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# Report of the International Law Commission on the work of its fifty-sixth session (2004)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat

**Addendum**

Contents



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## F. Diplomatic protection

### 1. General remarks

1. Delegations commended the Commission on completing its first reading of the draft articles on diplomatic protection,[1] and stressed the importance of the topic to the international community. Satisfaction was expressed with the general thrust of the draft articles and with the approach taken by the Commission, which largely codified customary rules for the exercise 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) constituting an internationally wrongful act of another State. Some delegations expressed the view, however, that the Commission had departed from customary international law with respect to some draft articles. It was stressed that the draft articles should 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. Others welcomed the progressive development undertaken with respect to some draft articles, and in particular draft article 8.

2. Concerning the scope of the draft articles, some delegations expressed satisfaction with the Commission's decision to exclude the concept of functional protection, the effects of diplomatic protection and the application of norms concerning reparation from the scope of the draft articles, as well as the possible delegation of the right to diplomatic protection. The view was expressed that the Commission had been wise to adopt such an approach, thereby maintaining the focus of the draft articles on admissibility of claims (nationality and local remedies). Conversely, it was suggested that, on second reading, the Commission should revisit and reconsider for inclusion provisions such as those dealing with the protection exercised by international organizations or with diplomatic protection exercised against or in conjunction with international organizations. Some delegations also spoke in favour of supplementing the text with, inter alia, provisions on the effects of diplomatic protection.

3. Reference was also made to the overlap between the topic and other areas of international law, for example, international human rights law and that relating to the protection of investments. It was observed that such types of protection were covered by other rules, institutions and procedures, and it was important not to anticipate conclusions on those matters. Some delegations further noted that, in considering diplomatic protection, it was necessary to take into consideration the relevant provisions of the Vienna Convention on Diplomatic Relations of 1961[2] and the Vienna Convention on Consular Relations of 1963,[3] in particular article 36. Reference was made to recent judicial pronouncements relating to the latter provision. In addition, some delegations noted that the draft articles were closely connected to draft articles on the responsibility of States for internationally wrongful acts,[4] and must be read in the context of those articles, including article 44.

## 2. Comments on specific draft articles

### PART ONE — GENERAL PROVISIONS

#### Draft article 1 — Definition and scope

4. Satisfaction was expressed with the fact that diplomatic protection, as defined in draft article 1, only arose within a context of peaceful settlement of disputes between States and not through recourse to the threat or use of force. It was stressed that diplomatic protection was currently one of the clearest manifestations of the principle set out in Article 2, paragraph 4, of the Charter of the United Nations, according to which all Member States of the Organization should refrain from the threat or use of force in their international relations.

5. The view was expressed that the language of draft article 1 was unsatisfactory as it focused on measures that a State could take for the exercise of diplomatic protection without defining the basic elements. Accordingly, it was considered irrelevant, for the purposes of the definition, that the claim should be accompanied by a protest — although that was often the case — containing a request for an investigation into the facts or a proposal for other means of peaceful settlement, since international practice showed that diplomatic protection consisted mainly of a State bringing a claim against another State concerning certain injuries to its nationals in order to compel that other State to abide by international law. What was relevant was that the State bringing such a claim espoused the cause of its nationals and stated as much.

6. The view was also expressed that draft article 1 did not sufficiently distinguish between "diplomatic protection" *stricto sensu* and other related concepts, such as diplomatic or consular assistance to nationals experiencing difficulties as a result of their detention or trial in another State — a situation where none of the criteria for diplomatic protection *stricto sensu*, such as the exhaustion of local remedies, could be invoked. It was noted that the distinction was not only a reality in daily practice but had been reflected in recent decisions of the International Court of Justice in the LaGrand and the Avena and Other Mexican Nationals cases, where the Court had found that a State had obligations incumbent upon it under an international convention to render consular assistance without prejudice to the State of nationality being able to exercise diplomatic protection later. Others noted with regret that the definition, as formulated, would exclude some of the consular functions in the Vienna Convention of 1963.

7. By way of providing a more precise definition of diplomatic protection, it was suggested that draft article 1 begin with the following wording: "Diplomatic protection consists of formal action through which a State adopts in its own right …", so as to emphasize the fact that the essence of diplomatic protection was the communication through which the State of nationality made a claim for international law, in the person of its nationals, to be respected, thus distinguishing such protection from "diplomatic or consular assistance" to nationals abroad.

8. As for the assertion, contained in paragraph 7 of the commentary to the draft article,[5] that the rules of diplomatic protection cover the protection of nationals not engaged in official international business on behalf of the State (and thereby protected by other rules of international law), the view was expressed that rules of diplomatic protection should apply to injuries caused to such persons outside the

context of the exercise of their duties and, therefore, outside the scope of the conventions in question.

**Draft article 2 — Right to exercise diplomatic protection**

9. Approval was expressed for the legal position, expressed in draft article 2, positing the exercise of diplomatic protection as a right, and not a duty, of States. It was noted that this clearly reflected existing customary international law and was consistent with case law. It was also recalled that, at the national level, even if for reasons of constitutional law the State was under an obligation to exercise diplomatic protection, it still had a large margin of discretion as to how to comply with that obligation. Hence, the concept of diplomatic protection had to be distinguished from other areas of law which dealt with the protection of individuals and, in particular, from the regime of human rights, which imposed clear obligations on States, even though in certain circumstances it might be exercised under conditions that involved the protection of human rights.

**PART TWO — NATIONALITY**

**Chapter I — General Principles**

**Draft article 3 — Protection by the State of nationality**

10. The view was expressed that the commentary was too brief, given the importance of the rule that the article established. For that reason, it was suggested that the commentary be expanded to include specific references to international jurisprudence, which had repeatedly affirmed the principle of customary law contained in the draft article.

11. The concern was further expressed that the exception to the general rule laid down in paragraph 2 might not cover the right of a State member of the European Union to offer diplomatic protection to citizens of other member States, provided that they had no diplomatic representation in the territory of a third State. It was therefore suggested that a third paragraph be added in order to expand the scope of the exception, bearing in mind that the problem might also arise in relation to other integration processes throughout the world.

**Chapter II — Natural Persons**

**Draft article 4 — State of nationality of a natural person**

12. While some delegations expressed approval for the direction taken by the Commission in draft article 4, they suggested certain refinements. In particular, it was noted that the draft article could have contained a specific reference to the domestic law of States, as had been the case in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws. Furthermore, the concern was expressed that the use of the word “acquired” implied that the Commission was referring only to cases of acquired nationality, to the exclusion of nationality of origin.

13. While acknowledging that succession of States affected the nationality of a great number of persons, both natural and legal, the view was expressed that it should not have been included in the list of forms of acquisition of nationality. The

legal effects of nationality acquired by such means fell within one of the established means of acquisition: birth, descent or naturalization.

14. It was stressed that States should avoid adopting laws which increased the risk of dual nationality, multiple nationality or statelessness. It was recalled that the draft article stipulated that the acquisition of nationality must not be inconsistent with international law. Thus, the draft articles did not allow either the acquisition or the granting of citizenship inconsistent with international law. Others suggested that the phrase "not inconsistent with international law" in connection with the acquisition of nationality could be refined further.

15. Agreement was expressed with the Commission's view that the genuine link rule expounded by the International Court of Justice in the *Nottebohm* case should not be interpreted as a general rule of international law applicable to all States.

**Draft article 5 — Continuous nationality**

16. Some delegations favoured the application of the continuous nationality requirement from the time of the injury until the date of settlement. It was considered important to maintain the nationality held on the date the claim was presented until the date of the judgment or other final settlement, because to do otherwise would destroy the causal link necessary for diplomatic protection. Other delegations expressed support for the Commission's drafting of the continuous nationality rule, which entitled a State to exercise diplomatic protection in respect of a person who was a national at the time of the injury and at the time of the official presentation of the claim, but was no longer a national at the time the claim is settled.

17. It was noted that, although the expression "continuous" nationality appeared in the title, it did not appear in the text. The use of the term "continuous" was considered a safeguard against the situation in which a person changed nationality merely to obtain diplomatic protection from a more influential State.

18. Some delegations expressed concern over the exception to the continuous nationality rule contained in paragraph 2. It was stated that care should be taken 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. In this regard, it was pointed out that if an injured person changed nationalities in the intervening period, then the new State of nationality lacked *locus standi*, since it had had no duty to protect the injured person at the time of the injury. It was also noted that the additional threshold requiring that there should be no nexus between the claim and the change of nationality was not easily enforceable, especially in cases of involuntary change of nationality. Moreover, some delegations did not share the Commission's view that paragraph 2, as drafted, properly addressed the concern regarding "nationality shopping" expressed by some members of the Commission. It was also suggested that the language of paragraph 2 needed to be revised in order to clearly limit the exception to cases of involuntary loss or imposition of nationality. It was further suggested that the phrases "for a reason unrelated to the bringing of the claim" and "not inconsistent with international law", in connection with the acquisition of nationality, could be refined further. Others favoured deleting paragraph 2, leaving paragraph 3 as the sole exception to the continuous nationality rule.

19. It was further suggested that an exception could be made to the rule of continuous nationality if, within the period described in paragraph 1, a stateless person or a refugee protected under draft article 8 acquired the nationality of the State exercising protection.

**Draft article 6 — Multiple nationality and claim against a third State**

20. It was noted that paragraph 2 fell within the realm of progressive development of international law. Although it was recognized that multiple nationality was a fact of international life, some delegations indicated that the Commission, during the second reading, might consider the question of competing assertions among several States claiming the exclusive right to protect the same person and how such a dispute could be resolved. Although paragraph (4) of the commentary discussed the possibility of joint claims, some viewed it as failing to offer direction in respect of separate or successive claims. It was suggested that the Commission could, for example, consider the possibility of applying general principles such as *res judicata* or establishing an order of preference based on the dominant nationality principle. It was similarly noted that, although eliminating the effective link requirement sounded simple in principle, it might prove to be difficult in practice.

21. With regard to the term "jointly", it was noted that although the Commission's view seemed to be that the term allowed States to exercise protection separately or in different forums, such situation would be covered by paragraph 1. Hence, the term "jointly", in paragraph 2, should be understood *stricto sensu*, namely, an identical action, as in the case of collective claims or actions.

**Draft article 7 — Multiple nationality and claim against a State of nationality**

22. It was noted that draft article 7 could be considered as constituting progressive development of international law since it 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. Some speakers were of the view that the provision could give rise to new controversies between States with citizens of dual nationality. While it was acknowledged that diplomatic protection was difficult to exercise in cases where an individual held the nationality of both the applicant State and the State which had committed the wrongful act, to some delegations the solution proposed in the draft article seemed contradictory.

23. Several speakers suggested that the concept of "predominant" nationality be re-examined, and some support was expressed for the deletion of the phrase. It was further noted that a concept such as predominant nationality could call into question the principle of the sovereign equality of States, since no criteria existed in international law to determine the predominance of one nationality over any other. Some delegations were of the view that, if it was decided to maintain the current approach of draft article 7, it would be useful to include clear criteria for determining predominance for the purposes of diplomatic protection. However, some delegations questioned the value of some of the factors listed in paragraph (6) of the commentary to the draft articles. For example, the view was expressed that factors such as curricula and the language of education, or bank accounts could never be considered as valid factors for deciding which nationality was predominant. Reference was further made to the criteria adopted by the Institute of International Law, in 1965, for determining the preponderant nature of an

individual's bond, namely, his usual place of habitual residence, the State in which he habitually exercised his civil and political rights, and other bonds which would indicate an effective link of residence and interests in and attachment to a State.

24. It was also queried whether the Commission intended that the approach to "predominant" nationality should be applied to situations where a treaty obligation was triggered by a foreign nationality. It was noted that certain important provisions of the Vienna Convention on Consular Relations, such as those under article 36, were triggered by the nationality of the individual.

**Draft article 8 — Stateless persons and refugees**

25. The extension of diplomatic protection to stateless persons and refugees in draft article 8 was welcomed by some delegations as constituting progressive development of international law. It was noted that refugees and stateless persons were the subject of other relevant international treaties, but that such instruments did not deal directly with their diplomatic protection; rather, they appeared implicitly to exclude it. Thus, the Commission was taking an important step, which would considerably improve the status of refugees and stateless persons. The Commission was nevertheless invited to reconsider the requirement of both lawful and habitual residence, as this set too high a threshold and could lead to a lack of effective protection for the individuals involved.

26. It was, however, noted that there remained concerns as to whether it was appropriate to address refugees within the context of diplomatic protection. Moreover, it was recommended that the elements of progressive development be weighed with caution so as not to depart from the legal regime in force for the protection of refugees. The view was also expressed that extending diplomatic protection to refugees and stateless persons was undesirable and susceptible to wider interpretation by the State of habitual residence of the stateless person, since the phrase "lawfully and habitually resident" in paragraph 1 referred only to the national law and not to an international standard.

27. Some delegations expressed concern as to the definition of "refugee" which, according to paragraph (8) of the commentary, was not limited to the definition in the 1951 Convention relating to the Status of Refugees[6] and its 1967 Protocol.[7] It was noted that it was difficult to accept any definition of refugee which deviated from the universally accepted definition. In terms of a further suggestion, a definition of term "refugee" could be provided in the draft article itself, in light of the fact that it was not intended to be limited to the category of persons defined in the 1951 Convention.

**Chapter III — Legal Persons**

28. Some delegations noted with approval that, in codifying the rules on diplomatic protection of legal persons, the Commission had based its work on the rules derived from the *Barcelona Traction* case. Others were of the view that the Commission had gone beyond the judgment in that case by dealing with matters not specifically addressed by the Court.

**Draft article 9 — State of nationality of a corporation**

29. Support was expressed for the basic rule, contained in draft article 9, that the State of nationality of a corporation could exercise diplomatic protection with regard to an injury to that corporation. Various observations were, however, made regarding the formulation of the draft article. It was pointed out that the use of the broader phrase "under whose laws the corporation was formed" instead of "under whose laws the corporation was incorporated" might create confusion in the legal systems of numerous States. Since the former would also apply with respect to the "other legal persons" referred to in draft article 13, it was considered preferable not to depart from the term "incorporated" used in the *Barcelona Traction* case. While some described the Commission's choice of the double nationality criteria of place of incorporation and location of the registered office or seat of management or some similar connection as prudent, others called for clearer guidance. In particular, it was suggested that the criterion of "the seat of its management or some similar connection" needed further clarification because its ambiguity might unnecessarily expand the scope of the concept of State of nationality of a corporation. The view was also expressed that basing the nationality of a corporation on the criterion of "seat of its management", which was not derived from the *Barcelona Traction* case, could be acceptable if "management" were qualified as "effective". It was also suggested that, in line with some of the ideas expressed in the Commission's report to the General Assembly at its fifty-eighth session,[8] there was room for a condition stipulating a genuine link or relationship, as well as the place in which the corporation's principal economic activities were carried out.

30. Others noted that the draft article did not deal with the case of a corporation that had more than one nationality, and that the possibility of protection of a corporation having its registered office in a State other than the State of incorporation remained unclear.

**Draft article 10 — Continuous nationality of a corporation**

31. Some delegations noted that valid arguments, as expounded in the context of draft article 5, also existed both for and against the approach of the Commission with respect to the continuous nationality requirement in draft article 10.

**Draft article 11 — Protection of shareholders**

32. Those delegations which expressed support for the Commission's formulation of draft article 11 noted that it had adopted a middle ground. It was acknowledged that the Commission, like the International Court of Justice in the *Barcelona Traction* case, had the overall objective of avoiding situations of overlapping claims. Thus, the view was expressed that the suggested exceptions to the general rule applied only to the limited cases in which the need for protection seemed to justify such exceptions.

33. Other delegations, however, noted that the provision was inconsistent with customary international law because it introduced two exceptions to the general rule that diplomatic protection could not be exercised in respect of shareholders for an injury to the corporation. Some delegations also observed that the provision raised practical problems, since the identification of the nationality of shareholders would prove difficult, and might generate a multiplicity of claims against the State presumed to have caused the injury. The view was expressed that paragraph (a)

could create a very broad scope for entitlement to protection by the State of nationality of the shareholders and paragraph (b) would disrupt the balance between the advantages to the shareholders of owning stock in a company incorporated in a foreign State and the risk they assumed by accepting that the company had the nationality of that State.

34. It was queried whether a separate article on the protection of shareholders was needed at all, since shareholders were already protected under the articles on the protection of natural or legal persons, as appropriate. It was also questioned whether the provision of special protection for shareholders would not in fact protect the investment rather than the national. In addition, it was indicated that rights concerning foreign investments could be better protected by a variety of arbitration clauses in investment treaties, as private parties were entitled to seek remedies directly from the recipient State of their investment.

35. The practicality of allocating the right of protection of a defunct company to the State of nationality of the company rather than the State or States of the shareholders was questioned. It was not clear that the former State had any real interest in taking action if the shareholders came from another State. In such a situation it was asked why it should not be possible to make a claim if a company had ceased to exist for a reason unrelated to the injury, as the shareholders had still suffered; and why the right to protect shareholders against the State of nationality of a company should be limited to the case where the company was required to incorporate in the State concerned in order to carry on business there. It was also noted that the exceptions might be too rigid and might not adequately take into consideration situations where, for reasons of equity, the State of nationality of the shareholders should exercise the right of protection.

36. Other suggestions included further harmonizing the interaction between draft article 10, paragraph 2 and draft article 11 since it was possible to read the two provisions in a manner that suggested that the more serious the violation of the shareholders' rights, the less the possibility that their States of nationality might initiate action to exercise diplomatic protection on their behalf.

**Draft article 12 — Direct injury to shareholders**

37. Some delegations expressed support for the formulation of draft article 12 proposed by the Commission. Others indicated that it needed further analysis. For example, it was suggested that the Commission should reconsider draft articles 12 and 13 to take into account the volatility of the status of shareholders in the modern international economy. It was also noted that while draft articles 5 and 10, on the continuous nationality rule, laid down precise conditions for the protection of natural and legal persons, the same could not be said with respect to shareholders; a reference to their nationality at the time of the injury, or a cross reference to the articles on natural persons, might prevent the sale of shares or a change of nationality for reasons of convenience.

38. As regards paragraph (4) of the commentary, the point was made that a company's incorporation in the wrongdoing State should not create a presumption of discriminatory treatment to foreign shareholders unless the municipal law of the State gave foreign shareholders unreasonably weaker rights than those granted to national shareholders. Moreover, it was noted that the rules containing "the general principles of company law" had not been specified, and that, even if such general

principles existed, it was unclear what role they could play in determining foreign shareholders' rights and in ensuring that shareholders were not subjected to discriminatory treatment. Thus, it was suggested that even if a corporation were incorporated in the wrongdoing State, the distinction between shareholders' rights and the corporation's rights must, as a matter of principle, be drawn in accordance with the municipal law of the State.

**Draft article 13 — Other legal persons**

39. Some delegations expressed support for the formulation of draft article 13. At the same time, it was suggested that it should be worded more explicitly, limiting diplomatic protection of other legal persons to defending their commercial and property rights. On the other hand, the view was expressed that the provision exceeded the permissible limits of progressive development of international law. Moreover, it was stressed that diplomatic protection should not be extended to non-governmental organizations, since, in performing their international functions, such organizations did not have sufficient links to their State of nationality and had, therefore, no claim to its protection.

40. Suggestions for improving the formulation of the provision included referring to articles 9 and 10, as well as articles 11 and 12, since such other legal persons might be persons comparable to shareholders. For example, reference was made to the limited liability company which existed in civil law systems as an intermediate form of commercial company between a limited company (*sociedad anónima*) and a partnership (*sociedad de personas*). Such an intermediate commercial company fell within the scope of draft article 13 and, as a consequence, was covered where appropriate by draft articles 9 and 10, but not by draft articles 11 and 12, which were not referred to in draft article 13. It was therefore suggested that the reference in draft article 13 to "draft articles 9 and 10" should be replaced by "draft articles 9 to 12 inclusive", and that paragraph (4) of the commentary to draft article 13 refer specifically to limited liability companies.

41. Others were of the view that, given the scant practice in the area, it was not possible to assert that the regime of diplomatic protection of all legal persons should be the same as the regime applicable to corporations. As such, it was suggested that article 13 be reformulated as a "without prejudice" clause.

**PART THREE — LOCAL REMEDIES**

**Draft article 14 — Exhaustion of local remedies**

42. Support was expressed for draft article 14, which codified the recognized rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim.

43. With regard to paragraph 2, the Commission was commended for revising the exhaustion requirement, which it had previously limited to remedies available "as of right" in the municipal law of the respondent State. Nonetheless, it was reiterated that 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. It was suggested that the expression "whether ordinary or special", in reference to judicial

and administrative courts or bodies, should be deleted since the phrase was superfluous and ambiguous.

44. Support was also expressed for the statement in paragraph (6) of the commentary that the injured alien "is not required to approach the executive for relief in the exercise of its discretionary powers". In this regard, it was observed that mechanisms for executive clemency did not constitute an adequate means of redress because such measures were different from judicial remedies, tended towards confidentiality or secrecy, and excluded standards of legal due process and equality of the parties. Furthermore, decisions resulting from such mechanisms did not allow for appeal and were based principally on considerations of a political nature.

**Draft article 15 — Category of claims**

45. Regarding draft article 15, it was considered important that the exhaustion of local remedies rule applied only to an international claim or a request for a declaratory judgment and not to other diplomatic measures covered by the concept of diplomatic protection as defined in draft article 1.

**Draft article 16 — Exceptions to the local remedies rule**

46. Several delegations expressed support for the exceptions, contained in draft article 16, to the basic rule on the exhaustion of local remedies. Other delegations, however, found one or more of the proposed exceptions problematic. It was noted that the exceptions were broad, vague and ambiguously drafted, and that their threshold was too low. Such formulation not only jeopardized the rule, but also made it redundant. The view was also expressed that, when defining criteria for exceptions to the exhaustion of local remedies rule, available remedies should not a priori be called into question. Since institutions for the administration of justice varied from one country to another, it was questioned how the conduct of a State could be evaluated in the context of draft article 16.

47. It was noted that there existed some overlap between paragraphs (a), (b) and (c). With regard to paragraph (a), some delegations spoke in favour of the Commission's text and noted that the provision was flexible and clear. Other delegations were dissatisfied with it, in particular when read together with the second part of the exception contained in paragraph (c). Some delegations also expressed support for paragraph (b), while others noted its shortcomings. It was observed that the exception was well-established in human rights instruments, judicial decisions and legal writings. However, the view was expressed that it was not essential to include a clause on undue delay in proceedings, since that eventuality was already covered by paragraph (a). Paragraph (c) also received support from some delegations, which noted that the formulation of the exception represented a carefully circumscribed acknowledgement of the fact that 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. Others pointed out that the drafting was overly complicated. While paragraph (d) also received the support of some delegations, it was stressed that any waiver must be expressly stated and not implied. It was also suggested that the key question of who decides whether a given circumstance constitutes a waiver should be elaborated upon in the commentary.

48. Several observations relating to the commentary to the draft article were also made. In relation to paragraph (3) of the commentary, it was noted that the term "claimant" seemed to refer to the injured person rather than the State of nationality. Another view held that paragraph (3) seemed unconvincing for, if it was common knowledge that "the local courts [were] notoriously lacking in independence", the question arose why an investor would risk investing in the country concerned. With regard to paragraph (4), support was expressed for the Commission's view that it was for the competent international tribunal to determine the admissibility of a claim of exception to the local remedies rule. A preference to see that point duly reflected in the text of the draft article was expressed. The view was expressed that it was not proper to discuss the examples listed in paragraphs (7) and (8), in which a voluntary link was absent in the context of exceptions to the local remedies rule, because the injuries quoted could have been caused by acts not prohibited by international law and, as such, would not be susceptible to diplomatic protection.

## PART FOUR — MISCELLANEOUS PROVISIONS

### Draft article 17 — Actions or procedures other than diplomatic protection

49. It was noted that other remedies or dispute settlement mechanisms, including those contained in human rights instruments, constituted *lex specialis* and had priority over remedies pursuant to diplomatic protection. However, it appeared to some delegations that the phrase "without prejudice" seemed to place diplomatic protection on an equal footing with other actions or procedures under international law. Others were of the view that the language of the provision was broad and problematic, although the commentary gave a more restrictive interpretation: it was not limited to redress for indirect injury but included the measures envisaged under the regime of State responsibility for redressing direct injuries, including resort to countermeasures. However, it was recalled that, according to article 53 of the draft articles on responsibility of States for internationally wrongful acts,[4] countermeasures were excluded if redress proceedings had been instituted, even by individuals. The text also implied to some that a State might exercise diplomatic protection even when an individual had already instituted proceedings before a human rights court. That interpretation meant that the State causing the injury would have to accept multiple claims entered both by the State exercising diplomatic protection and by the individual instituting human rights proceedings.

50. Some speakers suggested merging draft articles 17 and 18 in a single draft article. Others cautioned against that, for the sake of clarity. In terms of another suggestion, both draft articles 17 and 18 could be drafted in the same way, either as "without prejudice" clauses or as "exclusion" clauses.

### Draft article 18 — Special treaty provisions

51. Draft article 18 was welcomed by several delegations. While it was recalled that some agreements between States excluded the recourse to diplomatic protection in the event of an investment arbitration, it was nevertheless considered useful to include in the articles on diplomatic protection a clause to clarify the relationships among the various approaches taken to protect the interests of both natural and legal persons. Other speakers considered the language of draft article 18 to be overly broad. To them, it appeared that a determination would have to be made as to whether the provisions of a special treaty were consistent with the draft articles,

which could give rise to a degree of uncertainty and conflicts of interpretation. The exclusion of the application of the draft articles "where, and to the extent that, they are inconsistent with special treaty provisions" was considered unclear, particularly as to whether it required that the treaty specifically exclude resort to the exercise of diplomatic protection or merely that such protection was incompatible with the object and purpose of the treaty. Some delegations considered the breadth of the term "special treaty provisions" unclear: was there an implied hierarchy such that the principles of the draft articles applied to some treaty provisions but not others? It was also noted with regret that the commentary focused entirely on agreements relating to the reciprocal protection of investments, and failed to mention other relevant types of agreements.

52. According to another view, draft article 18 seemed contrary to the Commission's original intention of giving precedence to special treaty provisions, such as those contained in investment protection treaties, over the draft articles. It was therefore proposed that the draft article be revised to 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".

**Draft article 19 — Ships' crews**

53. Some support was expressed for extending the scope of the draft articles to the protection exercised by the flag State of a ship on behalf of a non-national crew member. The absence of the "bond of nationality" requirement was noted and, consequently, the recognition by the Commission that protection exercised by flag States could not be categorized as diplomatic protection was welcomed. The view was also expressed that the right to seek redress on behalf of crew members should rest primarily with the State of nationality of the ship, not the State of nationality of the crew members. This practice was considered to accord with the predominant role that that State played with regard to the ship, as expressly recognized by the international law of the sea. In that connection, the reasoning of the International Tribunal on the Law of the Sea in the The M/V "Saiga" (No. 2) case (Saint Vincent and the Grenadines v. Guinea), was considered particularly convincing. While acknowledging that this protection fell outside of the traditional understanding of diplomatic protection, it was considered consistent with international practice, and therefore the correct rule to be placed in the draft articles. Others noted that, although some practice allowing a flag State to exercise protection in respect of non-national crew members existed, such practice was neither extensive nor universal. The view was expressed 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.

54. Others expressed misgivings. It was observed that such protection was provided for under the provisions of the United Nations Convention on the Law of the Sea,[9] in the context of prompt release and compensation. The concern was expressed that the provision represented a shift in the overall thrust of the draft articles, creating a rule hitherto unknown in international law by combining two different concepts, and would open up the possibility of double claims being presented. It was also noted that the protections currently contained in the draft article could be found elsewhere in the draft articles, in particular article 3 on protection by the State of nationality and article 17 on actions or procedures other

than diplomatic protection. Some delegations even favoured the deletion of draft article 19.

55. As for the formulation of the draft article, the view was expressed that a flag State's protection of a ship's crew should not be limited to crew member injuries sustained "in the course of an injury to the vessel", since such formulation could be seen as excluding the situation of an unlawful detention of the crew. It was suggested that the article be revised to cover an injury to a crew member incurred because of his or her relationship to the ship. It was also recommended that the issue of exhaustion of local remedies be re-examined with a view to providing a specific exemption in the case of the crew. It was also noted that the text was not clear as to whether the crew's nationality or the ship's nationality took precedence.

### 3. Comments regarding the final form of the draft articles

56. Support was expressed for adopting the draft articles in the form of a convention. Others observed that the close relationship between the topic of diplomatic protection and that of State responsibility contributed to the need to ensure that such texts had a limited form and a non-binding nature.

## G. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary hazardous activities)

### 1. General remarks

57. Delegations commended the Commission 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.[10] Highlighting the importance of undertaking work on the liability aspects of the topic, delegations noted that while the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001[11] served as a useful guide for States, preventive measures alone could not completely preclude the possibility of transboundary damage occurring as a result of hazardous activities. The draft principles were considered significant and a sound basis for further work, and the view was expressed that they filled a gap by ensuring that States would take all necessary measures to make prompt and adequate compensation available to victims, thereby greatly assisting in achieving the aims of the Rio Declaration on Environment and Development.[12]

58. Doubts were expressed as to whether the approach taken by the Commission provided a workable compromise. While it would bring greater flexibility and allow the individual States to take into account the special features of various risks, it contemplated, in contrast to the existing regimes the creation of liability regimes, that would not be self-executing. Such flexibility not only reduced chances of enforceability but also created legal uncertainty, which would in turn give rise to additional costs and also raise questions of economic relevance. On the other hand, it was reiterated that international regulation of the liability aspects ought to be proceeded with by means of careful negotiations, tailored to specific issues and particular regions. It was recalled that such work was already being done in numerous negotiations in which such questions as environmental impact assessments, prevention measures and notification were addressed in detail. It was

noted that from experience, 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. Thus, recommendatory principles that took such factors into account and supported such efforts constituted an appropriate contribution.

59. Several delegations supported the approaches of the Commission, the main thrust of the draft principles, as well as the basic understandings as articulated in the general commentary.[13] Support was expressed particularly for the thesis that international liability for transboundary harm also arose when a State had complied with its international obligations relating to an activity that had been carried out under its jurisdiction or control. The fact that the scope of the draft principles and the applicable threshold would be the same as in the draft articles on prevention also received support. It was observed that the balanced provisions of the draft principles would contribute significantly to the resolution of issues relating to compensation for transboundary damage. The draft principles were complementary and without prejudice to existing international regimes. It was also envisaged that they would not substantially alter domestic legal regimes.

60. Despite the limited scope of the outcome, the progress achieved by the Commission was seen as encouraging. While the text adopted contained only a few draft principles, it had the advantage of drawing the attention of States to the need for fuller coverage of the risks inherent in hazardous activities. It was nevertheless highlighted that the general application of the draft principles would be difficult. It was therefore more reasonable to apply them in respect of certain types of risk or within a group of States in the same region. Moreover, the draft principles clearly needed to be adapted to the circumstances and expanded in detail as appropriate.

61. It was also noted that the draft principles did not address other pertinent albeit difficult issues such as damage caused in areas beyond the jurisdiction or control of a State. While acknowledging that issues surrounding compensation for losses to global commons were unique and complex and required separate treatment, some delegations would have preferred the application of the draft principles to the global commons. On the other hand, some other delegations welcomed the non-application of the draft principles to damage occurring in areas beyond national jurisdiction or control.

62. While welcoming the focus on principles rather than on rules, several delegations pointed out that some of the draft principles had gained only sectoral acceptance, and had not found general acceptance in State practice, effectively rendering major portions of the draft principles an exercise in the progressive development of international law. It was also noted that the work did not seem to be one of codification or even progressive development in the traditional sense. Accordingly, it was suggested that it would be helpful if the Commission could clarify the status of the various elements of the text of the draft principles.

63. Concerning the substantive provisions of the draft principles, it was noted that the draft principles should contain a set of procedural and substantive minimum standards, as this was an accepted trend under domestic law. While it was necessary to have flexibility for States to design regimes for specific hazardous activities at national and international levels, there was still room for fine tuning of the draft principles in the light of comments from Governments. Several delegations expressed their support for the principle of prompt and adequate compensation for

victims, as reflected in draft principles 3 and 4, noting that principle 22 of the Stockholm Declaration on the Human Environment[14] and principle 13 of the Rio Declaration[12] offered sufficient basis. Support was also expressed for the primary liability of the operator. Moreover, there was support for the principle of liability without proof of fault, which was a trend in liability regimes at both the national and international levels. Such a strict liability regime was in keeping with the "polluter pays" principle and was beneficial for victims of hazardous activities since it relieved them of the burden of proving fault. The need to strike a fair balance between the rights and obligations of the operator, the beneficiary of the activity and the victim was also stressed.

64. Some delegations noted that the draft principles might require further clarification and improvements in such areas as the definition of terms and how to guarantee prompt and adequate compensation. It was also observed that further development of the topic should give greater emphasis to the "polluter-pays" and precautionary principles. Furthermore, it was suggested that more thought be given to the relationship between the draft principles and the draft articles on responsibility of States for internationally wrongful acts. In particular, guidance would be welcome on how duplication of claims or recovery could be avoided in circumstances, as suggested in the commentary to draft principle 1, where liability under the draft principles might arise concurrently with State responsibility. The notion of the State as victim in draft principle 3 also raised the question of the relationship with the draft articles on State responsibility.

65. It was also contended that prompt response measures to prevent loss or damage caused; adequate financial security, achieved in particular by insurance obligations or the establishment of a fund; and the creation of effective judicial protection measures, particularly in transboundary cases, elements already reflected in draft principles 5 to 7, were essential for inclusion in any future instrument and were critical to the achievement of the overall goal of providing prompt and adequate compensation for victims.

66. Although some delegations agreed, in general, with the balance established between the role of the State and that of the operator as the primary object of liability, it was considered that the role of the State could be made more decisive considering that the State, not the operator, was the main subject of international law; and that the State had a prima facie obligation to provide compensation on the basis of the general obligation of States not to allow knowingly their territory to be used for acts contrary to the rights of other States. Moreover, it was incumbent upon the State to establish international or domestic mechanisms to recover costs from the operator.

67. However, it was also asserted that the role of States should not be given too much emphasis with respect to compensation, as most of the activities being considered were conducted by private operators. The provisions that placed undue emphasis on the responsibility of States in the aftermath of an incident resulting in damage were likely to be both unnecessary and an inaccurate reflection of the current reality in international law.

68. Some other delegations stressed the importance of participation of the State in the scheme for allocation of loss. It was suggested that provision must be made for supplementary funding mechanisms ensuring that additional compensation could be paid by compensation funds and, in some cases, by the State itself. The need to

establish the obligations of the States involved, especially the State of origin, was also stressed.

69. It was also recalled that several international instruments contained the principle of common but differentiated responsibility whose importance was underscored in the general commentary in its reference that the choices and approaches for the draft principles and their implementation might be influenced by the different stages of economic development of the countries concerned. In this connection, it was hoped that provisions that were detrimental to the interests of developing countries would be properly considered in the Commission with a view to paving the way for wider acceptance of the draft principles.

## 2. Comments on the draft principles

### Title

70. The view was expressed that the title of the topic was inaccurate in relation to the draft principles under consideration since it gave the impression that international law did not prohibit acts causing injurious consequences and that it was legitimate to commit such acts. It was activities, namely, lawful but hazardous activities, rather than acts, which were subject to a liability regime. Accordingly, support was expressed for either the title "International liability in case of loss from transboundary harm arising out of hazardous activities" or "Principles on the allocation of loss in case of transboundary harm arising out of hazardous activities".

### Preamble

71. A more prominent role for the "polluter-pays" principle in the preamble was recommended.

### Draft principle 1 — Scope of application

72. Some delegations were opposed to the threshold of "significant" harm in draft principle 1. It was contended that such a threshold was unnecessary and was not in line with the provisions of several liability regimes.

### Draft principle 2 — Use of terms

73. Some delegations noted that the threshold of "significant" in the definition of damage was unnecessary and not consistent with several liability regimes. In this connection, it was stated that the commentary did not make a convincing case for the retention of the threshold. In the first place, 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 *Lake Lanoux* award dealt only with serious injury. However, the point at issue in that case was the inability of the claimant State to submit evidence showing any injury. Thirdly, the reference in footnote 365 of the report of the Commission to the Convention on the Regulation of Antarctic Mineral Resource Activities, the Convention on Environmental Impact Assessment in a Transboundary Context and the Convention on the Law of the Non-navigational Uses of International Watercourses was somewhat misleading in that the first instrument was essentially superseded by the 1991 Madrid Protocol on Environmental Protection to the

Antarctic Treaty and the two remaining instruments were not concerned with liability issues. Indeed, other conventions which did not contain such a threshold, such as conventions on liability regimes relating to nuclear activities or the transport of oil by sea, were on the other hand not mentioned.

74. The view was also expressed that the definition of "significant damage" should be elaborated further to take into account the differences in political, social-economic and security realities among States and regions which might connote that what is significant in one State or region might not necessarily be so in another.

75. Some delegations welcomed the broad scope of the terms used in principle 2. Although the language proposed differed in some respects from that used in a number of relevant instruments, with some parts being cast in more general terms, it was observed that this was consistent with the overarching nature of the draft principles and allowed for the development of the law in that area in accordance with the draft principles. Moreover, some of the terms and the scope thereof had been elaborated in the commentary. Given the wide range of harm that might be suffered through an incident involving hazardous activities, it was noted that it was important that the definition of compensable damage should be wide enough to cover the range of situations where the causal link between the incident and the harm sustained was clear and demonstrable. In this context, some delegations welcomed the fact that the definition of damage covered both consequential economic loss and pure economic loss, including loss of income directly deriving from an economic interest in any use of the environment. It was stressed that it was important for economic loss suffered by fishing and tourism industries to be compensable, provided that the link between the incident and the economic loss was clear and demonstrable. It was also noted in respect of pure economic loss, which according to the commentary is covered under paragraph (a)(iii), that loss or damage by impairment to the environment raised delicate issues of causation. Accordingly, it was considered 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. It was also noted that the reference in paragraph (9) of the commentary to the Kiev Protocol was not apposite since that Protocol employed a compromise formulation that covered income directly deriving from an impairment of a legally protected interest.

76. Considering the overarching nature of the draft principles and the developing nature of international law in this area, some delegations considered it appropriate to have a broad definition of the environment, while preserving the need for the claimants to establish standing and causal connection between the incident and any loss suffered. Thus, support was expressed for the principle that damage to the environment per se should be actionable and subject to prompt and adequate compensation. It was also suggested the commentaries should elaborate methods of assessing environmental damage, including impairment of its non-use value.

77. However, some other delegations expressed reservations regarding the inclusion of damage to the environment per se in the definition of damage and urged the Commission to review this matter on second reading. In their view, such inclusion was not adequately grounded in international law and the arguments offered were unconvincing. Moreover, the environmental losses as referred to in draft principle 2 (a) (iii) could not easily be quantified in monetary terms, and there

would be difficulties in establishing *locus standi* as well as in establishing a causal connection between the activity in question and the environmental damage.

**Draft principle 3 — Objective**

78. The fact that the draft principle, in contrast to existing liability regimes, accords the right of compensation to both natural and legal persons, including States, was welcomed. However, it was noted that the draft principle was crafted in an overly condensed manner and its various elements ought to be separated on second reading. It lumped together as possible victims natural and legal persons, including States, and coupled damage to the environment with other kinds of transboundary damage.

79. Moreover, it was suggested that the draft principle should incorporate the guiding principle that the innocent victim should not bear the loss, and that the primary obligation for compensation should rest with those in command or control of the activity at the time of the incident.

80. While appreciating that under draft principle 3, as read in conjunction with draft principle 2, damage to the environment per se was actionable and the definition of environment covered a wide spectrum of cases, a delegation pointed out that stark economic realities made compensation for such damage extremely difficult to achieve and that certain conventions such as the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (*European Treaty Series,* No. 150), were unsuccessful because of provisions of similar import. Accordingly, it was considered prudent to adopt a narrower concept of environmental damage such as the compromise contained in the Kiev Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters (document MP/WAT/2003/1 of the United Nations Economic Commission for Europe), which in its article 2 (d) (iii) recognizes and limits such damage to "loss of income directly deriving from an impairment of a legally protected interest in any use of the transboundary waters for economic purposes". The article relates to claims in respect of an interest which was protected specifically by legislation.

**Draft principle 4 — Prompt and adequate compensation**

81. Agreement was expressed for the provisions of the present draft principle, noting that the draft principle was consistent with the principles of the Rio Declaration as well treaty practice, which applied the "polluter pays" principle. It also reflected the important function of the State in establishing the conditions for imposing liability on the operator.

82. However, some delegations raised doubts regarding the approaches adopted in the formulation of draft principle 4. They considered models that established direct liability claims under civil liability, such as those originally proposed by the Special Rapporteur in draft principle 4, alternative B (see A/CN.4/540, para. 38), to be preferable and more in line with the "polluter pays" principle. It was specifically noted that paragraph 1 of the draft principle had the obvious shortcoming of depriving an injured party of a direct right of action before the courts. In order to be operative, it would require relevant domestic legislation. This option seemed untenable and of limited impact particularly if the final form were to be a convention.

83. As concerns the notion of "prompt and adequate compensation", some delegations noted that the procedure for assessing compensation for environmental damage needed further elaboration. It would be more helpful if the commentary offered more guidance as to the meaning of "prompt and adequate" and it was suggested that developments in the law concerning investment could shed light on the matter.

84. It was also noted that draft principle 4, particularly the application of no-fault liability under paragraph 2, should be carefully studied, with some delegations seeking more prominence for the "polluter pays" principle. In particular, it was noted, in respect of paragraph 2, that the "polluter pays" principle was tempered by the additional reference that liability may, where appropriate, attach to a person or entity other than the operator. That formulation when read together with paragraph (13) of the commentary to the draft principle and paragraphs (11) to (14) of the commentary to draft principle 3 seemed to place the "polluter pays" principle in competition with other options, an approach which did not comport with recent practice.

85. Other delegations considered the proposed strict liability regime to be inflexible and not entirely consistent with current practice. It was suggested that the approaches of certain treaties that combined strict and fault liability should be followed.

86. It was also noted that in existing regimes, strict liability seemed to be limited to certain hazardous activities. Moreover, liability was limited and subject to other special procedures. To impose strict liability in respect of all "significant" damage therefore seemed very sweeping.

87. While draft principle 4 allowed scope for States to place conditions, limitations or exceptions on liability, some delegations cautioned against such a possibility being used to eschew payment of compensation to the victim. The caveat that such conditions, limitations or exceptions should be consistent with the overall objective of ensuring prompt and adequate compensation was therefore welcomed. It was also observed that treaty practice provided limited exceptions to strict liability such as armed conflict, force majeure or compliance with a compulsory public measure, etc. It was therefore suggested that such exceptions should be identified in the text of the draft principle itself instead of the commentary. Considering that in some circumstances damage to the environment may take several years to occur, it was proposed that the limitations envisaged under the draft principle should take into account such lengthy time-periods.

88. Moreover, it was pointed out that draft principle 4 had not fully achieved the objective of reducing the victim's burden of proof. The draft principle needed to consider ways of lessening the duty of the victim to establish causation by, for example, shifting the burden of proof or lowering it.

89. Some delegations expressed support for the requirement to have appropriate financial security to cover claims for compensation as proposed in paragraph 3.

90. Concerning paragraph 5, it was noted that the parameters of the obligation of the State were not clear and that its provisions went beyond the secondary duty of States to ensure compliance. Indeed, some delegations noted that the hint of residual State liability under paragraph 5 was problematic. While the Commission rightly placed primary liability on the operator, it was suggested that the role of the State

should be limited to ensuring that operators within its jurisdiction complied with their obligations, especially with regard to establishing adequate compensation mechanisms. In the interests of clarity, it was suggested that some aspects of paragraph (6) of the commentary reflecting the understanding that paragraph 5 does not require the State of origin to set up Government funds to guarantee prompt and adequate compensation could be incorporated into the paragraph. It was also noted that recent practice had developed a three-tiered approach, with funding from the polluter, a collective fund and the State. However, State funding was exceptional and applicable mainly in respect of nuclear accidents. It was therefore suggested that paragraph 5 should be restricted to ultra-hazardous activities. That restriction could be justified insofar as the State authorizing such activities should also assume the resulting risk.

91. Other delegations noted that the role of the State was flexibly defined in the draft principles to ensure that 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, by the terms of draft principles 4 to 8, the State had the obligation to take the necessary measures to ensure prompt and adequate compensation for victims of transboundary damage, including negotiations, consultations and cooperation with other States, as well as to take national legislative measures.

**Draft principle 5 — Response measures**

92. Support was expressed for the present draft principle, noting that it was an essential means of minimizing transboundary damage. However, it was also suggested that the draft principle fell outside the main thrust of the draft principles and should be restricted to the requirement of notification.

**Draft principle 6 — International and domestic remedies**

93. It was noted that it remained unclear under the present draft principle who would be entitled to claim compensation in cases of damage to the environment; whether, for example, non-governmental organizations would have standing or whether, pursuant to the provisions of draft principle 3, States will be entitled to present claims at a State-to-State level or be subject to private claims proceedings like individuals. It was also considered useful to combine paragraph 2, concerning international claims settlement procedures, with draft principle 7, on specific international regimes.

94. It was also observed that paragraph 3 was not specific as to whether it was the State of origin or the affected State which was to assume the obligation to ensure that its courts were competent to be seized of cases concerning liability and compensation. It was also suggested that criteria be established for identifying, in case of damage, the forum States because, as currently formulated, that paragraph seemed to establish universal civil jurisdiction.

**Draft principle 7 — Development of specific international regimes**

95. Some delegations endorsed the provisions of the draft principle. It was also noted that it might be desirable to include a more explicit lex specialis clause along the lines of article 55 of the draft articles on responsibility of States for internationally wrongful acts. It was also suggested that studies to determine the

extent to which recent environmental disasters, including dumping of hazardous wastes, had been the result of negligence or of violations of rules of international law were urgently needed.

**Draft principle 8 — Implementation**

[No comments made]

### 3. Relationship with State responsibility

96. Some delegations noted that they would welcome the inclusion of a principle which would make 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 for internationally wrongful acts. It was also contended that the preamble might be one place to deal with the relationship between the draft principles and the draft articles on responsibility of States for internationally wrongful acts.

### 4. Dispute settlement

97. Since the main objective of the draft principles was to provide guidance for States in the settlement of disputes concerning environmental damage, some delegations considered it most appropriate to include a provision on dispute settlement in the draft principles. According to this view, such a provision was still necessary even if the draft principles were not cast as a convention.

### 5. Comments regarding the final form of the draft principles

98. Concerning the final form of the outcome of work on the topic, some delegations noted that time was not yet ripe for a binding general convention on liability since the types of transboundary environmental risks to be covered were still too heterogeneous. In this connection, preference was expressed for some kind of framework convention or high-level reference document which extracted commonalities from existing treaties and carefully developed them for the future development of international law in the area.

99. Moreover, it was noted 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. The draft principles offered primary material for a framework convention. 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 and it was the function of the framework convention to provide inspiration and guidance. It was also noted that despite their current formal differences, it would be possible and useful to combine the draft articles on prevention and the draft principles into one instrument, preferably a convention, on international liability.

100. Other delegations noted that as, in the case of the work on prevention, the final version of the draft principles should take the form of draft articles, noting that such an approach laid the foundations for a binding legal text. It would also facilitate the development of more detailed and specific regimes in international agreements concluded on a regional or bilateral basis, and would ensure the adoption of prompt

remedial measures, including compensation for activities which risked causing significant transboundary harm.

101. While endorsing the basic content of the draft principles, some delegations did not favour casting it in the form of draft principles, essentially because in their view the term "principles" applied to general rules, such as generally recognized principles of international law. Moreover, some of the provisions of draft principles 1, 2 and 5 did not seem to fall into the same category of principles as understood in the context of the Stockholm Declaration or the Rio Declaration.

102. The current approach that presented draft articles in respect of the prevention aspects of the topic and then draft principles, albeit provisional, for the liability aspects was also not considered favourably. As a minimum, it was suggested that the obligation of States to take necessary measures to ensure that prompt and adequate compensation was available to victims as contained in the present draft principles should be incorporated, as an obligation, in the draft articles on prevention of transboundary harm from hazardous activities.

103. In view of diversity of the risks involved, it was found understandable that the Commission had elected not to prepare a draft general convention or even a mere framework convention. Doubts were also expressed as to the added value of concluding a framework convention, noting the Commission had managed to strike the right balance in presenting draft principles and the maintenance of such balance was not assured if the draft principles were upgraded into a framework convention, requiring lengthy diplomatic negotiations. It was also not certain that States would have a sufficient incentive to ratify such a convention. It was considered 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. It was also noted that given the lack of unanimity among States and in doctrine on a number of issues concerning the topic, guidelines would be the most appropriate form for a final document.

104. Moreover, it was noted that the draft principles did not lend themselves to becoming a self-executing treaty; they should merely establish some basic rules or guidelines for States that might evolve into legally binding rules following further elaboration. In this connection, some delegations favoured a non-binding instrument in the form of a declaration, guiding principles or a model law, which might serve as a guide for States and also as a basis for a future convention. It was contended that the primary aim should be to elaborate a set of general principles which could be drawn upon, as appropriate, when new agreements or domestic legislation were under.

105. Some delegations registered their expectation that the regime governing liability and compensation aspects of the topic would be cast as draft articles matching the draft articles on prevention. They were nevertheless appreciative of the different perspectives and views on the matter as well as the considerations taken into account by the Commission in presenting draft principles. In similar vein, it was suggested that the draft articles on prevention should be adopted together with the draft principles in a single General Assembly resolution or separate but coordinated resolutions.

106. Without excluding the possibility of a "soft law" approach, some delegations emphasized the importance of concluding a more effective instrument, that would ensure adequate mechanisms for enforcement.

107. Some other delegations noted that at this stage it was premature to take a decision on the final outcome of the work, while others reserved judgement until they had given due consideration to the draft principles. It was also suggested that any decision on the final form should be on the basis of a text integrating the draft articles on prevention and the draft principles.

*Notes*

[1] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59.

[2] United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[3] Ibid., vol. 596, No. 8638, p. 261.

[4] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum* (A/56/10 and Corr.1), para. 76.

[5] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 60.

[6] United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150.

[7] Ibid., vol. 606, No. 8791, p. 267.

[8] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10).

[9] See *The Law of the Sea: Official Texts of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.97.V.10).

[10] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 175.

[11] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum* (A/56/10 and Corr.1), para. 97.

[12] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[13] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum* (A/56/10 and Corr.1), para. 98.

[14] *Report of United Nations Conference on the Human Environment, Stockholm, 5-16 June 1992* (United Nations publication, Sales No. E.73.II.A.14), and corrigendum, chap. I.

[15] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10).