said that the draft articles on diplomatic protection were well balanced and provided a good starting point for the preparation of the text to be submitted on second reading. Slovenia did not contest the International Law Commission's position that recourse to diplomatic protection was a right of States, although it had initially emphasized the human rights dimension of contemporary diplomatic protection. With regard to the State of nationality of a natural person, addressed in draft article 4, Slovenia did not dispute the rule of effective nationality established by the Commission, which was less stringent than the rule suggested in the *Nottebohm* case. Draft article 4 also contained a non-exhaustive list of several means of acquiring nationality, including succession of States. While it was true that succession of States affected the nationality of a great number of persons, both natural and legal, the acquisition of nationality by a natural person by succession of States was not in itself a form of acquisition of nationality. The legal effects of nationality acquired by that means fell within one of the established means of acquisition: birth, descent or naturalization.

2. With regard to continuous nationality, her delegation had some reservations about the changes of nationality envisaged in draft article 5, paragraph 2; that question should be approached with great precision and care in order not to deviate from the basic rule that it was the State of nationality at the time of the injury which was in fact entitled to exercise diplomatic protection. The joint presentation of a claim on behalf of two or more States of nationality of a natural person holding dual or multiple nationality with respect to a wrongful act of another State could be regarded as an example of the progressive development of international law. Despite the existence of some practice to the contrary, the same view could be taken of the rule on multiple nationality and claims against a State of nationality contained in draft article 7. That rule departed from the traditional position disallowing, in the case of multiple nationality, the exercise of diplomatic protection against a State of which the person concerned was also a national.

3. Her delegation was inclined to accept the Commission's view that one State of nationality might exercise diplomatic protection against another State of which the person was a national, provided that the nationality of the first State was predominant at the time of the occurrence of the injury and at the time of the presentation of the claim. The criteria for determining predominance were outlined in paragraph 6 of the commentary to draft article 7 and were based mainly on the criteria developed in the practice of States. However, her delegation was somewhat reluctant to have certain subjective notions, such as language, number of visits, and family ties, listed among those criteria. Slovenia had always believed that the State of residence of stateless persons or refugees should be entitled to exercise diplomatic protection on their behalf and it therefore supported the inclusion of draft article 8 in the current text.

4. With respect to draft articles 9, 10 and 13, although her delegation did not contest the exercise of diplomatic protection in respect of corporations and other non-State legal entities, it had some reservations concerning the protection of shareholders within the context of diplomatic protection, despite the existence of some legal precedents in that field. In particular, draft article 12, on direct injury to shareholders, called for additional analysis. It was not always easy in practice to draw a distinction between the rights of a corporation and those of its shareholders, for that distinction depended primarily on the domestic legislation of the corporation's State of nationality. Notwithstanding those difficulties, there must be no discrimination against foreign shareholders, and the property rights deriving from their shareholder status must be fully respected.

5. Although her delegation supported in principle the Commission's approach to the requirement of exhaustion of local remedies, it suggested that the expression "whether ordinary or special", in reference to judicial and administrative courts or bodies, should be deleted from the definition of local remedies contained in draft article 14, paragraph 2; the term was somewhat superfluous and ambiguous, the more so if it was intended to refer to a State's highest courts, for such courts were not special. An individual's access to a State's highest courts must be examined in the light of the jurisdiction of the court in question, on a case-by-case basis and within the ordinary meaning of

exhaustion of local remedies as developed in international law.

6. Her delegation was in favour of retaining draft article 19, which stated the right of a ship's State of nationality to seek redress on behalf of its crew members when they had been injured as a result of an injury to the ship by another State.

7. **Mr. Gumbley** (Australia) said that his delegation remained particularly interested in the subject of diplomatic protection of corporations and their shareholders, given the difficulty of codifying workable rules in that area. It noted the approach taken by the Special Rapporteur in draft article 9, where he endorsed the fundamental principle enunciated in the *Barcelona Traction* case, and in draft article 11, which set out some exceptions to that principle in order to protect foreign investors. The Australian delegation further noted the altered language on the requirement of continuous nationality of corporations in draft article 10.

8. On the question of diplomatic protection of a ship's crew by the flag State, addressed in draft article 19, the law of the sea, including the relevant provisions of the United Nations Convention on the Law of the Sea, covered the issue adequately; it should therefore be excluded from the draft articles.

9. Turning to the topic of international liability, he reiterated his delegation's view that the guiding principle should be that the innocent victim should not bear the loss, and that the primary responsibility for compensation for such loss should rest with those in command or control of the activity at the time of the incident. That point might be incorporated into the objective of draft principle 3. In the case of damage to the environment, in some circumstances it might take several years for the damage to come to light. Given that draft principle 4 provided for the possibility of limitations, such limitations should take into account the time elapsed before the damage was perceived. The procedure for assessing compensation for environmental damage needed further development. With regard to draft principle 5, Australia supported the taking of prompt and effective response measures by the State, if necessary with the assistance of the operator, or, where appropriate, of other entities, for that was an essential means of keeping transboundary damage to a minimum. Australia would welcome the inclusion of a principle which made it clear that the draft principles were without prejudice to the rights and obligations of the parties under rules of general international law concerning the international responsibility of States. It reserved judgement on the final form which the work on the topic should take until it had given due consideration to the draft articles.

10. **Mr. Rosand** (United States of America), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that the draft principles were aiming in the right direction and that international regulation in that area ought to proceed by means of careful negotiations tailored to specific issues and particular regions; such negotiations should address in detail such questions as environmental impact assessment, prevention measures and notification. Experience taught that different types of hazardous activity required different solutions, that different legal systems might require different methods, and that States at different levels of economic development might require different approaches. Recommendatory principles which took such efforts into account and supported them could make an appropriate contribution. It was particularly appropriate that the draft principles should be recommendatory, for they were innovative rather than descriptive of current law or State practice. Since there was no consensus on liability or loss allocation in the event of harm arising out of acts not prohibited by international law, it was important that the draft principles should not be presented in a form which might be construed as a codification of customary international law; in that regard, his delegation applauded the work done by the Commission.

11. **Mr. Serradas Tavares** (Portugal), referring to the draft articles on diplomatic protection and specifically to article 3, paragraph 2 thereof, said that the exception to the general rule laid down in that provision might not be sufficient under the current international legal system; for instance, it might not cover the right of any State members of the European Union to offer diplomatic protection to citizens of other member States, provided that they had no diplomatic representation in a third State's territory. A third paragraph might therefore need to be added in order to expand the scope of the exception, bearing in mind that the problem might also arise in relation to integration processes throughout the world.

12. With regard to draft article 8 (Stateless persons and refugees), his delegation believed that the

requirement of both lawful and habitual residence set too high a threshold and could lead to a lack of effective protection for the individuals involved. He therefore invited the Commission to give due consideration to that issue when it embarked on the second reading of the draft articles.

13. With respect to draft articles 11 and 12 on the issue of shareholders as autonomous subjects of diplomatic protection, his delegation considered that the protection provided to shareholders was perhaps too generous; it departed from existing customary international law and thus did not constitute a "progressive" development of international law. A careful analysis of the articles and the commentaries thereon showed that they had been drafted solely on the basis of the *Barcelona Traction* case and covered matters not specifically addressed by the Court. Thus, innovation rather than progressive development was proposed in the draft articles. The Commission's proposals were based not on solid arguments given by the International Court of Justice, but on prognosis reasoning. His delegation's main concern was whether a shareholder, as either a natural or a legal person, should benefit from special protection other than that provided to States' nationals in the draft articles. In the first place, his delegation saw no added value in the specific provisions concerning shareholders, as compared with the protection afforded to nationals, in cases where a shareholder was directly injured by a State's act; Portugal wondered whether, in that instance, protection should not be granted to them in general terms as nationals rather than shareholders. Second, the draft articles were meant to protect nationals as such; the question was whether the provision of special protection for shareholders would not protect the investment rather than the national and whether such protection, which would constitute positive discrimination in favour of shareholders, would be justifiable. His delegation believed that the protection of shareholders as investors would be better grounded within specific instruments of international law, such as bilateral treaties for the protection of foreign investments, as draft article 18 seemed to recognize, or at least accept. Third, most direct injuries to shareholders were produced in violation of their individual rights, which were afforded, primarily, if not solely, by domestic rather than international law.

14. His delegation understood that similar difficulties concerning other issues relating to the scope of the draft articles were to be resolved on second reading. They included the possibility of widening the scope to include not only protection of ships' crews and of shareholders, but also the issue of functional protection of nationals employed by international organizations and the question of diplomatic protection in situations where a State or an international organization administered a foreign territory or a State, issues which Portugal had raised in the past.

15. With respect to international liability for injurious consequences arising out of acts not prohibited by international law, although his delegation agreed in general with the balance established between the role of the State and that of the operator as the primary subject of liability, it considered that the role of the State could be made more decisive in view of the fact that the State, not the operator, was the subject of international law; that the State had prima facie responsibility for providing adequate compensation according to the principle of international law that the State was liable for acts emanating from its territory; and that the State should establish international or domestic mechanisms to recover costs from the operator.

16. As to the final form of work on the topic, his delegation still believed that it should be a set of draft articles, rather than principles, that would complete the draft articles on prevention already adopted by the Commission and that could, in due course, lay the groundwork for an international convention on liability in the case of transboundary harm arising out of hazardous activities. Portugal hoped that the Commission would take that concern into account when embarking upon the second reading of the issues relating to prevention and allocation of loss, the two components of the topic of liability.

17. **Ms. Kamenkova** (Belarus) said that some elements of the draft articles, particularly the innovative ones reflecting progressive development of the rules of diplomatic protection, required further study by Governments.

18. Her delegation considered Chapter II of the draft articles to be well thought out and well balanced. Generally speaking, the prior condition for the exercise of diplomatic protection by a State was that the natural person requesting such protection must hold the nationality of the State which was prepared to provide it — in other words, there must be a solid legal link

between the physical person and the State. The draft articles contained exceptions which allowed States to exercise diplomatic protection in respect of stateless persons and refugees who were permanently resident in their territory when an injury occurred. Those exceptions were perfectly justified, since they reflected the general tendency of contemporary international law to create conditions conducive to the effective protection of the rights and interests of that category of especially vulnerable persons, who had lost their link to their country or other place of habitual residence.

19. On the other hand, her delegation had serious doubts regarding the provision in draft article 7 that would allow the State of predominant nationality of a person to bring a claim against the State of that person's other nationality. The concept of "predominant nationality" was not well defined in international law and, in some cases, entailed subjective factors, with the risk that ill-intentioned persons might exploit multiple nationality in order to benefit from diplomatic protection. Her delegation would prefer to consider the possibility of removing those provisions from the draft articles.

20. While her delegation understood the importance of the principle that a corporation should receive protection from its State of nationality rather than the State of nationality or citizenship of the shareholders, it seemed logical and acceptable to include in draft article 11 an exhaustive list of special circumstances in which the protection of shareholders could be exercised by their State of nationality or citizenship. Her delegation proposed that consideration should be given to combining the provisions of draft articles 11 and 12 in a single article in the light of their common purpose.

21. With respect to draft article 13, her delegation could agree to the inclusion of a special article on the conditions for granting other legal persons, mutatis mutandis, the same protection as corporations, but it would prefer fuller unambiguous wording on that point. Her delegation believed that the diplomatic protection of other legal persons should be strictly limited to defending their commercial and property rights. Belarus saw no urgent need to establish rules that would allow diplomatic protection to be extended to non-governmental organizations and did not believe that would be justified; in performing their international functions, NGOs did not have sufficient links to their State of nationality and had, therefore, no claim to its protection.

22. Her delegation reiterated the need to exclude protection of ships' crews from the draft articles, and also welcomed the decision not to include rules on functional protection in the context of the rights and interests of international organizations.

23. **Mr. Keinan** (Israel) said, with regard to diplomatic protection, that it was important to seek a practical role for the draft articles and to focus on real-life issues, based in State practice. The Commission and many States were significantly concerned about the scope of nationality rules for legal persons. Further thought should perhaps be given to achieving a balance of interests between the nationality of the corporation and the nationality of shareholders. The rights of shareholders must have a significant role in the draft articles.

24. One of the potential causes of change of nationality not noted in the commentary to draft article 5 was the transfer of territory from one State to another, as dealt with in the decision adopted by the International Court of Justice in 2002 in the case concerning the land and maritime boundaries between Cameroon and Niger, and in previous judgements.

25. The close relationship between the topic of diplomatic protection and that of State responsibility contributed to the need felt by States to ensure that such documents had a limited form and a non-binding nature, and to have flexibility in carrying out affairs of State without a perception of stifling limitations.

26. As to the form that the draft articles should take, Israel supported the view of many States — reflected in the approach adopted by the Commission — that a set of non-binding principles should be sought that could be used by States as appropriate. As in the case of other documents dealing with matters relating to the environment, it was vital to incorporate flexibility into regional solutions.

27. It was worth noting that, in draft principle 2, the definition of the term "damage" included the word "damage". In addition, the chapeau of the definition might read, "and may include" rather than "and includes", since the damage did not necessarily include all the details listed afterwards. Neither paragraph 3 of draft principle 4 nor paragraph 3 of draft principle 6 seemed to reflect adequate appreciation for the national

legislation of a State. The "requirement" that appeared in paragraph 3 of principle 4 should be limited to requirements that were compatible with local law. Similarly, paragraph 3 of principle 6 should be expressly subject to the national legislation of a State.

28. **Ms. Ow** (Singapore), said with respect to draft article 2 (Right to exercise diplomatic protection), that she fully agreed with the opinions espoused in the commentary, namely, that international law imposed no obligation or duty on a State to exercise diplomatic protection on behalf of a national; it was a discretionary power, the exercise of which could be determined by considerations of a political or other nature, unrelated to the particular case. That must be so, since the conduct of international relations was a delicate and sensitive matter which must take into account considerations of a multifaceted nature.

29. Turning to draft article 8 (Stateless persons and refugees), she said the commentary confirmed that the article was an exercise in the progressive development of the law and departed from the traditional rule that only nationals could benefit from the exercise of diplomatic protection; it was also described as an exceptional measure introduced *de lege ferenda*. Although Singapore understood the underlying concern with enhancing the protection of stateless persons and refugees, it also noted the valid questions posed by other delegations on whether or not it was appropriate to address that issue within the context of diplomatic protection.

30. Draft article 17 (Actions or procedures other than diplomatic protection) contained saving clauses for the right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered due to an internationally wrongful act. As the commentary stated, the article was primarily concerned with the protection of human rights by means other than diplomatic protection while also preserving the rights of States, natural persons and other entities under procedures other than diplomatic protection. The arguments for and against the inclusion of such a saving clause had been comprehensively presented in the fifth report of the Special Rapporteur; Singapore was reflecting on the meaning of draft article 17 and the need for its inclusion.

31. The commentary on draft article 18 (Special treaty provisions) suggested that its underlying intention was to clarify the relationship between the draft articles and treaties regulating and protecting foreign investment. Singapore understood the reasons for such an approach, in the light of the increasing number of investment treaties and would give positive consideration to its inclusion. It was unclear, however, whether the phrase "special treaty provisions" was clearly understood and recognized in that context. What was the difference between "special treaty provisions" and other treaty provisions, for example? Was there an implied hierarchy such that the principles of the draft articles applied to the latter but not the former? Furthermore, if the principal objective of the article was to clarify the relationship between the draft articles and investment treaties, might that be achieved through explicit reference to investment treaties or provisions in free trade agreements?

32. The commentary on draft article 19 (Ships' crews) explained that its purpose was to affirm the right of the State or States having the nationality of the ship's crew to exercise diplomatic protection on their behalf, while recognizing that the State of nationality of the ship also had a right to seek redress on their behalf, irrespective of their nationality. In that regard, the commentary cited the available literature, jurisprudence and examples of State practice to support the position that the flag State could seek redress on behalf of non-national crew members. Leaving aside the latter question for the time being, Singapore welcomed the recognition by the Commission that any such right could not be categorized as diplomatic protection, and noted that the majority of speakers in the Committee had opposed the inclusion of a provision recognizing the right of the flag State to exercise diplomatic protection on behalf of non-national crew members. Care must be taken to ensure that the inclusion of an article on the issue of ships' crews did not inadvertently run counter to such objections. Singapore noted that State practice on that topic was neither universal nor extensive, and that international arbitral awards are inconclusive on the right of a flag State to extend protection to non-national crew members. Her delegation believed that the flag State's ability to seek redress for non-national crew members depended on the facts of each case, the nature of the complaint, the redress sought and the legal regime under which it was sought. In other words, it might not necessarily exist in every scenario. Therefore, the Commission might wish to consider

whether it would be useful to provide a clarification in the commentary on the article, if it were included.

33. **Ms. Dascalopoulou-Livada** (Greece) said that draft articles 1 to 5 were acceptable to her delegation. Draft article 6, paragraph 2, which provided that two or more States of nationality might jointly exercise diplomatic protection in respect of persons having dual or multiple nationality, was a novel provision that fell within the activities of the Commission which promoted the progressive development of international law.

34. Her delegation was also in favour of draft articles 7 and 8. The provisions regarding the exercise of diplomatic protection in respect of stateless persons and refugees also constituted a positive step which she wholeheartedly supported.

35. Chapter III of the draft articles on diplomatic protection of legal persons had been significantly improved, especially with the inclusion of the corporation's seat of management (registered office) among the criteria for deciding the nationality of the corporation.

36. She retained some doubts on draft article 16 regarding exceptions to the local remedies rule. Indeed, the plethora of grounds for dispensing with the rule of exhausting local remedies tended to annihilate the rule. Furthermore, the wording was vague and, in the case of subparagraph (c), complicated. As a result, there was a strong possibility of overlap in subparagraphs (a), (b) and (c). For that reason, the Commission should come up with a text indicating succinctly and clearly why the rule on the exhaustion of local remedies should be set aside.

37. Regarding Part Four of the draft articles, her delegation was perplexed by the solution adopted in draft article 17, which dealt with actions or procedures other than diplomatic protection. According to her reading of the phrase "without prejudice", the text, as it currently stood, seemed to place diplomatic protection as such on an equal footing with other actions or procedures under international law. Given that the remedies provided for by human rights treaties were lex specialis vis-à-vis the rules on diplomatic protection, they should have priority over the latter.

38. Draft article 18 dealt with other special treaty provisions, particularly those on bilateral investments and dispute resolution to which, however, treatment different from that afforded by draft article 17 to human rights treaties had been reserved. Seeing no reason for such a differentiation between draft articles 17 and 18, she suggested that the same treatment should be afforded to both situations, irrespective of whether a human rights or investment protection or dispute settlement mechanism was employed. Concerning human rights in particular, diplomatic protection might be invoked in cases where the respondent State failed to implement the judgement or other ruling of the relevant court. In general, she agreed with those Commission members who had supported the merging of draft articles 17 and 18.

39. The Greek delegation had consistently and strongly supported the extension of the possibility for the flag State to afford diplomatic protection to ships' crews irrespective of the nationality of their ship. That accorded with the predominant role that such State played with regard to the ship, as expressly recognized by the international law of the sea. In that connection, she found particularly convincing the reasoning of the International Tribunal on the Law of the Sea in the *Saiga* case described in paragraphs 62 to 65 of the fifth report of the Special Rapporteur. Although she agreed with the inclusion of a new draft article 19, she failed to see any valid reason why the flag State's protection of a ship's crew should be limited to the case of crew injuries sustained "in the course of an injury to the vessel". Clearly, that provision would mostly be needed in the case of unlawful detention of the crew, which most probably would have been preceded by the seizure and detention of the vessel. She did not feel certain that "injury to the vessel" would cover its seizure and detention alone in the absence of material damage to it. Even in that event, however, it would be sufficient that injury to the crew had been incurred because of its relationship to the ship. Similarly, the issue of exhaustion of local remedies should also be examined with a view to providing a specific exemption in the case of the crew. Second, her delegation did not share the view that the principle of diplomatic protection being exercised by the State for the benefit of its nationals needed reiteration. The purpose of the draft article should be simply to afford the protection of the flag State to the ship's crew regardless of their nationality. For that reason, her delegation preferred the original text proposed by the Special Rapporteur.

40. Regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Greek delegation welcomed the Commission's preference for a regime of strict civil liability not based on the notion of fault. Such a regime would be extremely beneficial to victims of hazardous activities not prohibited by international law since it relieved them from having to prove that the person or entity causing the damage was at fault in order to obtain adequate compensation.

41. Under draft principle 2, the report indicated that loss of earnings would be compensated under subparagraphs (i) and (ii) of paragraph (a) if connected with bodily harm or property damage, while pure economic loss connected with damage to the environment would be covered under subparagraph (iii) of the same paragraph. That loss category raised delicate issues of causality, for which reason it would be preferable to define loss of income within the context of subparagraph (iii), as reflected in draft principle 2 of the original text proposed by the Special Rapporteur. She was also of the view that the principle should contain a definition of response measures, as well as measures of reinstatement, since those terms often occurred in the text with no unanimity as to their exact meaning in practice.

42. While damage to the environment per se was actionable, as the commentary on draft principle 3 affirmed, stark economic realities made that extremely difficult to achieve and explained why conventions such as the 1992 Lugano Convention had been unsuccessful. That was also why more recent instruments such as the Kiev Protocol, in its article 2 (d) (iii), had recognized as damage "loss of income directly deriving from an impairment of a legally protected interest". The idea had been to arrive at a compromise formula which would limit claims to those in respect of an interest which was protected specifically by legislation. Furthermore, that draft principle, in contrast to existing conventions on civil liability, enunciated the right of persons and States which had suffered injuries to invoke its provisions. That was a welcome innovation, particularly since the draft principle recognized that environmental damage as such should be compensated and that, in principle, only the State would have the locus standi necessary to formulate such a claim.

43. The first paragraph of draft principle 4 imposed on States the obligation to take measures in order to secure compensation for persons who had suffered damage. The solution which consisted of leaving the attribution of liability to the discretion of the State without indicating who would eventually assume that liability had the obvious shortcoming that injured parties would not have a direct right of action before the courts, a right that would be operative without invocation of the relevant domestic legislation. Should the draft develop towards the adoption of a convention, its influence, if the aforementioned solution was maintained, would be rather limited precisely because of legislative action of the State, which would, in addition, have a rather wide margin of discretion with regard to the compensation mechanism it would adopt. Paragraph 2 of the draft article provided that those "measures should include the imposition of liability on the operator". Such an application of the "polluter pays" principle was subsequently mitigated by the provision pursuant to which the responsibility of another person or entity could also be included. That formula, in conjunction with paragraph 13 of the commentary on the draft principle and particularly paragraphs 11 to 14 of the commentary on draft principle 3, placed the "polluter pays" principle in competition with other options, thus allowing for a flexible approach to the subject. The Greek delegation believed, however, that such an approach did not coincide with recent practice which was placing increasing emphasis on the "polluter pays" principle. Accordingly, she would support a bolder formulation of paragraph 2 to confirm the predominant role of that principle in the attribution of liability.

44. Paragraph 3 of draft principle 6 provided that every State should ensure that its courts were competent to be seized of cases of liability but gave no specific indication of which State was to assume that obligation. The Commission must propose criteria for identifying the forum States in case of damage because, as currently formulated, that paragraph gave the impression of intending to establish universal civil jurisdiction.

45. Her delegation was firmly of the opinion that by its very nature, a text on civil liability had to take the form of a legally binding instrument, such as a framework convention, provided that a clear definition of hazardous activities was adopted to constitute its scope of application *ratione materiae*. Even though regional agreements would ultimately determine the choices most suited to their own particular areas of

geographical application, those choices had to fall within a particular spectrum. The function of the framework convention, therefore, would be to provide that guidance.

46. **Mr. Lindenmann** (Switzerland), referring to draft article 5 on diplomatic protection, recalled that the Commission had raised the question of whether the State of nationality should lose the right to exercise diplomatic protection in a case where the person changed nationality after the date of the official presentation of the claim but before the matter was resolved, and said that he believed the solution now proposed by the Commission in article 5 was unobjectionable. Although it was a State's right and not its obligation to exercise diplomatic protection, the new State of nationality of such a person was caught in a difficult situation: it was one thing for a State to decide from the outset that it did not wish to bring a claim in the exercise of diplomatic protection on behalf of a person; it was another, from the moral standpoint, for it to abandon the exercise of diplomatic protection in a procedure already initiated by another State on behalf of that person. Such difficulties did not arise in the context of the system currently proposed in article 5.

47. Instead, on the issue of protection of shareholders, the grounds for the solution proposed by the Commission in draft article 10, paragraph 2, and in draft article 11, subparagraph (a), were questionable. Although the commentaries on both provisions were persuasive, a balance had to be struck between two approaches to that difficult issue, and the internal logic of the proposed solution was not clear. According to his delegation's interpretation, if a State committed a serious internationally wrongful act against a corporation such that the corporation ceased to exist, only the State of nationality of the corporation could exercise diplomatic protection on its behalf. If, on the contrary, the injury caused by the internationally wrongful act was less serious, so that the existence of the corporation was not jeopardized, but the corporation ceased its activities for reasons not related to the injury, it would not be the State of nationality of the corporation but the States of nationality of the shareholders which would have the right to exercise diplomatic protection on their behalf. The solution set out in article 10, paragraph 2, and article 11, subparagraph (a), seemed paradoxical, at least from the vantage point of the shareholders. Indeed, the more serious the violation of their rights, the smaller the possibility that their States of nationality might initiate action to exercise diplomatic protection on their behalf.

48. That said, the draft articles on diplomatic protection were very positive and reflected elements of the progressive development of codification, especially with respect to the situation of stateless persons and refugees.

49. Regarding the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Switzerland had been one of the countries that had asked for further consideration of the question of liability, and his delegation thought that the quality of the drafting exceeded expectations. As to the final form, it believed that the Commission had wisely decided not to draft a framework convention, and that the innovations of the draft would be better reflected in the form of principles.

50. **Ms. Armas García** (Cuba) said that her delegation, like others, believed that the late issuance of the report had reduced the possibility for Governments and competent national institutions to study it.

51. Cuba was concerned that the Commission had included new items in its current programme of work without explaining to the Committee how it planned to conclude work on the items already under its consideration for which, furthermore, it had been given a mandate by Member States. Any future consideration of the new items proposed by the Commission would have to depend on the decision taken in that respect by the Committee.

52. With regard to diplomatic protection, that should continue to be a discretionary right exercised by a State and not an international obligation, because it was incumbent upon the State to decide whether or not it would take up the cause of one of its nationals injured as the result of an internationally wrongful act by another State. Diplomatic protection had to be exercised only by peaceful means, in accordance with the norms of international law.

53. Concerning draft article 7 on multiple nationality and claim against a State of nationality, no exception should be made to the rule that in the case of a dual national, neither of the two States of nationality could exercise diplomatic protection and present a claim to the other State on behalf of that person, because the

non-liability norm must be upheld, as recognized in a number of instruments, among them the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, article 4 of which declared that "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". Furthermore, Cuba considered that the concept of "predominant nationality" was ambiguous and that if it was decided to maintain the current approach of draft article 7, it would be very useful to include clear criteria for determining predominance for the purposes of diplomatic protection. Draft article 8 included elements of progressive development that should be weighed with caution so as not to depart from the legal regime in force for the protection of refugees.

54. With regard to draft article 9 on the State of nationality of a corporation, the latest formulation was more complete and avoided the difficulties that had arisen in that connection. Nevertheless, the concept of "some similar connection" could introduce a certain ambiguity, and the Commission would have to continue working on the matter to ensure greater legal certainty.

55. Concerning draft article 11, the Commission should give more consideration to the need to include a separate article on the protection of shareholders. They ought to be already protected under the articles on the protection of natural or legal persons, as appropriate. Also, Cuba supported the principle that no State could invoke diplomatic protection of one of its nationals if that person had not previously exhausted all available domestic remedies.

56. Lastly, concerning the possibility of drafting an article on the clean hands doctrine in the context of diplomatic protection, in Cuba's view that was an imprecise notion not fully accepted in international law and not recognized by all States, and therefore special treatment should not be given to the subject.

57. **Ms. Zabolotskaya** (Russian Federation) said, with regard to the topic of diplomatic protection, that the scope of the draft articles had been identified correctly, and that such topics as functional protection by international organizations, the clean hands doctrine, and questions of delegation of diplomatic protection could be easily set aside. At the same time, doubts remained concerning the provision in draft article 13 regarding "other legal persons", according to which the principles applicable to corporations set forth in draft articles 9 and 10 were to be applied "as appropriate" to diplomatic protection of other legal persons. Given the wide variety of legal persons and the practice of legal regulation of their status, the Russian Federation reiterated its proposal to withdraw the issue of "other legal persons" from the draft and, at the same time, to complement it with a clause to the effect that the articles were without prejudice to the right of diplomatic protection for legal persons that could not be considered "corporations" under draft article 11.

58. It was important to remember that the exhaustion of local remedies rule in draft article 15 applied only to an international claim or a request for a declaratory judgement and not to other diplomatic measures covered by the concept of diplomatic protection as defined in draft article 1.

59. More thought should be given to article 16, for when defining criteria for exceptions to the exhaustion of local remedies rule, such remedies should not a priori be called into question. In particular, there were doubts regarding the presence of subparagraph (a) along with the second part of the sentence contained in subparagraph (c) of draft article 16. In fact, the provision in paragraph 3 of the commentary on the draft article seemed unconvincing, for if it was common knowledge that "the local courts [were] notoriously lacking in independence", she wondered why an investor would risk investing in the country concerned. Furthermore, the "threshold" of exhaustion of local remedies set forth in draft article 16 seemed too low.

60. With respect to draft article 11, concerning the protection of shareholders, the structure appeared to be correct, inasmuch as the right to exercise such protection arose in exceptional cases only. Nevertheless, the formulation of the exceptions was too vague and might lead to confusion.

61. Lastly, the distinction between draft articles 17 and 18 was not clear; when comparing the regime of diplomatic protection with the protection mechanisms provided for in other rules of international law, the question arose in what circumstances one should be guided by the provisions of article 17 and in what circumstances by the provisions of article 18.

62. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, given the lack of unanimity on a

number of important issues relating to that theme, guidelines would be the most appropriate form for a final document, and it would be expedient to limit work on the topic to the scope of the draft articles as established in draft principle 1, i.e., significant damage, and to exclude from the scope of application of the principles environmental damage occurring outside the national jurisdiction.

63. Her delegation agreed with the model on loss allocation adopted by the Commission, which placed the main liability for compensation for damage caused on the operator. That approach was in keeping with the "polluter pays" principle enshrined not only in international law but also in Russian legislation.

64. Her delegation also agreed on the importance of participation by the State in the loss allocation scheme, above all to ensure that the victims were not left alone to bear all the losses resulting from the damage. Although there was no direct reference to the liability of the State in terms of compensation for loss, subparagraph (h) of draft principle 3 and draft principles 4 to 8 concentrated on the State's obligation to take the necessary measures to ensure prompt and adequate compensation for victims of transboundary damage. Lastly, the definitions contained in draft article 2 would need further analysis, as the arguments for including damage to the environment per se in the concept of "damage" were not fully convincing.

65. Her delegation expressed its support for the inclusion of two new topics in the current programme of work, i.e., "Expulsion of aliens" and "Effects of armed conflicts on treaties", and for the inclusion of "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in the long-term programme of work.

66. **Ms. Villalta** (El Salvador) said, with regard to diplomatic protection, that when dealing with the codification and progressive development of international law, it was necessary to take into consideration the relevant provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, in particular article 36 thereof. The importance of that provision was reflected in advisory opinion OC-16 of the Inter-American Court of Human Rights and, at the international level, in the ruling of the International Court of Justice referred to by other speakers.

67. With regard to the principles governing nationality, conflicts of nationality must be mentioned from both the positive and negative standpoint, i.e., dual or multiple nationality and lack of nationality, and draft article 4 should distinguish between nationality acquired by birth (*jus soli* or *jus sanguinis*) and nationality acquired by naturalization.

68. Lastly, draft article 6 concerning dual or multiple nationality should take into account the rules of private international law that established the obligation of States to honour the nationality effectively in use, in accordance with the case law of the International Court of Justice, which had established the precedent of effective nationality.

69. **Mr. Khan** (Pakistan) said, with regard to the topic of diplomatic protection, that his delegation would submit written observations on all aspects of the draft articles.

70. With respect to international liability for injurious consequences arising out of acts not prohibited by international law (international liability in the case of loss from transboundary harm arising out of hazardous activities), his delegation agreed that any State had the right to engage in lawful activities. It must, however ensure that such activities did not harm other States and take measures to that end, or be held liable for the harmful consequences of its acts. It was difficult to draw up an exhaustive list of lawful activities involving a risk of harm, but it should be possible to establish an illustrative list.

71. Secondly, the expression "significant harm" raised difficulties for his delegation, as it would force a debate as to whether harm was significant or not and, in addition, as to who should decide that question. Pakistan might have accepted the term if a mechanism for dispute settlement had been in place. As no such mechanism existed, his delegation favoured the deletion of the word "significant" before the word "harm".

72. **Mr. De Vel** (Director General of Legal Affairs, Council of Europe) said that Europe wished to make its legal heritage available to the Commission in order to assist in its deliberations; in that context, he wished to present a brief summary of recent developments in the Council of Europe.

73. First, he noted that there were now 46 States members of the Council of Europe, following the accession of the Principality of Monaco. Furthermore, Protocol 14 of the European Convention on Human

Rights, reforming the procedures of the European Court of Human Rights, had been adopted, and preparations were under way for the third Council of Europe summit, to be held in Warsaw in May 2005.

74. With specific reference to the report of the Commission (A/59/10), he wished to highlight in particular the topic of jurisdictional immunities of States and their property. The Council of Europe envisaged making a contribution, in the form of a pilot study of State practice in that area, prepared by the Committee of Legal Advisors on Public International Law. The study should be published in the spring of 2005.

75. Another activity of the Committee of Legal Advisors that was of interest to the Commission concerned reservations to international treaties. The Committee functioned as a European observatory on reservations to international treaties, thus allowing member States to consider jointly, reservations that might give rise to objections. The reservations in question had been made by States members of the Council and by non-member States, and they related to European conventions and those concluded outside the Council of Europe. When a reservation presented difficulties, dialogue was initiated with the State concerned, in order to clarify the grounds for the reservation.

76. The Council of Europe was about to conclude a protocol to the 1997 European Convention on Nationality, which sought to prevent statelessness in relation to succession of States. The protocol was based on the practical experience acquired over recent years, and took into account the provisions of other international instruments, including the draft articles formulated by the Commission.

77. With regard to counter-terrorism, the Council of Europe had been working since November 2001 to make a concrete contribution to such efforts in three areas: strengthening legal measures against terrorism and its financial support, safeguarding fundamental values and, within a longer-term perspective, adopting measures to deal with the causes of terrorism in order to eradicate its roots, which were discrimination, racism, intolerance and extremism, and promote multicultural and inter-religious dialogue.

78. Since the introduction of the Council of Europe's plan of action, two instruments had been formulated: a protocol amending the 1997 European Convention on the Suppression of Terrorism, which had been opened for signature on 15 May 2003, and the guidelines on human rights and the fight against terrorism, approved by the Committee of Ministers in July 2002.

79. The Committee of Experts on terrorism was currently working on a new international legal instrument for the prevention of terrorism which covered, among other aspects, support for terrorism, the recruitment and training of terrorists, and the liability of legal persons, and which was intended to fill existing gaps in the legal sphere and in international counter-terrorism measures.

80. That was the case with the Convention on Cybercrime, which had entered into force on 1 July 2004, and whose scope extended beyond the continent of Europe. In addition to the 40 member States of the Council of Europe, the signatories of the Convention included Canada, Japan, South Africa and the United States of America. The Convention was the first international treaty on crime committed via the Internet and other international networks and it defined, in particular, offences relating to copyright law, computer fraud, child pornography and network security. Its main purpose was to formulate a common criminal policy aimed at protecting society against crime in cyberspace, notably through the approval of relevant laws and the promotion of international cooperation.

81. With regard to measures to combat trafficking in persons, the Council of Europe was making rapid progress in preparing a European convention against human trafficking, which could be concluded by the beginning of 2005.

82. In the field of bioethics, the Council had adopted the Convention on Human Rights and Biomedicine, the first international treaty in that area. Work was also being carried out on an additional protocol to the Convention, on human genetics, and on a draft instrument on research using human biological material. The Secretary General of the Council of Europe had sent a letter to the Governments of member States in order to bring to their attention the problem of trafficking in organs and to request information about measures adopted to prevent it.

83. Lastly, he highlighted the excellent cooperation that existed between the Council of Europe and the United Nations, and between the Council and the Commission.

84. **Mr. Mikulka** (Secretary of the Committee), referring to the date of issuance of the Commission's report (A/59/10), which several delegations had mentioned, said that the report had been issued on 24 September 2004, the earliest date of issuance in the past five years. As a result, the period for its consideration had been 36 days, which was also the longest in five years. On the day of its issuance, the report had been placed on the United Nations Official Documents System (ODS) and on the web site of the Commission in all official languages of the Organization. As had been stated on several occasions, the Codification Division, which was the substantive secretariat of the Commission, completed its work on the report within the five days following the closure of the Commission's session, and submitted it for processing by the United Nations Office at Geneva. From that point onwards, the Division had no further control over the process of translation and publishing of the report, which depended on factors determined by the Documents Control Section of the Department for General Assembly and Conference Management. Over the past two years, several other measures had been adopted in order to provide States with more and faster information concerning the progress of the Commission's work during its session and the results achieved. The Commission had set up a web site which contained information — updated almost on a daily basis — on the consideration of topics by the Commission during its session. The draft articles adopted by the Commission were also published on the site in all official languages at the end of the session, usually during the first or second week of August. The Codification Division was thus doing everything possible to keep delegations informed about the work of the Commission and would continue to do so.

85. *Mr. Dhakal (Nepal), Vice-Chairman, took the Chair*.

Agenda item 162: Observer status for the South African Association for Regional Cooperation in the General Assembly (A/59/234; A/C.6/59/1/Add.3 and A/C.6/59/L.21)

Draft resolution A/C.6/59/L.21

86. **Mr. Al-Hinai** (Pakistan) introduced draft resolution A/C.6/59/L.21 on behalf of its sponsors (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka).

87. **Ms. Ahmed** (Bangladesh) said that her delegation supported the draft resolution.

The meeting rose at 12.25 p.m.