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

Contents

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The meeting was called to order at 9.40 a.m.

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

1. **The Chairman** recalled the contribution made by the International Law Commission to the progressive development of international law and its codification in accordance with the provisions of Article 13 of the Charter of the United Nations, and welcomed the progress made by the Commission with regard to the various items on its agenda.

2. **Mr. Melescanu** (Chairman of the International Law Commission) said the Commission dealt with several very complicated topics at the same time, which required understanding not only of developments in the current year but also the proceedings of previous years. The Commission therefore encouraged Governments to submit comments in writing, after examining those topics more carefully. The Commission relied on the Sixth Committee for advice from Governments and information on State practice, when that information was not readily available. The Commission's success in the codification of international law therefore depended to a large extent on the support it received from the Committee. Turning to the report of the Commission on the work of its fifty-sixth session (A/59/10), he said he would concentrate on Chapters IV, VII and XI.

3. With regard to Chapter IV (Diplomatic protection), the Commission had considered the fifth report of the Special Rapporteur covering several outstanding matters, completed its consideration of the remaining 19 draft articles proposed by the Special Rapporteur, and subsequently adopted the 19 draft articles on first reading.

4. In accordance with articles 16 and 21 of the statute of the Commission, the draft articles had been transmitted, through the Secretary-General, to Governments for comments and observations, with the request that the latter be submitted to the Secretary-General by 1 January 2006. It was the Commission's intention to complete the second reading of the draft articles at its fifty-eighth session later that year, taking into account any comments and observations member Governments might wish to make.

5. The 19 draft articles were divided into four parts. Part one, entitled "General Provisions", contained articles 1 and 2, dealing respectively with the definition and scope of the draft articles and the right to exercise diplomatic protection. The text of the articles remained substantially the same as that adopted in 2002, with the exception of some rearrangement between paragraphs.

6. Part Two, entitled "Nationality", had been restructured into three chapters. Chapter I, entitled "General Principles", contained article 3, paragraph 1, of which established that the State entitled to exercise diplomatic protection was the State of nationality. That was the basic premise of the draft articles. Paragraph 2, in turn, referred to the exceptions to the nationality principle contained in article 8, which dealt with the exercise of diplomatic protection on behalf of non-nationals.

7. Chapter II of Part Two was entitled "Natural Persons" and contained draft articles 4 to 8, which had been adopted by the Commission in 2002. Article 4 defined the State of nationality for the purposes of diplomatic protection of natural persons; article 5 dealt with the continuous nationality requirement for the exercise of diplomatic protection; articles 6 and 7 dealt with the complex situation of multiple nationality and claims against a third State (art. 6) or against a State of nationality (art. 7). Article 8 provided the two exceptions, in the case of stateless persons and refugees to the basic rule, set out in article 3, that only the State of nationality could exercise diplomatic protection.

8. While the Commission had made some minor drafting changes, the provisions remained largely the same. The only substantive change to that group of articles related to the continuous nationality principle in articles 5, 7 and 8. The Commission had considered the suggestion made by a member Government that the end point for the requirement of continuous nationality be changed from the time of the "official presentation" of the claim to the date of "resolution" of the claim, as had been decided in the *Loewen* case, in the context of the North American Free Trade Agreement (NAFTA). However, the Commission, while acknowledging the position taken by the tribunal in that case, was nonetheless of the view that the draft articles dealt with the entitlement of a State to exercise diplomatic protection and such exercise of diplomatic protection could not be subject to some future date of resolution

of the dispute. It therefore preferred to retain the date of official presentation of the claim as the pertinent point in time. It should, however, be noted that there was support in the Commission, as reflected in paragraph (5) of the commentary to article 5, for the proposition that an individual ceased to be a national for the purposes of diplomatic protection if he changed his nationality between the date of the official presentation of the claim and the making of an award or the handing down of a judgement. The Commission encouraged Governments which had not yet expressed views in that regard to do so.

9. Chapter III of Part Two, entitled “Legal Persons”, contained articles 9 to 13, which had been considered and adopted by the Commission in the current year. Article 9 dealt with the question of the State of nationality of a corporation for the purposes of diplomatic protection. The structure of the provision had been modelled on article 4, its counterpart for natural persons.

10. Article 10 applied the continuous nationality principle to the exercise of diplomatic protection in respect of a corporation; earlier comments on the appropriate date until which nationality must be continuous in the case of natural persons likewise applied in that context. The article had been drafted in the form of two paragraphs, the first establishing the basic rule, the second containing a proviso, namely that the State continued to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as a result of the injury, had ceased to exist according to the law of the State and could not therefore satisfy the continuous nationality requirement. Paragraph 2 should, however, be read in conjunction with article 11, paragraph (a), which made it clear that the State of nationality of the shareholders would not be entitled to exercise diplomatic protection in the case of an injury to the corporation which had led to its demise.

11. Article 11 recognized the basic principle, affirmed by the International Court of Justice in the *Barcelona Traction* case, that the State of nationality of the shareholders in the corporation was not entitled to exercise diplomatic protection on their behalf in the case of injury solely to the corporation. There had been some discussion the previous year in the Sixth Committee and the Commission as to whether exceptions to that basic proposition should be recognized. In the end the Commission had decided to adopt two exceptions allowing the State of nationality of the shareholders to exercise diplomatic protection on their behalf for injury caused to the corporation: where the corporation had ceased to exist for a reason unrelated to the injury; and where the corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury and incorporation under the law of the latter State was required by it as a precondition for doing business there. The Commission had considered the two exceptions with caution, cognizant of the fact that their inclusion had been a source of contention for some delegations in the Sixth Committee. Article 11 sought to strike a balance, recognizing the possibility for the State of nationality of the shareholders to intervene in cases where it was the corporation that had been injured, while seeking to place appropriate limitations on that possibility. He referred interested delegations to the commentary to article 11, particularly paragraph (3) and onwards, for more discussion of the exceptions.

12. Article 12 had been included as a saving clause to protect the interests of shareholders in instances where their rights had been directly injured by an internationally wrongful act. In such a scenario, the State of nationality of any such shareholders would be entitled to exercise diplomatic protection on their behalf. That provision had also been based on the decision of the International Court of Justice in the *Barcelona Traction* case and was considered by the Commission to be relatively uncontroversial.

13. Thus far the chapter on the diplomatic protection of legal persons, with the exception of article 12, dealt with the position of corporations, because corporations tended to have certain common features and engaged in foreign trade and investment and were therefore more likely to be the subject of an international dispute involving the exercise of diplomatic protection. Article 13, on the other hand, contemplated the applicability of the provisions relating to corporations (articles 9 and 10) to other legal persons, as appropriate. The article had been intentionally drafted without specifying the extent to which those provisions would apply, in recognition of the diversity of other legal persons. It had been considered preferable to state the basic point that the principles pertaining to corporations contained in the draft articles would have to be adjusted in order to take that diversity into account. It would then be for a court to determine which principles in fact applied to other legal persons.

14. Part Three dealt with the exhaustion of local remedies and contained three articles, articles 14, 15 and 16, all of which had been adopted by the Commission the previous year. The only issue that had arisen in the current year in relation to Part Three had to deal with a refinement to article 14 laying down the basic rule. The Commission had decided to replace the original reference in paragraph 2 to remedies existing "as a right" with "legal remedies". The original reason for the inclusion of the phrase "as a right" had been to exclude from the scope of the rule those discretionary mechanisms of conflict resolution which did not necessarily guarantee the possibility of resolving the dispute. The Commission had, however, accepted the observation made during the previous year's debate in the Sixth Committee that the phrase might exclude certain types of appeal which were within the discretion of the court in question, such as the *certiorari* process before the United States Supreme Court. Articles 15 and 16 dealt with the categorization of claims for purposes of the exhaustion of local remedies rule and with the exceptions to that rule, respectively. No changes had been made to those articles

15. Part Four, entitled "Miscellaneous Provisions", contained articles 17, 18 and 19, all of which had been considered for the first time in the current year. All three were concerned less with rules on the exercise of diplomatic protection than with how such rules related to other rules of international law. Article 17 was a saving clause designed to preserve the rights of States, individuals or other entities to resort to procedures other than diplomatic protection, including, for example, universal or regional human rights treaties, to secure redress for injury suffered as a result of an internationally wrongful act.

16. Article 18 recognized that alternative, special regimes for the protection of foreign investors, as provided for in bilateral and multilateral investment treaties, took precedence over the general regime of diplomatic protection. However, such precedence existed only where, and to the extent that, the regimes were inconsistent with each other.

17. Article 19 dealt with the protection of ships' crews and affirmed the right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf, while acknowledging that the State of nationality of the ship also had a right to seek redress on behalf of such crew members, irrespective of their nationality, when they had been injured in the course of an injury to the ship resulting from an internationally wrongful act.

18. Chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law) contained the text of the eight draft principles. The Commission would welcome observations on the final form. It had been suggested that draft articles would be the counterpart, in both form and substance, to the draft articles on prevention. In favour of draft principles, it was contended that different characteristics of particular hazardous activities might require the adoption of different approaches with regard to specific arrangements; moreover, the choices or approaches adopted could vary under different legal systems or might depend on the different stages of economic development of the countries concerned. In the final analysis, the Commission had concluded that the recommended draft principles would have the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems. Moreover, it was perceived that wide acceptance of the substantive provisions would be more feasible through draft principles. However, as noted in the footnote to the title of the draft principles, the Commission had reserved the right to reconsider the matter on second reading, in the light of the comments and observations of Governments.

19. The Commission would also appreciate written comments and observations from Governments on the commentaries to the draft principles. It should be noted that the commentaries contained an explanation of the scope and context of each draft principle, as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national implementation measures and in the elaboration of specific international regimes.

20. In preparing the draft principles, the Commission had proceeded on the basis of a number of basic understandings, which also reflected the general views expressed previously in the Sixth Committee's debates, and in written comments from Governments. First, the draft principles offered a legal regime that was general and residual in character and without prejudice to the relevant rules of State responsibility.

21. Second, the scope of the liability aspects was the same as the scope of the draft articles on prevention of

transboundary harm from hazardous activities, which the Commission had adopted in 2001. Thus, the same threshold of "significant", applicable in the case of the draft articles on prevention, was also applicable in respect of the draft principles. In addition, the Commission had considered whether the examination of the topic should extend to issues concerning global commons. However, considering that issues associated with the latter were different and had their own particular features, the Commission, reaffirming conclusions reached at its 2002 session, had decided that those issues required separate treatment.

22. Third, the draft principles reflected certain policy considerations. In the main, it was recognized that the activities contemplated for coverage within the draft principles were essential for economic development and beneficial to society. At the same time, it was important that prompt and adequate compensation for the innocent victims was provided in the event that such activities gave rise to transboundary damage. Moreover, in order to minimize damage, it was necessary that contingency plans and response measures should be in place, over and above those contemplated in the draft articles on prevention.

23. Fourth, the draft principles sought to attach liability primarily to the operator. Such liability would be without proof of fault, and could be limited or subject to exceptions, taking into account social, economic and other policy considerations. Models of existing liability and compensation regimes revealed that State liability was more of an exception than the rule. However, the attachment of primary liability to the operator was not intended to absolve the State from discharging its own duties of prevention under international law.

24. Fifth, the title "Draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities" reflected the new approach taken by the Commission, shifting the prior emphasis on State liability and conceptualizing the topic in terms of State cooperation, with substantial regard for the "polluter pays" principle. Although there was a shift away from State liability, the Commission had taken full cognizance of the extensive damage often caused by hazardous activities and the fact that the operator's liability would be limited. Thus, it had been considered appropriate to envisage the provision of supplementary funding, seeking to spread the loss among multiple actors, including the State, as appropriate.

25. Turning to the text of the draft principles, the draft preamble was self-explanatory. It contextualized the draft principles within the relevant provisions of the Rio Declaration on Environment and Development, in particular principles 13 and 16. Thus, it stressed the need to develop national law on liability and compensation, and to achieve cost internalization, taking into account the "polluter pays" principle.

26. Draft principle 1, entitled "Scope of application", established that the draft principles had the same scope as the draft articles on prevention. Thus, they related to activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences. The phrase included four criteria. All the elements — human causation, risk, extraterritoriality, and the physical element — had been taken from the draft articles on prevention. The word "transboundary" qualified "damage" to stress the transboundary orientation of the draft principles.

27. Draft principle 2 concerned the use of terms. Paragraph (a) defined damage, whose eligibility for compensation required reaching a particular threshold, a requirement that was not without precedent. For example, the *Trail Smelter* award concerned the "serious consequences" of the operation of the smelter, while the *Lake Lanoux* award dealt with serious injury. A number of instruments had also referred to "significant", "serious" or "substantial" harm or damage as the threshold for a legal claim. "Significant" had also been used in other legal instruments and domestic law. For the purpose of the draft principles, damage had to be "significant". The term was understood to refer to something more than "detectable", but did not need to be "serious" or "substantial". The determination of "significant damage" would involve factual and objective criteria and a value determination.

28. The definition of damage was also crucial, since its elements were relevant in establishing the basis for a claim. The elements of damage included damage caused to persons, property or the environment. Subparagraphs (i) and (ii) covered loss of life or personal injury and property damage, including aspects of pure economic loss, such as loss of income directly related to the injury or deriving from the property. It also covered aspects of cultural heritage, which could be State property.

29. Subparagraphs (iii) to (v) addressed aspects concerning claims that were usually associated with damage to the environment, as defined in paragraph (b). Loss or damage by impairment under subparagraph (iii) also covered loss of income in respect of such impairment. The Commission had decided to provide a broader definition of environment, which seemed justified by the general and residual character of the draft principles. Moreover, the acceptable remedial responses, as reflected in subparagraphs (iv) and (v), namely "costs of reasonable measures of reinstatement" and reasonable costs of "clean-up" associated with the "costs of reasonable response measures", seemed limited albeit modern concepts. Recent treaty practice had tended to acknowledge the importance of such measures, but had left it to domestic law to indicate who might be entitled to take them.

30. Paragraph (c) defined "transboundary damage" and accentuated the extraterritorial context of the draft principles. The incidents falling within the scope of the draft principles could have victims within both the State of origin and the States of injury. Therefore, within the scheme of the draft principles, it was considered important to anticipate the disbursement of funds for victims who suffered damage in the State where the incident occurred. The 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage envisaged such a system.

31. Paragraph (d) defined hazardous activity as any activity that entailed a risk of causing transboundary harm through its physical consequences. The draft principles, like the draft articles on prevention, did not apply to transboundary harm caused by State policies in monetary, socio-economic or similar fields.

32. Paragraph (e) provided a functional definition of operator. Channelling liability to a single entity, whether operator or owner, was the hallmark of strict liability regimes. Thus, some person other than the operator could be specially identified as liable, depending on the interests involved in respect of a particular hazardous activity.

33. Draft principle 3, entitled "Objective", set forth the essential aim of the draft principles. The notion of liability and compensation for victims was duly reflected in principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration. It was also perceived from the perspective of achieving cost internalization, thus according efficacy to the "polluter pays" principle, as reflected in principle 16 of the Rio Declaration. Although that principle found expression in a number of international instruments, judicial decisions and arbitral awards, the Commission was well aware of its limitations and had taken them into account.

34. Three essential elements could be extrapolated from draft principle 3. The first related to the need to ensure prompt and adequate compensation to victims. That aspect had been a constant from the inception of discussions on the topic. However, as noted in paragraph (1) of the commentary, the draft principles had other objectives. The second element related to the notion that "victim", a term which had not been formally defined, encompassed both natural and legal persons, including States. The involvement of States became prominent in pursuing claims for environmental damage. The third element concerned the notion that transboundary damage included damage to the environment. The extent to which damage to the environment was covered had to be determined in the context of the terms used in draft principle 2.

35. Draft principle 4, entitled "Prompt and adequate compensation", was another key provision. In a general sense, the draft principle accentuated four concepts which found support in treaty practice and domestic legislation. First, each State should take measures to establish liability regimes under its domestic laws for activities within its jurisdiction. Secondly, that liability regime should include the imposition of liability on the operator or, where appropriate, other person or entity, without requiring proof of fault. Those strict criteria echoed the "polluter pays" principle. Thirdly, the requirement for proof without fault might be subject to conditions, limitations or exceptions. Thus, for example, in most cases where liability was without proof of fault compensation was limited. The limitation might not apply, for instance, if there was proof of negligence or recklessness on the part of the operator. Moreover, liability might be excepted when, for instance, the damage had been the result of armed conflict, hostilities, civil war or insurrection or the result of a natural phenomena. All those elements were supported by treaty practice and domestic legislation. The Commission, however, considered it essential to stress that any such conditions, limitations or exceptions should not be inconsistent with the general principle that the victim should not be left alone to

bear loss, in accordance with draft principle 3. The second and third concepts were reflected in paragraph 2. Fourthly, the draft principle sought to integrate various forms of securities, insurance and funding mechanisms to provide sufficient financial guarantees for the provision of prompt and adequate compensation, in accordance with paragraphs 3 and 5. The need for financial guarantees to cover claims for compensation could not be overemphasized. Such guarantees might take the form of financial security deposits, insurance or bonds. Paragraph 4 established a second tier of supplementary funding mechanism, financed by the industry concerned. Paragraph 5 anticipated a third tier of funding in the event that the measures provided in paragraphs 3 and 4 were insufficient to provide adequate compensation. While paragraph 5 did not directly require the State to set up government funds to guarantee prompt and adequate compensation, it did require the State to ensure that additional financial resources were allocated.

36. Draft principle 5, entitled “Response measures”, responded to the policy consideration that any contingency plans and response measures must go beyond those contemplated in the draft articles on prevention. The envisaged role of the State was complementary to that provided for in draft articles 16 and 17 of the draft articles on prevention, which dealt with obligations relating to emergency preparedness and notification of emergency. The importance of taking prompt and effective response measures also applied to States that had been, or might be, affected by the transboundary damage. While no operational sequence was contemplated in the phrase “States, if necessary with the assistance of the operator, or, where appropriate, the operator”, it would be reasonable to assume that in most cases of transboundary damage the State would have a more prominent role. That role derived from the general obligation of States to ensure that activities within their jurisdiction and control did not cause transboundary damage.

37. Draft principle 6 was entitled “International and domestic remedies”. The requirement to ensure appropriate compensation procedures applied to all States. Paragraph 2 referred to international procedures, which might include mixed claims commissions, negotiations for lump sum payments, and so on. The international component did not preclude the possibility that a State of origin might disburse compensation to the affected State through a national claims procedure. The reference to procedures that were expeditious and involved minimal expenses reflected the desire not to overburden the victim with a lengthy procedure akin to judicial proceedings which might act as a disincentive. Paragraph 3 focused on domestic procedures and the equal right of access. That paragraph stressed the need to confer the necessary competence on administrative and judicial mechanisms to ensure that they were in a position to entertain claims effectively and the importance of non-discriminatory standards for the determination of claims was also emphasized. With regard to equal access to information, the latter should, where feasible, be accessible free of charge or with minimal costs.

38. Turning to draft principle 7, which dealt with the development of specific international regimes, he said that its objective was to encourage States to cooperate in the development of international agreements on a global, regional or bilateral basis in three areas: prevention, response measures and compensation and financial security. In essence, the draft principle would establish at the international level the same set of obligations contemplated in draft principles 3, 4 and 5.

39. Draft principle 8, which addressed implementation, reaffirmed what was implied in the other draft principles, namely that each State must adopt legislative, regulatory and administrative measures for the implementation of the draft principles, and emphasized the principle of non-discrimination. The reference to nationality, domicile or residence were merely examples of the basis of discrimination in the context of the settlement of claims concerning transboundary damage.

40. He drew attention to the “other decisions” contained in chapter XI of the report and observed that the Commission had decided to include two new topics that already appeared in its current programme of work, namely “Expulsion of aliens” and “Effects of armed conflicts on treaties”, for which Mr. Maurice Kamto and Mr. Ian Brownlie respectively, had been appointed Special Rapporteurs. Although the Commission normally decided on the inclusion of new topics in its long-term programme of work at the end of a quinquennium, the Working Group had recommended that the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” should be included in the programme of work for the current quinquennium.

41. The Commission had been cooperating with other bodies, including the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation, and had had a visit from Judge Jiuyong Shi, President of the International Court of Justice. Members of the Commission had also conducted informal exchanges of views on topics of mutual interest with members of the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the International Committee of the Red Cross and the International Law Association.

42. With regard to summary records, mentioned in paragraph 9 of General Assembly resolution 58/250 of 23 December 2003 on pattern of conferences, the Commission had concluded once again that those records were an inescapable requirement for the procedures and methods of its work. They constituted the equivalent of *travaux préparatoires* and were an indispensable part of the process of progressive development of international law and its codification.

43. The Commission attached great importance to the International Law Seminar, which was held annually in Geneva during the meetings of the Commission and enabled young lawyers, particularly those from developing countries, to familiarize themselves with the Commission's work and the activities of international organizations with headquarters in Geneva. Through its Chairman, it therefore expressed its appreciation to those Governments that had contributed to the Seminar and urged States to provide financial assistance as soon as possible.

44. He alluded to the importance of the Commission's secretariat, the Codification Division of the Office of Legal Affairs. Its competence, efficiency and valuable assistance, in respect of both the substance of the Commission's work and the procedural aspects thereof, were vital to the success of that work. Since the Division also served as the secretariat of the Sixth Committee, it was an invaluable and irreplaceable link between the two bodies and provided a high-quality service which must be preserved.

45. Lastly, he took note with appreciation of the updated Survey of Liability Regimes prepared by the Codification Division and of a thematic presentation of comments and observations received from Governments and international organizations on the topic "Responsibility of International Organizations". He recommended that they should be issued as official documents of the Commission.

46. **Mr. Lammers** (Netherlands) said his delegation attached great importance to the codification and progressive development of the rules of international law governing diplomatic protection. Consequently, the Netherlands had regularly commented on the work on the topic and the progress made. Those comments had related mainly to diplomatic protection on behalf of an injured person against a State of which that person was a national, or of stateless persons and refugees; the question of the need to exhaust local remedies; the protection of corporations and their shareholders and other legal persons, and the relationship between the draft articles and international investment protection agreements. The Netherlands was pleased that a complete set of draft articles had been adopted on first reading and would submit pertinent comments and observations, after obtaining the advice of the independent Netherlands Advisory Committee on Public International Law Issues.

47. Turning to the question of 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), the Commission and, in particular, its special rapporteurs, should be commended for the adoption, on first reading, of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission had been debating the topic for more than 25 years, owing to changes in position and the divergent views of its members, but the persistence of the special rapporteurs, with help from academic writings, had culminated in a result that was conceptually well-founded in international law.

48. The Netherlands supported the main thrust of the draft principles and the thesis that international liability for transboundary harm arose also when a State had complied with its international obligations relating to an activity that had been carried out under its jurisdiction or control. The draft principles sought to fill a gap in international law by ensuring that States took all necessary measures to make prompt and adequate compensation available to victims of transboundary damage caused by hazardous activities. As for the content of such measures, it appeared to have been accepted that domestic law should consist of

a set of procedural and substantive minimum standards. While it was necessary to grant States some flexibility in that regard, discussions on that point had not been exhausted, and an effort should be made to refine the draft principles; his Government would therefore submit new comments and observations.

49. The Netherlands did not support the current, albeit provisional, approach of giving the final form of a draft convention to the work on the prevention aspects, and of draft principles to the work on the liability aspects. As a minimum, the obligation of States to take necessary measures to ensure that prompt and adequate compensation was available to victims of transboundary damage caused by hazardous activities should be incorporated into the draft articles on prevention of transboundary harm from hazardous activities. It could be supplemented by guidance in the form of general principles, but, in any case, should take the form of an international obligation to ensure that innocent victims of transboundary damage would not be deprived of compensation.

50. **Mr. Ehrenkrona** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), expressed regret that the final version of the Commission's report had only been made available to delegations on 15 September 2004; he hoped that the delay would not be repeated the following year. Regarding the various topics on the Commission's agenda, the Nordic countries appreciated the achievements with regard to diplomatic protection and responsibility of international organizations. Nevertheless, with regard to some of the other topics in the Commission's current programme, it was noticeable that once a topic had been put on the agenda, it seemed difficult to remove it, regardless of the comments of Governments during the Sixth Committee's discussions, or the utility of the outcome. It was true that the choice of topics to be included in the agenda lay with the Commission. However, regarding the appropriateness of certain current topics, it would be desirable for the Commission to take the opinions of Governments into account. For example, the Nordic countries considered that the topic "Unilateral acts of States" should be removed from the agenda and had already made a proposal to that effect, but apparently the Commission had never discussed that possibility. That problem was related to the connection between the Sixth Committee's discussions and the way in which they were reflected in the Commission's deliberations. The dialogue between Governments and the Commission should be reinforced, so that their contributions were duly taken into account by the latter. Consequently, it was important that the Secretariat should forward all statements made in the current debate to the Commission in writing.

51. The fragmentation of international law was an extremely interesting topic, of both theoretical and practical significance, and the Commission was dealing with it in an innovative way. Further results from the Working Group were awaited with interest, not only because of their substantive importance, but also because they provided a possible example of the way in which the Commission could proceed with other suitable topics in the future.

52. The Commission had decided to include two new topics in its current programme of work, namely: "Expulsion of aliens" and "Effects of armed conflicts on treaties", and had appointed special rapporteurs for both topics. Although the first topic was potentially very interesting, the exact focus of the special rapporteur's work had yet to be defined. If it was a question of preparing a study on migration law and policies, the Nordic countries were not convinced that it was a suitable topic for closer scrutiny by the Commission. The effects of armed conflicts on treaties could prove to be a more focused topic that would reflect previous calls by the Nordic countries for flexible but restrictive approaches when choosing the topics to be studied by the Commission. An outline and a first report were awaited at the Commission's next session.

53. As for the topic "Obligation to extradite or prosecute", which the Commission had decided to include in its long-term programme, despite the Nordic countries' initial reluctance, it was now possible to identify two areas of interest: the relationship between *aut dedere aut judicare* obligations and human rights obligations, and the way in which the traditional perception of the *aut dedere aut judicare* rule should be considered in the light of modern concepts of universal jurisdiction.

54. With regard to the Commission's long-term programme, the Nordic countries had been in favour of including the issue of international disaster response law as a possible topic for study, and wondered what the international community's possibilities were in the

context of the relevant international law. The Commission should focus on topics whose codification and development would contribute to the needs of the international community, using its broad competence and experience in matters of general international law. In that respect, the Nordic countries appreciated the practice of cooperation with associations of jurists involved in the codification and development of international law, and encouraged further cooperation of that nature.

55. The Commission should continue seeking ways to make its sessions as productive and efficient as possible. Consequently, it was crucial that the work of the special rapporteurs should make good progress. In that respect, the Commission's Planning Group should not only examine future topics and parts of the Commission's working routines, but also present its vision of how the Commission should function in future, since it could produce documents of immense importance to international law and order.

56. **Mr. Strømmen** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Sweden and Norway) and referring to the topic "Diplomatic protection", said they would respond to the Commission's request for comments on the draft articles before the 1 January 2006 deadline. In general, the Nordic countries was satisfied by the thrust and envisaged results of the draft articles, since, in its work, the Commission had taken into account their call for clear and unambiguous provisions that responded to the needs of practitioners. In relation to draft articles 5 and 10, and the issue of whether the rule of continuous nationality should apply not only until the time of the official presentation of the claim, but until the resolution of the dispute or the date of an award or a judgement, there were arguments in favour of the approach followed by the Commission and also of the one that required relevant links between the person or corporation and the State exercising diplomatic protection, even after the official presentation of the claim. They therefore looked forward to other States' comments on the issue and further discussions by the Commission.

57. The Nordic countries were particularly pleased that the Commission had drafted a provision on diplomatic protection in respect of stateless persons and refugees (art. 8), because such individuals could be exposed to vulnerable situations. Although it was true that the article appeared to deviate from the traditional rule that a State could only exercise diplomatic protection on behalf of its nationals, it should be noted from the commentary that the term "refugee" was not necessarily limited to the definition that appeared in the Convention relating to the Status of Refugees and its Protocol. The Nordic countries understood that a State could exercise diplomatic protection also on behalf of a foreign national, lawfully and habitually residing in that State, and who, in that State's opinion, clearly needed protection, even though not formally qualifying for refugee status.

58. The Nordic countries were pleased that, when codifying the rules on diplomatic protection of legal persons, the Commission had based its work on the rules derived from the *Barcelona Traction* case. The corresponding judgment of the International Court of Justice had struck a balance between the interests of the company and those of the shareholders and had enhanced legal clarity. They were also pleased to observe that the draft articles on diplomatic protection would not exclude the protection exercised by the flag State and vice versa, so that important protective measures established by the law of the sea would not be undermined. It would be desirable to proceed swiftly to adopt the draft articles on second reading and it was to be hoped that they would soon be adopted in the form of a convention so that legal clarity would be enhanced in that important field of law.

59. **Mr. Čižek** (Czech Republic), referring to draft articles 1, 2 and 3 on diplomatic protection, said he was gratified to note that the Commission had decided to cleave to the traditional concept of diplomatic protection, according to which the State of nationality was entitled, but not obliged, to bring, on its own behalf, an international claim arising out of an injury to one of its nationals (whether a natural or a legal person), which resulted from the internationally wrongful act of another State. His delegation was pleased that, in Part Two of the draft articles, the basic principle underpinning the draft articles on the exercise of diplomatic protection of corporations reflected the general rule which the International Court of Justice had expounded in its Judgment in the *Barcelona Traction* case, namely that the State of nationality of a corporation had the exclusive right to exercise diplomatic protection in respect of an injury sustained by the corporation as a result of an alleged internationally wrongful act of another State. It also agreed with the Commission that the rule expounded

by the International Court of Justice in the well-known *Nottebohm* case should not be interpreted as a general rule of international law applicable to all States.

60. Part Three of the draft articles, on the exhaustion of local remedies and exceptions to the rule that all domestic remedies must have been exhausted before an international claim could be brought against a State, dealt with a well-established rule of customary international law, as the International Court of Justice had stated in its Judgment in the *Interhandel* case. That rule applied not only to diplomatic protection, but also to other concepts of international law relating to the protection of natural and legal persons. Although the exhaustion of local remedies rule was indisputably part of existing international law, there were many uncertainties and no provision clearly and exhaustively specified the situations in which that rule should be applied. While his Government agreed with the exceptions to the local remedies rule listed in paragraphs (a), (c) and (d) of draft article 16, it was not convinced that it was essential to include an express clause on undue delay in proceedings, since that eventuality was covered by paragraph (a) of draft article 16. Paragraph (b) of that draft article could therefore be deleted.

61. With regard to Part Four of the draft articles, his Government had misgivings about extending the scope of the draft articles to the protection exercised by the flag State of a ship in respect of an injury suffered by a member of the ship's crew who was a national of a State other than the flag State. Since one of the requirements for the exercise of diplomatic protection was the existence of the so-called "bond of nationality" between the State exercising diplomatic protection and the person who had suffered the injury giving rise to that protection, the exercise of protection by the flag State did not fall within the scope of the draft articles. The existence of such a regime could be reflected in the commentary to draft article 17 referring to actions or procedures under international law other than diplomatic protection.

62. His Government agreed with the conclusions drawn by the Special Rapporteur in his fifth report in respect of the delegation of the right to exercise diplomatic protection and the transfer of a claim to diplomatic protection.

63. In the context of diplomatic protection, the "clean hands" doctrine, the topic which would be discussed in the Special Rapporteur's sixth report, could be invoked against a State exercising such protection solely in respect of that State's acts which were inconsistent with its obligations under international law, but not in respect of misconduct by a national of that State. Having examined the Special Rapporteur's comments on the existence and applicability of the clean hands doctrine in the context of diplomatic protection, his Government concurred with the Special Rapporteur's conclusions that there was no clear and sufficient authority which would justify the introduction of a clause on the clean hands doctrine in draft article 8.

64. **Mr. Gao** Feng (China) said that he reserved the right to make further comments in the future on the draft articles on diplomatic protection. With regard to draft article 12 on direct injury to shareholders, he agreed that, in most cases, the issue of shareholders' rights should be decided by the State's municipal law. He was not, however, of the opinion that where the company was incorporated in the wrongdoing State, there might be a case for the invocation of the general principles of company law in order to ensure that the rights of foreign shareholders were not subjected to discriminatory treatment (paragraph (4) of the commentary). A company's incorporation in the wrongdoing State did not automatically have a bearing on any discriminatory treatment which might be meted out to foreign shareholders. The mere fact that a company was incorporated in the wrongdoing State was not sufficient grounds for assuming that foreign shareholders would be subjected to discriminatory treatment. That assumption would be valid only if the municipal law of the State gave foreign shareholders unreasonably weaker rights than those granted to national shareholders. Moreover, the rules containing "the general principles of company law" had not been specified. Even if such "general principles" existed, it was unclear what role they could play in determining foreign shareholders' rights and in ensuring that they were not subjected to discriminatory treatment. Even if a corporation were incorporated in the wrongdoing State, the distinction between shareholders' rights and the corporation's rights must be drawn in accordance with the municipal law of the State as a matter of principle.

65. Draft article 16 provided for four exceptions to the local remedies rule. The instance referred to in paragraph (d) raised no problems, but it was necessary to stress that, in order to be valid, such an exception

had to be expressed. The key question was who decided if given circumstances constituted one of the three exceptions. Perhaps the commentary should discuss the matter in greater detail. In practice, it was the injured natural or legal person who would first advance the claim that it was unnecessary to exhaust local remedies to the State of nationality. The latter would consider the case and reach a decision on it. If that decision was favourable, before the party concerned exhausted local remedies and in order to protect its national, the State of nationality could exercise diplomatic protection vis-à-vis the wrongdoing State, or it could seek to establish the international responsibility of that State by recourse to international judicial bodies, and if that were done, the relevant international judicial organs would take the final decision on whether the circumstances in question warranted an exception. Plainly the State of nationality of the injured person played a major role in determining whether it was necessary to exhaust local remedies in a particular case and that decision would directly affect the possibility of bringing an international claim before exhausting such remedies. Despite the Commission's intention to set forth clear, objective exceptions in draft article 16, paragraphs (a), (b) and (c) still offered the State of nationality a wide enough margin of discretion to make it hard to prevent abuses of the exceptions.

66. His third observation related to paragraph (3) of the commentary to draft article 16, which stated that the Commission "preferred the third option which avoids the stringent language of 'obvious futility' but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress". In that context, the term "claimant" seemed to refer to the injured person rather than the State of nationality and the crux was therefore the entity requiring proof from the injured person that there was no need to exhaust domestic remedies. If it was the State of nationality, any exegesis in the commentary would be superfluous, since the matter would be covered by the domestic procedure of the State of nationality; if it was an international judicial body dealing with diplomatic protection, an individual had no real access to it. At the international level, the burden of proof lay with the State bringing the claim on behalf of its national and not with the latter. For that reason, it was to be hoped that the Commission would revise that part of the commentary accordingly. Paragraphs (7) and (8) of the commentary, referring to paragraph (c) of draft article 16 which laid down the third exception, provided examples in which a voluntary link was absent. It was not, however, proper to discuss such examples in the context of exceptions to the local remedies rule, because the injuries quoted in the examples could have been caused by acts not prohibited by international law rather than by internationally wrongful acts of the State. Such injuries would not therefore be susceptible of diplomatic protection, because the prerequisite for diplomatic protection was the existence of an internationally wrongful act of a State.

67. Fourthly, draft article 18, which gave all special treaty provisions precedence over the draft articles, was somewhat inconsistent with draft article 17. It was also at odds with the Commission's original intention with regard to draft article 18. Initially, the Commission had only intended, through that article, to give precedence to special treaty provisions, such as those contained in investment protection treaties, over the draft articles. Hence his Government proposed the deletion of the phrase "including those" so that draft article 18 would read "The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions concerning the settlement of disputes between corporations or shareholders of a corporation and States".

68. His fifth observation pertained to draft article 19, which had been favourably received by his Government, since it confirmed that the right of the State of nationality of crew members to exercise diplomatic protection remained unaffected. Although his delegation was not against a draft article providing for the right of the State of nationality of a ship to seek redress on behalf of foreign crew members, in the interests of the progressive development of international law, it would be advisable to see whether that principle was firmly anchored in the latter. Draft article 17 had broached the question from a general angle and it was therefore to be hoped that the Commission would consider whether a separate article on the right of the State of nationality of a ship to seek redress on behalf of foreign crew members was required.

69. Turning to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he noted that in 2001

the Commission had concluded its work on the draft articles on prevention of transboundary harm from hazardous activities and within three years it had successfully completed its first reading of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The draft articles on prevention of transboundary harm from hazardous activities served as a useful guide for States on how to prevent transboundary damage. Preventive measures alone could not, however, completely preclude the possibility of such damage occurring. For that reason, victim compensation and determination of the liability of the operator or State were important issues which the international community must resolve. The draft principles sought to regulate compensation liability and damage allocation from the perspective of general principles; its balanced provisions would contribute significantly to the resolution of issues relating to compensation for transboundary damage.

70. His Government endorsed the principle of prompt and adequate compensation for victims, which was established in the draft text. Primary liability should rest with the operator. The proposed principles were complementary, without prejudice to existing international regimes and should not have a substantial effect on States' domestic regimes.

71. His Government wished to make two comments specifically relating to the draft principles. First, it had reservations about the inclusion of damage to the environment per se in the definition of damage, because that inclusion was not adequately grounded in international law. Secondly, the strict liability regime governing transboundary damage in the draft principles was inflexible and not entirely consistent with current international practice. It should be brought into line with the approach adopted in some treaties where strict liability was combined with fault liability and the regime was applicable mutatis mutandis to specific cases.

72. Ultimately the outcome of the work on that topic could take the form of a declaration, a guiding principle or a model law which might serve as a guide for States and also as a basis for a future convention.

73. **Mr. Curia** (Argentina) said he was pleased that the Commission had adopted, on first reading, the draft articles on diplomatic protection and the draft principles under the topic "International liability for injurious consequences arising out of acts not prohibited by international law". He believed that through a second reading in 2006, work on the two topics could be completed. He also supported the proposal that the Commission should undertake two new studies in 2005: one on the effects of armed conflicts on treaties and the other on the principle *aut dedere aut judicare*.

74. He endorsed the approach taken in the draft articles on diplomatic protection because they codified customary rules for the exercise of diplomatic protection in its most traditional and classic form. It was therefore clear that the scope of the topic excluded other types of protection (such as human rights and investments) which were covered by other regulations, institutions and procedures, and it was important not to anticipate conclusions on those matters.

75. Within the framework of that traditional codification system, it was his delegation's understanding that draft article 8 on diplomatic protection in respect of stateless persons and refugees, which represented a satisfactory solution, constituted an instance of progressive development.

76. The draft articles did not address the issue of the effects of diplomatic protection, nor did it cover the application of norms concerning reparation; his delegation believed that it would be highly casuistical and of little use for the Commission to extend its study to include those issues insofar as they arose from application of the general rules concerning reparation.

77. With regard to the continuous nationality rule (draft article 5), it was important to bear in mind the date on which the claim was presented and the fact that nationality must be retained until the date of the judgement or other final settlement; to do otherwise would destroy the causal link necessary for diplomatic protection.

78. The clean hands doctrine concerning the conduct of a national did not constitute an additional condition or requirement for the exercise of diplomatic protection. The concurrent guilt of the victim of the wrongful act should be taken into account in determining the scope of the reparation.

79. His delegation was in favour of pursuing work on the draft principles on international responsibility for injurious consequences arising out of acts not prohibited by international law with a view to a general

declaration of principles by the General Assembly; it was to be hoped that that declaration would contain general rules on liability for risk and would include consideration of the allocation or assignment of losses in a manner that would address the question of liability and reparation for injury.

80. His delegation expressly supported the Commission's approach and the content of the draft principles and considered it important to establish the principle that the victims of transboundary disasters were entitled to prompt reparation and adequate compensation (recognized in principles 3 and 4).

81. Lastly, he stressed the need to establish the obligations of the States involved, especially the State of origin of the damage.

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

82. **Mr. Braguglia** (Italy), addressing the issue of shareholder protection, observed that in conventional practice, there was a fairly general trend towards increased protection of shareholders from harm caused to their corporations, but general international law did not appear to reflect that development. That fact might be a consequence of the difficulty of establishing the nationality of shareholders because of the ease of movement of shares. The solution adopted by the Commission was therefore understandable: shareholders were entitled to protection only in the case of an injury to a corporation which had ceased to exist or where the State in which the corporation was located had required incorporation as a precondition for doing business there. There were only a few such cases where the need for protection seemed to justify an exception to the rule.

83. The Commission's solution regarding protection of ships' crews (who often held a nationality other than that of the ship) seemed appropriate; it allowed the flag State to intervene, although not through diplomatic protection.

84. It was also useful to include in draft article 17 a reminder that the conditions established for the exercise of diplomatic protection did not preclude recourse to other actions or procedures to secure redress for injury. The means of recourse available in the areas of the defence of human rights and the protection of investments demonstrated the importance of that option. It was clear that in such cases, the State could exercise its right to protect its national but could not affect that national's enjoyment of the right to recourse.

85. With respect to the question of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had just completed rapidly a text which constituted encouraging progress despite its scope, which was limited as it failed to address difficult issues such as that of damage caused in areas beyond a State's jurisdiction. Although the draft text contained only a few principles, it had the advantage of drawing States' attention to the need for fuller coverage of the risks inherent in hazardous activities. General application of the principles set forth by the Commission would be difficult; it would be more reasonable to apply them in respect of certain types of risk or within a group of countries in the same region. Thus, it was understandable that the Commission had elected not to prepare a draft general convention or even a mere framework convention. It was also understandable that the establishment of a few principles constituted limited progress towards a solution to the problem. Clearly, those principles needed to be adapted to the circumstances and expanded in detail.

86. **Mr. Ludbrook** (New Zealand) said that in some areas, such as the right to exercise diplomatic protection in respect of stateless persons and refugees, his delegation might have been inclined to opt for slightly different and more flexible rules to ensure that individuals were not left without effective protection. It recognized, however, that the situations which States had to face at the practical level varied greatly and that the Commission had struck a balance in that regard. The formulation of the exception to the local remedies rule represented a carefully circumscribed acknowledgement of the fact that, currently, an individual could be injured by the act of a foreign State outside or within its territory without having any real connection with that territory. In such circumstances, which were difficult to define, it might well be unreasonable or unjust to require the exhaustion of local remedies.

87. On the topic of international liability, his delegation continued to believe that the risk of transboundary harm from hazardous activities was an issue that would grow in importance with the advent of new technologies. Prevention was certainly a key to the issue, but the question of who had to carry the loss in

circumstances where, despite the application of the best-known prevention measures, loss occurred, could not be ignored. His delegation was therefore pleased that the Commission had adopted on first reading a set of draft principles on the liability aspect of the topic to complement the draft articles on prevention.

88. In his delegation's view, there were three aspects to the issue of transboundary harm arising out of hazardous activities not prohibited by international law. The first related to the development of rules or principles governing prevention of an accident. The second related to the development of rules or principles governing mitigation of or response to an accident in order to limit the harm that might result, despite the best preventive steps having been taken. The third related to the development of rules or principles governing compensation and liability in the event of an accident occurring. Those three aspects were part of a continuum since, if prevention and response were effective, issues of compensation and liability need never arise or at least would not involve such high levels of loss.

89. In general terms, his delegation could support the draft principles and accept the basic understandings articulated by the Commission in the general commentary (pages 157 to 160 of the report). However, on the question of scope, it would have liked the regime to apply to the global commons, although it accepted the Commission's advice that the issues surrounding compensation for such losses had some unique and complex features that might require separate treatment. On the question of form, his delegation acknowledged that there could be different perspectives and views and understood the factors involved.

90. Given the wide range of harm that might be suffered through an accident involving hazardous materials, it was important in a framework instrument that the definition of compensable damage should be wide enough to cover the range of situations where the causal links between the accident and the harm sustained were clear and demonstrable. The language of the proposed definition differed in some respects from that used in a number of relevant instruments, with some parts being cast in more general terms. However, that was consistent with the overarching nature of the set of principles and allowed for the development of the law in that area in accordance with those principles. Thus, it was clear that consequential economic loss might be covered under Principle 2, paragraphs (a) (i) and (ii), and pure economic loss under paragraph (a) (iii), which was broad enough to encompass loss of income deriving directly from an economic interest in any use of the environment. In New Zealand's region, two key areas of risk were related to harm caused to the fishing and tourism industries as a result of significant harm suffered by the marine environment. It was important for economic loss suffered by such industries to be compensable, provided that the link between the incident and the economic loss was clear.

91. His delegation supported the Commission's continued allocation of priority to the completion of its work on the draft principles and supported the inclusion of appropriate language in the resolution on the Commission's work. It welcomed the adoption on first reading of the draft principles and called on members to submit comments by 1 January 2006 with a view to the Commission's completion of its work on them during the current quinquennium.

92. **Ms. Ertman** (Finland), speaking on behalf of the five Nordic countries (Denmark, Iceland, Norway, Sweden and Finland), and referring to chapter VII of the Commission's report, said that the approval of the draft principles was a major achievement. The Nordic countries were content with the draft principles and were in favour of a civil liability model taking a general rather than a sectoral approach. The draft principles were pragmatic in the sense that they aimed to ensure compensation rather than to serve as an environmental policy instrument.

93. Firstly, the objective of the draft principles — to ensure compensation for victims of transboundary damage — was the right one, for the situation of the victims should be the primary focus of the liability regime. That was the starting point of Principle 22 of the 1972 Stockholm Declaration and of Principle 13 of the 1992 Rio Declaration. Secondly, the principle that liability should not require proof of fault was also correct. That had been the trend in environmental liability regimes at both the national and international levels. Moreover, that approach was in line with the scope of application, i.e. transboundary damage caused by activities not prohibited by international law. Thirdly, the Nordic countries also supported the view that damage to the environment per se was actionable and required prompt and adequate compensation. Fourthly, liability principles should be based primarily

on civil liability, and a liability regime ought consequently to impose liability on the operator; in addition, there should be appropriate financial guarantees as proposed in draft principle 4.

94. The Nordic countries favoured the title appearing in brackets, i.e. "International liability in case of loss from transboundary harm arising out of hazardous activities" or the title "Principles on the allocation of loss in case of transboundary harm arising out of hazardous activities". However, the title of the topic — "International liability for injurious consequences arising out of acts not prohibited by international law" — was not quite accurate in relation to the principles under consideration, for it gave the impression that international law did not prohibit acts causing injurious consequences and that it was legitimate to commit such acts. Rather than acts, it was activities or, more specifically, lawful but hazardous activities, which should be subject to a liability regime. That position was in line with the Commission's draft articles on responsibility of States for internationally wrongful acts.

95. The Nordic countries were not in favour of including a "significant" threshold in the scope of application or in the definition of "damage" since such a threshold was unnecessary and would be out of line with several liability regimes. The commentary to principle 2, paragraph (a), was not convincing. Firstly, although the commentary referred to the general pronouncements on future damage in the *Trail Smelter* case, it did not mention that the arbitral tribunal had awarded compensation with regard to cleared land and uncleared land without taking such a threshold into account. Secondly, the commentary stated that the *Lake Lanoux* award dealt only with serious injury. However, the point at issue had been Spain's inability to submit evidence showing any injury. Thirdly, the commentary cited in footnote 365 to the Convention on the Regulation of Antarctic Mineral Resource Activities, the Convention on Environmental Impact Assessment in a Transboundary Context, and article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which referred to "significant", "serious" or "substantial" damage as thresholds for legal claims. That was somewhat misleading, since the first instrument had been superseded by the Madrid Protocol and the other two examples were not concerned with liability issues. It was interesting that the commentary did not mention conventions which did not set such a threshold, for example the conventions on liability regimes relating to nuclear activities or the transport of oil by sea.

96. With regard to the concept of prompt and adequate compensation, it would be helpful for the commentary to give more guidance as to what was meant by "prompt and adequate". For instance, precedents or examples from the field of investment could shed light on the matter.

97. When it came to the possible form of the instrument, doubts arose as to the added value of concluding a framework convention. There were other possibilities, such as the adoption of the draft principles by means of a General Assembly resolution. The Commission had managed to strike the right balance in codifying principles on the allocation of loss, and it was doubtful whether that balance could be maintained if the principles were upgraded into a framework convention, which would require lengthy diplomatic negotiations. Nor was it certain that States would have sufficient incentive to ratify such a convention.

98. The draft instrument on the prevention of transboundary harm from hazardous activities should be adopted in conjunction with the draft principles on liability. The two instruments could be dealt with in a single General Assembly resolution or presented as two separate but coordinated resolutions.

99. **Mr. Buchwald** (United States of America) said that his delegation congratulated the Commission on the adoption on first reading of the draft articles on diplomatic protection, on which it would submit written observations in due course. One preliminary comment on a positive note was that the revised draft articles on the exhaustion of local remedies no longer included a provision that exhaustion should be limited to available remedies provided for in the municipal law of the respondent State, for such a provision would be inconsistent with the rule of customary international law to the effect that a litigant must exhaust all possible remedies, including those dependent on a discretional decision of the highest judicial or administrative organ. His delegation believed the change to be a positive one, all the more so because it was not satisfied with the exceptions to the local remedies rule set out in draft article 16. It was also good that the draft articles did not define the relationship between diplomatic protection and

functional protection, for the regulation of functional protection remained relatively vague and the topic fell outside the scope of the draft articles.

100. Turning to other questions which caused his delegation concern, he said that the scope of the draft articles must remain limited to the codification of customary international law and should depart from or add to the customary regime only in the presence of grounds arising from considerations of public order supported by a broad consensus among States — conditions not found in several of the draft articles approved on a provisional basis. Specifically, the treatment of the continuous nationality rule departed without justification from customary international law, which required that the injured person must be a national of the State exercising protection from the time of the injury until the date of settlement. The draft articles replaced the date of settlement of the claim by the date of its submission as the end of the time limit of the continuity requirement and left open the question whether continuity was required during the period from the occurrence of the injury to the end of the time limit, whether submission or settlement. Such departures from customary international law lacked foundation.

101. Draft article 11 on protection of shareholders was also out of line with the customary rules in that it introduced two exceptions not found therein. Unless agreed otherwise, a State could exercise diplomatic protection on behalf of shareholders only when they had suffered direct losses which had not been made good. The Commission should harmonize the articles in question with the customary international law in force.

The meeting rose at 12.35 p.m.