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**Summary record of the 2868th meeting**

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37. With regard to draft article 6, there had been no strong opposition from Governments, although the United Kingdom had queried whether it yet constituted a rule of customary international law.

38. As for draft article 7, the provision had been hotly debated in the Commission but broadly welcomed by States, although some had raised questions about the use of the word “predominant”. Italy, for example, had suggested that the provision should revert to the requirement of a genuine link. As no State had raised any objection of principle, any further amendments might be made by the Drafting Committee.

39. Draft article 8 had also been highly controversial within the Commission, but, surprisingly, it had been generally welcomed by States. A number of suggestions had been made relating to the wording but there had been no objection to the principle. The final wording should therefore be left to the Drafting Committee.

40. With regard to the claims of corporations and the shareholders of corporations, covered in draft articles 9 to 13, the comments by States had raised two important questions: first, whether the final phrase “or some similar connection” should be retained, since it implied that a genuine link between the corporation and the State exercising diplomatic protection was required. Secondly, there was the problem of the corporation “formed” (incorporated) in one State but with a registered office in another State. That raised the question of which State could exercise diplomatic protection.

41. Aware that the phrase might be misunderstood, the Commission had, in its commentary to draft article 9, gone out of its way to make it clear that a “similar connection” did not imply a genuine link.<sup>20</sup> Despite that, States seemed unhappy with the phrase, believing, understandably, that it would be construed as requiring some form of genuine link. In his view, therefore, the Commission should eliminate the requirement. Secondly, it should consider the question of a corporation that had a registered office in a State other than that in which it was incorporated. During the drafting process, the Commission had inclined to the view that the State that protected the corporation should be required to show not only that the corporation had been formed in its territory but also that it had its registered office in that territory. In the commentary, it had been emphasized that the Commission did not wish to contemplate the suggestion that a corporation might possess dual nationality.<sup>21</sup> That was an error, and one that must be rectified. In commercial life it was not infrequent for a corporation to be formed in one State and have its registered office in another. Guatemala had put forward a useful proposal, whereby draft article 9 would be divided into three paragraphs. Paragraph 2 would read: “For the purposes of diplomatic protection of corporations, a corporation has the nationality of the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection”. Paragraph 3 would read:

“Whenever the application of paragraph 2 means that two States are entitled to exercise diplomatic protection, the State with which the corporation has, overall, the closest connection shall exercise that protection”. That might be the best solution, but the Commission would clearly have to give the draft article further close consideration.

42. As for draft article 10, on continuous nationality of a corporation, he had already discussed the continuous nationality rule in respect of natural persons. It was therefore unnecessary to revisit the arguments in favour of the continuous nationality requirement between the *dies a quo* and the *dies ad quem*. Once more, the Commission would be wise to refer to the “predecessor State”, as suggested by the United States in relation to draft article 5. Again, he believed that the *dies ad quem* should be the date of the official presentation of the claim.

43. The United States, however, objected to draft article 10, paragraph 2, arguing that the protection of extinct corporations should not be an exception to the rule of continuous nationality. It claimed that “a State may continue to exercise protection with respect to the claims of a corporation so long as the corporation retains a legal personality, which can be as bare as the right to sue or be sued under municipal law”. It therefore argued that there was no need for such a provision. Unfortunately, it failed to consider the concerns raised in that connection by judges (notably the United States judge, Judge Jessup, in the *Barcelona Traction* case), tribunals and scholars, all of which had been examined exhaustively in his fourth report on diplomatic protection.<sup>22</sup> In the light of the failure of the United States to refute (or even to consider) those authorities, and in the absence of a wider comparative survey of corporate law and practice to establish that many legal systems allowed corporations to sue and be sued following dissolution, his inclination was to retain paragraph 2; that position was supported by the United Kingdom Government, which, however, favoured deletion of the phrase “as the result of the injury”. That suggestion too, he was inclined to accept.

*The meeting rose at 6 p.m.*

## 2868th MEETING

*Tuesday, 2 May 2006, at 10.05 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

<sup>20</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 30, paras. (4)–(6) of the commentary to draft article 9.

<sup>21</sup> *Ibid.*, para. (7) of the commentary.

<sup>22</sup> *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/530 and Add.1.

**Diplomatic protection (*continued*) (A/CN.4/560, sect. D, A/CN.4/561 and Add.1–2, A/CN.4/567, A/CN.4/575, A/CN.4/L.684 and Corr.1–2)**

[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Special Rapporteur to continue his introduction of his seventh report on diplomatic protection.

2. Mr. DUGARD (Special Rapporteur), after reading out draft article 11 (Protection of shareholders), said that he was inclined to support the proposal by Austria that the phrase “for a reason unrelated to the injury” in subparagraph (a) should be deleted, for the reasons indicated in paragraph 60 of the report. In view of the reasoning by the ICJ in favour of the exception made in the *Barcelona Traction* case (paras. 64–68 of the judgment), however, he could not support the deletion of the entire subparagraph, as suggested by the United States.

3. Subparagraph (b) had been the subject of debate and controversy within the Commission but had been generally accepted by States, as evidenced by the comments received from States and the statements made in the Sixth Committee: the Russian Federation, Germany, Greece and, perhaps more surprisingly, Cuba had given their approval to the draft provision. Only the United States had objected to the subparagraph on the grounds of law and policy set out in paragraph 63 of the report. He could not accept the arguments marshalled by the United States, for the reasons set out in paragraphs 64 and 65. In general, the arguments put forward were rather weak, and he found them difficult to accept. He therefore recommended that the Commission should retain subparagraph (b). The Nordic countries, the United Kingdom and Belgium objected to the reference to the fact that a company was compelled to incorporate under the law of the responsible State, considering that a corporation might be compelled to incorporate in a State as a result of political pressure. He shared that objection and suggested that the qualification, which also did not appear in the *Barcelona Traction* case, should be deleted. Accordingly, draft article 11 should be retained in the form adopted by the Commission, subject to deletion of the phrase “for a reason unrelated to the injury” in subparagraph (a) and the phrase “under the law of the latter State” in subparagraph (b). The United Kingdom had also raised the question of the protection of interested parties other than the shareholders and multiple claims where the shareholders were from different States. In his view, that issue should be dealt with in the commentary, but the Commission might consider it useful to discuss the question.

4. There had been no serious objection to draft article 12 (Direct injury to shareholders), although the United States considered it superfluous; he thought that it should be retained, in the interests of fully codifying the principles expounded in the *Barcelona Traction* judgment and providing a comprehensive picture of the law on that aspect of diplomatic protection.

5. Lastly, with regard to draft article 13 (Other legal persons), he thought that the proposal by Guatemala to

replace the words “articles 9 and 10” with the words “articles 9 through 12 inclusive”, so as to include limited liability companies among the other legal persons, should be referred to the Drafting Committee.

6. Mr. GAJA said that the reports on diplomatic protection had always reflected a certain tension between the traditional approach to diplomatic protection as a State prerogative and a greater concern for the position of individuals. The first-reading draft appeared to follow the traditional approach, particularly in the commentary to draft article 2, which emphasized the dictum of the PCIJ in the *Mavrommatis* case. The definition in draft article 1 was more ambiguous. The wording, borrowed from the *Interhandel* judgment, did not, unlike the *Mavrommatis* judgment, stress the right of the State exercising diplomatic protection. At the same time, it did not refer to rights that individuals might have under international law. Although the ICJ had held, in the *LaGrand* and *Avena* cases, that nationals of States parties to the Vienna Convention on Consular Relations possessed rights under international law arising from that Convention, it had not said that all the principles and rules of international law concerning the treatment of aliens gave individuals rights under international law. In the *Avena* judgment, the Court had made a significant distinction between action that the claimant Government took with regard to the rights of individuals under the Convention on the one hand, and diplomatic protection of the same individuals on the other.

7. For that reason, the Commission should hesitate before adopting the proposal made at the previous meeting by the Special Rapporteur to the effect that diplomatic protection always concerned the rights of individuals under international law. It was clear that diplomatic protection essentially concerned injuries that affected individuals. Such injuries set limits on any claim a State could make when no direct injury to that State was involved. The wording suggested at the previous meeting, however, seemed to convey the view that there was always some kind of direct injury for the State concerned. Traditionally, injury affecting an individual was regarded only as an element that could trigger action by the State of nationality. The individual's current position in international law with regard to the primary rules concerning the treatment of aliens and the rules concerning human rights called for a new approach to the secondary rules concerning diplomatic protection, since they were necessarily linked to the primary rules. That was not to say that, contrary to practice, the State should be regarded merely as an instrument for the protection of individual rights. The idea that a State had an obligation under international law to exercise diplomatic protection had been rejected at first reading and should not be revived at the current stage. That also applied in cases of infringements of *jus cogens*, which should be regarded as the concern of all States and not specifically of the State of nationality.

8. The current position of the individual in international law implied some other changes in an institution that had traditionally been regarded as a State prerogative. One of those implications had been outlined by the Special Rapporteur in his proposal concerning the right of an injured national to reparation: since reparation was

given to the State on behalf of the injured individual, reparation ought to accrue to the individual concerned. The Commission might also consider, first, the question of whether a State was entitled to put forward a claim of diplomatic protection irrespective of the individual's request or wishes: such cases, though rare, existed in practice. Secondly, it might consider whether the individual should have a role with regard to the modalities of reparation, when a choice arose between restitution and compensation. Thirdly, it might consider whether the individual's consent should be required for a settlement to become effective. While it would be difficult to find practice that would support the existence of rules on such matters and there might be some hesitation about expressing such rules by way of progressive development, the draft articles could well include some recommendations to States to apply certain criteria in their practice that would give greater weight to the position of the individual than had traditionally been the case.

9. Turning to certain points raised by the Special Rapporteur in his report, he noted that, while attempting to define the distinction between diplomatic protection and consular assistance, the Special Rapporteur had acknowledged that the distinction might be blurred in practice and that the two sometimes overlapped. Apart from the fact that such overlapping was more common than the report seemed to indicate, neither the 1969 Vienna Convention on the Law of Treaties (hereinafter the "1969 Vienna Convention") nor bilateral treaties on consular relations gave support to the idea expressed in paragraph 19 of the report that consular assistance might be given by a State to a non-national, irrespective of the express or implied consent of the host State. Moreover, contrary to the suggestion in paragraph 20, it was not necessarily the case that consular assistance was preventive and must therefore cease when an injury occurred. More fundamentally, he did not believe that a reference to an undefined institution called "consular assistance" would bring clarity to the text. It would therefore be necessary to define the concept and see to what extent it could be distinguished from diplomatic protection.

10. The new paragraph that the Special Rapporteur suggested (in paragraph 24 of the report), should be added to draft article 2, seemed ambiguous. To say that a State was under an obligation to accept a claim of diplomatic protection appeared to mean that the State allegedly responsible should provide reparation; that was clearly not what the provision was intended to say, which was simply that the claim should be regarded as admissible. However, that was already implied by the very fact of setting out certain conditions of admissibility; once those conditions were met, it followed that the claim was admissible.

11. With regard to draft article 5, while it was true that the term "continuity of nationality" appeared at first sight to mean that nationality had to exist continuously between the two critical dates mentioned in paragraph 47 of the report, that was not how the term had been understood and applied in practice. There was a policy reason for referring only to the two critical dates: namely, the difficulty of providing evidence that no change of nationality had occurred between those dates. The question also arose as to why it should be significant that a person had not

changed nationality in the meantime, since the important factor was that it should be the same State that brought the claim. Again for policy reasons, he tended to agree with the Special Rapporteur that the second critical date should be that of the presentation of the claim rather than that of its resolution, as a different rule could encourage delays in settling the claim. There would be no need, in his view, to provide an exception for the case in which an individual acquired, after presentation of the claim, the nationality of the respondent State if the Special Rapporteur's proposal to the effect that the claimant State should transfer compensation to the aggrieved individual, even if he no longer had the nationality of that State, was accepted. Similar considerations applied to the proposed amendments to draft article 10, concerning the continuous nationality of a corporation.

12. He was also not persuaded by the proposed changes to draft article 9, concerning the State of nationality of a corporation, which appeared in paragraph 55 of the report. The requirement of both incorporation and registered office in a given State had been set out by the ICJ in paragraph 70 of its judgment in the *Barcelona Traction* case. The Court had not viewed the registered office as representing an effective link; it had addressed the question of whether the Barcelona Traction, Light and Power Company had an effective link with Canada only in a later passage, at the end of paragraph 70 and in paragraph 71. A registered office needed to be no more than a letterbox. When corporations moved their registered office to another country, they often sought a new incorporation. Should the Commission encourage companies to incorporate in one country and have their registered office in another in order to enjoy diplomatic protection from more than one State? It was true that the Special Rapporteur had suggested that only the State of predominant nationality could bring a claim, but that would create uncertainty, as it was unclear which nationality would be considered predominant. Moreover, such a position would be inconsistent with the rule set out in draft article 6 concerning individuals of dual nationality, with regard to whom two States might exercise diplomatic protection.

13. His preference was mainly to retain the text submitted on first reading.<sup>23</sup> He hoped that the Commission would be able to conclude its consideration of the topic of diplomatic protection during the current session.

14. Mr. PELLET said that the Special Rapporteur's seventh report on diplomatic protection was courageous and interesting, but was also somewhat overcautious and disappointing in some respects. It was courageous because it gave a forthright and precise account of Governments' comments and observations—which unfortunately were few in number—on the draft articles; the Special Rapporteur took account of all the views expressed by a number of States, not hesitating to criticize them sharply when there was cause to do so, such as when he took the United States to task for its incredible assault on draft article 5, paragraph 1. The report was also courageous because it dealt with a question that had not appeared in the draft articles adopted on first reading, namely the

<sup>23</sup> See footnote 7 above.



right of the protected person to compensation, the words “protected person” being more exact than the term “injured national” used in the report. The seventh report was interesting because it shed light most usefully on a number of provisions in the draft articles by considering them in depth and from perspectives that had been neglected or even forgotten thus far, such as the analysis of the *Loewen* case, the question of the relationship between diplomatic protection and consular protection, or the problems posed by the notion of European citizenship, even though Mr. Dugard’s treatment of that subject was hopelessly conservative. Notwithstanding certain disagreements on substance, he welcomed the opportune changes to the draft articles, even though the problems identified were not new, the draft had perhaps been prepared too hastily and more thorough consideration would probably have been more useful.

15. In view of the incomplete nature of the draft articles adopted on first reading, and given States’ ready acceptance of the rare elements of progressive development they contained, in particular draft article 7, on the principle of predominant nationality, and draft article 8, on stateless persons and refugees, the Commission had been unnecessarily cautious. In listening to members’ statements, one had the impression that the provisions referred to States for comments had been so revolutionary that they could only be rejected, although it must be said that such had not been the case. In the future it would be preferable not to anticipate the reactions of States and instead to make a greater effort to ensure the proper codification and progressive development of international law. The Commission had thus been overly prudent, conservative and cautious in producing the draft articles, and it was unfortunate that it had not been bolder in its proposals for codifying existing rules. With the exception of draft article 8 and a few aspects of draft article 7, the proposed text was limited to ready-made solutions which moreover concerned only the conditions for the exercise of diplomatic protection, i.e. the least interesting or most traditional part of the subject. He regretted that the Commission had engaged in self-censorship and agreed with the Special Rapporteur’s comments in that regard. Although it was too late to overcome the draft articles’ serious deficiencies, it was still possible to attenuate them, and he proposed to go through the Special Rapporteur’s proposals for reformulating draft articles 1 to 8, which he supported on the whole.

16. A number of comments were called for on draft article 1 concerning, in declining order of generality, the concept of diplomatic protection itself, the difference between diplomatic and consular protection, and the impact that the notion of European citizenship might have on diplomatic protection. Regarding the concept of diplomatic protection, he was grateful to the Government of Italy for daring to challenge, even at the current stage of work, the postulates—completely outdated at the beginning of the twenty-first century—on which the *Mavrommatis* (or *Vattel*) fictions<sup>24</sup> were based. The traditional institution of diplomatic protection, in the

sense of those fictions, could be separated into two very different propositions. The first, which could be regarded as constituting the very definition of diplomatic protection, was that the State had the right to protect its nationals injured by an internationally wrongful act when they could not obtain reparation by other means. Neither the Government of Italy, subject to its proposals concerning draft article 2, nor he himself had the intention of revisiting that aspect: diplomatic protection was indeed a right vested in the State, to exercise at its discretion. According to the second proposition, that is, the *Mavrommatis* fiction as such, which was much more questionable, when a State exercised its right to protect its national, it was said to be exercising its own right, namely its right to ensure respect for international law in the person of its nationals. Whereas such a fiction might have been necessary in 1924, when the State had been the sole subject of international law, it no longer had any reason to exist, because the individual now had established rights under international law. As the Government of Italy had noted, it was no longer acceptable to consider that the law that had been violated belonged only to the State exercising such protection. In contemporary international law, individuals had rights, and it was those rights for which the State could ensure respect by means of diplomatic protection. It was thus absurd to say that when the State ensured respect for the rights of the individual, it was in reality ensuring respect for its own right, and he did not understand why the Commission clung to that notion, which dated back to the beginning of the eighteenth century.

17. In other words, diplomatic protection was a right that the State could exercise or not, in principle in a discretionary manner, while the rights protected by diplomatic protection, which was merely a means, were those of individuals and not of the State, contrary to what followed from the *Mavrommatis* fiction and, unfortunately, from the current draft article 1, owing to the extraordinary parenthetical clause “in its own right”. In actual fact, the State did not act in its own right but on behalf of its national, with a view to protecting the national’s rights. He noted that the phrase had been deleted, and very rightly so, from the new text proposed for draft article 1 (A/CN.4/567, para. 21), thereby making the draft acceptable in his view, but the Special Rapporteur had not explained why, which was most intriguing.

18. The great merit of Italy’s observations had been to provide an explanation for that deletion, but unfortunately it had not taken its comments to their logical conclusion, no doubt terrified by its own boldness, and appeared to have confused two different things. In challenging the Commission’s approach, Italy based itself not only on the correct assertion that when it exercised diplomatic protection, the State defended the rights of a national who had been injured by the internationally wrongful act of another State, but also on another, equally correct assertion, although one of very different significance, that a State could sometimes defend both the right of its national and its own right, as Mexico and Germany had done in the *LaGrand* and *Avena* cases. However, that was a completely different problem that had nothing to do with draft article 1, but rather with draft article 15. The Government of Italy had drawn the wrong conclusions: the wording proposed by Italy for that provision of draft article 1 maintained the confusion because it had diplomatic protection

<sup>24</sup> See E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (The law of nations, or the principles of natural law), English translation of the edition of 1758 in *The Classics of International Law*, vol. III, Washington, D.C., Carnegie Institution, 1916.

covering both the rights of the injured national, which were the actual subject of diplomatic protection, and the State's own rights, which were in fact excluded from the scope of diplomatic protection because the State that was a victim of an internationally wrongful act had no need to resort to that mechanism to ensure respect for its rights, as the Special Rapporteur had correctly pointed out in paragraph 18 of his report. He wished to stress again that diplomatic protection concerned the rights of individuals and not the rights of the State. The Commission must thus choose between adopting the new wording of draft article 1, paragraph 1, proposed by the Special Rapporteur, which had the advantage of avoiding the *Mavrommatis* fiction but would entail heavily rewriting the French version of the text, or accepting the text proposed by Italy, provided that it left out the phrase "in its own right" and perhaps even the words "in respect of an injury to that national", which did not seem essential. The latter version would be almost ideal, but might have rather serious consequences for the remainder of the text. The paragraph would then read: "Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State which maintains that the rights of its national have been violated by the internationally wrongful act of another State". That was precisely what diplomatic protection was. Unlike the current definition, such a definition was largely sufficient and was consistent with contemporary international law.

19. Draft article 1 posed another, much less serious problem, that of the confusion that arose in the current text between diplomatic protection and consular assistance. It was the first time that that problem had come up in the course of the Commission's work, which perhaps showed that it was not so serious and that it should not be given too much importance. Although the Special Rapporteur seemed to have carefully analysed the differences between the two institutions, he did not draw convincing conclusions. It was not advisable to include a new paragraph on the question in draft article 1 itself, particularly as no definition of consular assistance was given. Moreover, it was strange, to say the least, to define the concept of diplomatic protection by what it was not, particularly after saying what it was in paragraph 1. It would be preferable to explain those differences in the commentary rather than in a paragraph, which would weaken draft article 1.

20. The last problem in draft article 1 had to do not with its actual wording, but with the Special Rapporteur's objections to article I-10 of the stillborn Treaty establishing a Constitution for Europe. The Special Rapporteur's criticism, which appeared in paragraph 19 of his report, seemed excessive, since no one was claiming, at least for the moment, that European citizenship was the equivalent of nationality. No such assertion was to be found in any European text. European citizenship superimposed itself on the nationalities of the 25 member States without replacing them, and it was certain that no other State was required to accept the protection of a European citizen that a State other than the State of nationality or the European Union itself might want to exercise on behalf of a European citizen. There was thus no reason to get upset by the possibility that the European Union or another member State might try to exercise protection, whether consular or diplomatic, in respect of its citizen; non-member States were certainly not bound to reply to such

an attempt at protection. That was a matter that concerned only Europeans, and the Commission should not set out to criticize a development that might take place and was in no way shocking. For the same reason, he was quite opposed to the highly restrictive wording proposed for draft article 5, paragraph 1 (para. 47 of the report). Employing the word "only" would unnecessarily prejudice the future of integration organizations in general, and not just the European Union, and would prevent them from inventing new forms of protection for their citizens.

21. Draft article 2 as currently formulated was rather insignificant, not to say totally superfluous, and he was not surprised that it had hardly attracted States' attention. That was not the case with the proposals made on the subject by Austria and Italy. The wording proposed for the new draft article 2, paragraph 2, on Austria's initiative was quite ambiguous (para. 24 of the report), because it seemed to say that the State in respect of which diplomatic protection was exercised had an obligation to comply; that could not be taken for granted, however, and he supported the comments made in that regard by Mr. Gaja. A State was certainly bound to examine a claim for diplomatic protection, but examining did not imply an obligation to accept, for those were two different things. If the State was internationally responsible, it must accept the consequences stemming from its responsibility, but diplomatic protection was an earlier stage in the process of deciding whether or not responsibility actually existed, and it could not be prejudged. The draft articles under consideration concerned a procedure for bringing responsibility into play when the victim of an internationally wrongful act was a private individual, but the effects of diplomatic protection should not be confused with those of responsibility itself. He therefore believed, with regard to the innovation proposed by the Special Rapporteur in response to the Austrian suggestion, that the Drafting Committee should give careful consideration to the wording used, even though he himself was in favour of the underlying idea of the proposed paragraph 2, especially since the draft articles focused much too heavily on the presentation of claims in exercise of diplomatic protection while neglecting the other equally important aspect, that of the effects of claims.

22. By and large, he supported the Italian proposal regarding draft article 2, according to which the State would have a duty to exercise diplomatic protection in the case of a violation of an absolutely essential right. Although it was true that the right to exercise diplomatic protection was a right of the State which it could exercise in a discretionary manner, and that this power of discretion, in which highly political considerations could play a role, should be respected, it was not unreasonable to think, at the beginning of the twenty-first century, that when an individual was the victim of a violation of an absolutely fundamental right, he ought to be able to count on the protection of his national State. That said, he wished to qualify his agreement in principle with Italy's proposal. First of all, the text of the new provision must be modelled on articles 40 and 41 of the draft articles on responsibility of States for internationally wrongful acts,<sup>25</sup> for since an obligation to protect was incumbent on the State, the State

<sup>25</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, and pp. 112–116 for the commentary to these draft articles.

should take action only in the event of a serious breach of an obligation arising under a peremptory norm of general international law. Secondly, he was categorically opposed to the idea of giving examples of internationally wrongful acts that might justify the exception contemplated in the discretionary exercise of diplomatic protection by the State. The idea included in that new provision, if it was retained, should be illustrated in the commentaries. Thirdly, he was not sure that the wording of subparagraph (b) of Italy's proposal was necessary. Fourthly, he was very opposed to paragraph 3, pursuant to which States would be obliged to make provision in their municipal law for a procedure before a domestic court. The Commission's job was to establish norms, not to impose institutional obligations on States.

23. Lastly, once it was acknowledged that breaches of peremptory norms of general international law which caused injury to private individuals came under a special regime, consideration should be given to the possibility that, in such cases, States other than the State of nationality might exercise protection on behalf of the injured person. That would be in keeping with article 48 of the draft articles on responsibility of States,<sup>26</sup> according to which in the case of a serious breach of a peremptory norm of international law, the State of nationality lost its protection monopoly, and the international community as a whole was concerned. Without necessarily codifying that idea, the Commission should at least express it, and he would be in favour of doing so in an article, perhaps by following the procedure adopted for article 54 of the draft articles on responsibility of States.<sup>27</sup>

24. He had no particular comment on draft article 3 (Protection by the State of nationality), apart from his earlier criticism of the Special Rapporteur's remarks on European citizenship in paragraph 26 of his report. He endorsed the wording of the new draft article 4 (State of nationality of a natural person), but wondered why the French version spoke of "*ascendance*" rather than "*filiation*".

25. With regard to draft article 5, he said that he had always considered the continuous nationality rule to be absurd and illogical, and practice was too uncertain for it to be regarded as customary. According to the *Mavrommatis* fiction, the relevant nationality was the one that had been in effect on the day the injury had been caused. According to the more realistic fiction that he supported, it was the nationality in effect on the day of the claim that was important, because the State was not defending its own right but that of the injured individual. In neither of those two cases was the requirement of continuous nationality justified. He had always been alone in insisting that a rule was pointless if no one knew how to apply it. He noted that the position of States during the *travaux préparatoires* of the 1930 League of Nations Conference for the Codification of International Law, to which the Special Rapporteur attached great importance and to which he referred in paragraph 39 of his report, in fact reflected

a tendency to reject that rule.<sup>28</sup> In any event, if the rule of continuous nationality, indefensible as it was, had to be retained, at least its drawbacks should not be made worse. He supported the views of the Special Rapporteur on the whole, but wished to point out that the considerations of principle and policy that the Special Rapporteur cited in paragraph 43 actually tended to favour abandoning what was an arbitrary and useless rule. The risk of "nationality shopping" that lay behind it was illusory because individuals did not choose a nationality on the basis of the rules of diplomatic protection, which no one knew, and even if they did choose on that basis, there were many other ways apart from the continuous nationality rule of dealing with the matter.

26. He was, however, opposed—for the reasons already mentioned—to the restrictive formulation ("only") in the new draft article 5, paragraph 1, proposed by the Special Rapporteur (para. 47 of the report). It would be regrettable to delete the current paragraph 2, which had the merit of introducing a minimum of flexibility into the principle of continuous nationality, which was too rigid, and he did not understand why the Special Rapporteur, who himself seemed to be in favour of that paragraph, had not retained it. The new paragraph 2, which would become paragraph 3 again, was necessary because it might help to avoid such absurd solutions as the one reached in the *Loewen* case. Referring to a comment by Mr. Gaja, he stressed that it would in fact be bizarre for a State to be bound to accept a claim lodged on behalf of a person who had its nationality. Nor was it certain that draft article 20 would be accepted by the Commission or judged acceptable by States; caution dictated the inclusion of paragraph 2 *bis* proposed by the Special Rapporteur. As for paragraph 3, which would become paragraph 4 if paragraph 2 was reintroduced, he had never understood its point, but he was not opposed to its inclusion if the paragraph was deemed necessary.

27. Draft article 6 (Multiple nationality and claim against a third State) elicited no comment, except to say that the term "*multiple nationalité*" should rightly read "*nationalité multiple*" in the French version. He did not see why paragraph 2 should be deleted, as it made a useful point. When several States could jointly exercise diplomatic protection, there was no reason that one of them should have any priority over the others or that several States should not lodge a claim.

28. Draft article 7 (Multiple nationality and claim against a State of nationality) should be retained in its current form. He was not convinced by the reasoning of the Government of Italy, although he agreed that the preponderant nationality should result in a link that was not "*authentique*", as rendered in the French version of the Italian proposal, but "*effectif*". At issue was the most preponderant effectiveness, but that needed only to be dealt with in the commentary.

29. Lastly, he was pleased that States had not been opposed to draft article 8 (Stateless persons and refugees). In reply to the question asked by the Special Rapporteur

<sup>26</sup> *Ibid.*, pp. 29–30, and pp. 126–128 for the commentary.

<sup>27</sup> *Ibid.*, p. 30, and pp. 137–139 for the commentary.

<sup>28</sup> See footnote 14 above.



in paragraph 51 of the report, he said that while the respondent State could certainly refuse to recognize the right of a claimant State to exercise diplomatic protection on behalf of a person who did not fulfil all the requirements of the definition of refugee, nothing prohibited the claimant State from taking such action, and nothing prohibited the respondent State from going along with it. That should not result in any change in the text of draft article 8, which in his view was the most convincing and courageous of all the draft articles.

30. Mr. MATHESON commended the Special Rapporteur on the quality of the seventh report on diplomatic protection, which skilfully managed to accommodate the views of States on the draft articles adopted on first reading in 2004.<sup>29</sup>

31. With regard to draft article 1, he agreed with the Special Rapporteur on the need to distinguish clearly between diplomatic protection and consular functions, but he did not understand the exact significance of the Italian proposal to rewrite the definition of diplomatic protection. He wondered whether it should be taken to mean that diplomatic protection should be available only where there was a violation of the rights both of the State and of its national, as had occurred in the *Avena* case. If so, he would have doubts about the proposed formulation.

32. The use of the word “accept” in the new formulation proposed for draft article 2, paragraph 2, might suggest that a State must pay a claim that met the procedural requirements of the draft articles, which was not the case. Another term, such as “receive”, “consider” or “address”, would be more appropriate. As for the Italian proposal to impose a legal duty on States to exercise diplomatic protection for certain claims, Governments would undoubtedly register strong objections, since States had always insisted on the fact that diplomatic protection was a right rather than a duty and that they could opt not to exercise it on such grounds as foreign policy, practicality or the conduct of the national concerned. The Commission should not adopt such a radical measure. There was no reason to single out any particular category of conduct, however serious it might be, for different treatment. There were other possible remedies for the serious offences described in the Italian proposal, such as consular protection, resort to international human rights mechanisms, national or international criminal prosecution, or action by the Security Council, which might constitute a more sensible response than diplomatic protection.

33. With regard to draft article 5 (Continuous nationality), he expressed support for the revised version of paragraph 1, including the addition of the word “only”, which restricted the right of diplomatic protection to individuals who met the condition of continuous nationality. The requirement of continuity was the best protection against manipulative changes in nationality. Moreover, the revised formulation also addressed the case of State succession, which should not interrupt the continuity of nationality.

34. There remained the question of what effect a change of nationality between the date of presentation and the date of resolution of a claim might have. The new paragraph 2 proposed by the Special Rapporteur covered the most compelling circumstance, in which an injured person acquired the nationality of the State against which the claim was brought. In such cases a State’s right to exercise diplomatic protection should lapse, since a State should not be required to pay compensation to another State for injuries to its own national. That was not, however, the only situation in which a change in nationality after presentation of a claim should cause the right of diplomatic protection to lapse. It would, as the United States had argued, be inconsistent with the rationale of diplomatic protection to allow a State to receive compensation for injury to a person who was not its national at the time compensation was awarded. That consideration, along with the possibility of manipulative changes of nationality, was presumably the reason that many arbitral tribunals had decided that continuous nationality should apply up to the date of resolution of the claim.

35. The work of an international tribunal would, however, be further complicated if it had the burden of discovering all the changes in nationality that might occur after presentation and before resolution of a claim. For that reason, he would suggest that the new paragraph 2 should be amended to say that a State was not entitled to exercise diplomatic protection where the respondent State demonstrated that the person in question had lost the nationality of the claimant State after presentation of the claim. That would put the burden on the respondent State and not on the tribunal. In any event, the Commission should not adopt a rule that precluded a tribunal from finding that there were other circumstances in which a change of nationality after the date of presentation would preclude further exercise of diplomatic protection. For example, a tribunal might find that a person had manipulative motives in maintaining one nationality up to the point of presentation and then changing it for his own purposes. In other words, the Commission should at least make it clear that paragraph 1 was without prejudice to the possible effect on the continued assertion of diplomatic protection of a change in nationality after the presentation of the claim. In that way, the further development of the law by State practice and jurisprudence would continue.

36. The proposed deletion of the former text of draft article 5, paragraph 2, seemed appropriate, since the only justification for its retention—State succession—was explicitly dealt with in the new paragraph 1. If the old paragraph 2 was revived in any form, it should be formulated more clearly.

37. Turning to draft article 8, he said, in response to the Special Rapporteur’s request for guidance as to how the term “refugee” should be understood, that the Commission should retain the internationally accepted definition contained in the 1951 Convention relating to the Status of Refugees. As for draft article 9, concerning the State of nationality of a corporation, he endorsed the new wording proposed by the Special Rapporteur but believed that the provision should make it clear that a corporation did have the nationality of the State in which it had been formed,

<sup>29</sup> See footnote 7 above.



provided that it was treated as such under the law of that State. Otherwise, a respondent State could challenge the right of that State to exercise diplomatic protection on the grounds that the corporation had links with other States.

38. With regard to the continuous nationality of a corporation, dealt with in draft article 10, his comments on that topic in the context of draft article 5, paragraphs 1 and 2, applied *a fortiori* to corporations. The United States was opposed to the former paragraph 2, which had become paragraph 3, apparently for fear that it would enable a State to ignore reasonable requirements for the timely filing of claims against a defunct corporation. That concern could be adequately addressed, however, by making clear that reasonable time limits for the admissibility of such claims must be complied with, so that the situation of a defunct corporation could be resolved in timely fashion. If that was made clear, then the new paragraph 3 should be retained, since it guaranteed that there would be at least one State with the ability to exercise diplomatic protection in such a case. Indeed, he would favour the deletion of the phrase “as a result of the injury”, which did not constitute a logical basis for distinction.

39. Draft article 11 was more controversial. Its purpose, which was presumably to ensure some possibility of diplomatic protection for shareholders in cases where protection by the State of nationality of the corporation might be unlikely, was understandable, yet on the other hand, giving a right of protection to all the States of nationality of the shareholders, of whom there might be many, could make it very difficult to resolve a dispute. It could put the respondent State at a serious disadvantage and give foreign shareholders protection that local shareholders would not enjoy. That was why developing States in particular had traditionally resisted exceptions such as those provided for in draft article 11, which the United States argued were not consistent with customary international law.

40. The Commission should therefore look at the two exceptions carefully and sceptically. That contained in subparagraph (a) could be deleted if draft article 10, paragraph 3, proposed in paragraph 59 of the report, was retained without its limiting phrase. The State of nationality of a defunct corporation would then have the right to continue to protect it, which would give all its shareholders as much protection as those of any other corporation. There was no reason to give them special treatment by allowing them to be protected by their own State of nationality, particularly since that would, as noted earlier, put the respondent State at a considerable disadvantage and complicate the resolution of the matter. Subparagraph (b) was a more difficult case. There might be reason to doubt that any real protection would be offered by a State that had required incorporation under its law as a condition for doing business and had then been responsible for injuring the corporation concerned. In principle, the United States was probably correct in opposing the exception in that subparagraph, but in practice its proponents also had valid arguments. One solution would be to eliminate the multiplicity of claimant States by limiting the right of protection to the State whose shareholders had a majority ownership interest. In any event, the exception should be restricted

to a situation in which the offending State had required incorporation under its law as a condition for doing business in its territory.

41. Lastly, he saw no need to delete draft article 12 (Direct injury to shareholders), as the United States had proposed.

42. The CHAIRPERSON invited the Special Rapporteur to introduce the final part of his seventh report.

43. Mr. DUGARD (Special Rapporteur), introducing draft articles 14 to 20, thanked the members of the Commission who, through their constructive suggestions, had made him more aware of many of the difficulties raised by his proposals.

44. There had been no comments on the substance of draft article 14, which dealt with the fundamental principle of the exhaustion of local remedies.

45. Draft article 15 (Category of claims) provided that local remedies had to be exhausted only in cases of indirect injury to a State. The *Avena* judgment added considerably to an understanding of the difference between direct and indirect injury, but it did not affect the validity of the formulation of the principle. He proposed to deal extensively with the *Avena* case in the commentary.

46. Draft article 16 dealt with exceptions to the local remedies rule. Subparagraph (a) stipulated that there was no need to exhaust local remedies where there was no reasonable possibility of effective redress. The United States had raised objections to that provision. When the Commission had formulated it, it had had to opt for one of three conditions: obvious futility; no reasonable prospect of success; and no reasonable possibility of effective redress.<sup>30</sup> It had shown a preference for the third option, but the United States had called on it to reconsider its decision and opt for the futility rule, on the ground that it reflected customary international law more accurately. He was not generally in favour of reopening issues that had already been decided, but, given that the futility rule had enjoyed some support in the Commission, it might be wise to reconsider the principle. The Commission should, however, recall that the issue had been thoroughly debated when the provision had been adopted and that the general view had been that the futility rule was too stringent,<sup>31</sup> which was why the Commission had adopted the proposal by Sir Hersch Lauterpacht to introduce into the text the element of “reasonableness”.<sup>32</sup> The text proposed by the Government of Italy, which also considered subparagraph (a) too strict, used the words “inexistent”, “inaccessible”, “ineffective” and “inadequate”, but even Italy seemed to recognize that the phrasing was clumsy, since it had subsequently suggested using the term

<sup>30</sup> See *Yearbook ... 2002*, vol. II (Part Two), pp. 55–57, paras. 177–188.

<sup>31</sup> *Ibid.*, p. 56, para. 186.

<sup>32</sup> *Yearbook ... 2004*, vol. II (Part Two), pp. 38–39, para. (3) of the commentary to article 16 adopted on first reading by the Commission. See also the separate opinion of Sir Hersch Lauterpacht in *Certain Norwegian Loans*, p. 39.

“reasonable prospect of success”, which was close to the second possibility considered by the Commission. The Government of Italy had also suggested introducing the concept of the denial of justice into subparagraph (b), which provided that there was no need to exhaust local remedies in cases where there had been an undue delay on the part of the respondent State. The Commission had, however, deliberately resisted making any reference to the concept, the general view being that it was a primary and not a secondary rule and that, in any case, it was already covered by subparagraphs (a), (b) and (c). Subparagraph (c) dealt with the principle that there was no need to exhaust local remedies where there was no relevant connection between the injured person and the State alleged to be responsible or where the circumstances of the case otherwise made it unreasonable to require the exhaustion of local remedies. Two very different proposals had been made in that respect. Austria had proposed the deletion of the first phrase and the retention only of the second, whereas the United States had proposed the retention of the first phrase and the deletion of the second. He had sympathy with the United States’ position, but the main purpose of subparagraph (c) was to provide for an exception to the rule of the exhaustion of local remedies where the injured person had no voluntary connection with the State alleged to be responsible for the injury. During the debate in the Commission, some members had referred to other situations in which there was no need to exhaust local remedies, such as a situation in which the injured person was denied entry to the territory of the State concerned or the costs of litigation were prohibitive. The second part of subparagraph (c) had been adopted with such situations in mind. However, the United States was correct in saying that such situations were already covered by subparagraph (a). Italy, emphasizing the importance of the reference to special considerations that might exclude the use of local resources, had suggested retaining subparagraph (c) in its entirety, with the addition of a list of special circumstances, but in his view the examples provided by Italy were already covered by subparagraph (a). Lastly, subparagraph (d) had not elicited any particular comment.

47. It had been suggested that the Commission should merge draft articles 17 (Actions or procedures other than diplomatic protection) and 18 (Special treaty provisions), which served the same purpose, namely to specify that the draft articles did not affect and were not affected by other procedures or mechanisms of customary international law or treaty law that provided certain rights for the settlement of claims. On reflection, he considered it wiser to retain both sets of provisions, since they dealt with very different questions. Although it did not expressly mention human rights, draft article 17 essentially sought to guarantee that the institution of diplomatic protection should not hinder or prevent the protection of human rights by other means. The Commission acknowledged that diplomatic protection was only one means of protecting human rights, and a very limited one at that, since it was restricted to nationals. There were other procedures for the protection of human rights that were not so restricted. Human rights treaties conferred rights and provided remedies for anyone whose human rights had been violated, irrespective of nationality. Moreover,

as Mr. Gaja and Mr. Pellet had noted, recent developments in international law enabled a State to protect both its nationals and non-nationals who were victims of violations of human rights norms—especially those with the status of *jus cogens*—in the territory of another State. Unfortunately, the whole purpose of draft article 17 had been misunderstood by some writers, who had taken it to mean that the Commission was trying to restrict the scope of article 48, paragraph 1 (b) of the draft articles on the responsibility of States for internationally wrongful acts.<sup>33</sup> The best way of dispelling such doubts was to retain draft article 17 as a separate provision. Meanwhile, draft article 18 served a very different purpose, namely to make it clear that the draft articles were not intended to interfere in any way with rights and obligations under bilateral and multilateral investment treaties.

48. Draft article 19 (Ships’ crews), which formed part of an exercise in progressive development, had received the support of most States. The United States had no objection to its content but considered that it had no place in draft articles on diplomatic protection, a view shared by the United Kingdom. The Commission should therefore reconsider the question of whether the provision relating to the protection of ships’ crews should be included. In that context, Belgium had proposed that draft article 19 should be extended to cover members of aircraft crews, but, first, there was no State practice to support such a move and, secondly, the human rights considerations that had guided the Commission in drafting article 19 did not apply to aircraft cabin crew, who seemed to enjoy greater status and protection.

49. Lastly, he turned to the new proposal, contained in paragraphs 93 *et seq.* of the report, concerning the right of an injured national to receive compensation. As Mr. Pellet had pointed out earlier, the draft articles did not deal with the consequences of diplomatic protection, since most aspects of that topic were covered by the draft articles on the responsibility of States for internationally wrongful acts. One aspect of such consequences was not, however, covered by those draft articles: namely, whether a State that had satisfactorily brought a claim was obliged to pay the injured national any compensation received. The draft articles had been criticized, by, among others, the representative of France to the Sixth Committee in 2005,<sup>34</sup> Austria, in its comment to the Commission, and Mr. Pellet at the previous session for having missed the opportunity to recognize such a rule, if only by way of progressive development. On reflection, he thought that the Commission should consider the question, even at the eleventh hour. As Mr. Pellet had noted, the stumbling block in the provision was the rule established in the *Mavrommatis* case. It seemed logical to assume that, if a State had absolute discretionary power to exercise diplomatic protection, it ought to be able to keep the compensation that it had received following a claim on behalf of its national. That idea was supported by the fact that, in practice, States often agreed on a partial settlement of claims without consulting the injured

<sup>33</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, and pp. 126–128 for the commentary thereto.

<sup>34</sup> *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 11th meeting (A/C.6/60/SR.11), p. 13, para. 73.

individual. As Mr. Pellet had pointed out earlier in the meeting, the *Mavrommatis* case was also responsible for the decision not to impose on States an obligation to exercise diplomatic protection. In his own view, it had to be admitted that the *Mavrommatis* case was undermined by a number of institutions relating to diplomatic protection, especially the continuous nationality rule and the requirement of the exhaustion of local remedies. Moreover, it did not apply to the payment of claims, since the damages claimed by a State were calculated on the basis of the damage suffered by the individual. It might therefore be argued that the obligation on States to consult the national had become a part of customary international law. That clearly showed that the *Mavrommatis* case was not sacrosanct. State practice in that area was, as explained in paragraphs 96 *et seq.* of the report, contradictory, but the trend was towards an erosion of the State's discretionary power to bring a claim. For all that, it could not be said that that amounted to a rule of customary international law. Under the circumstances, he proposed that the Commission, in the interest of progressive development of the law, adopt a provision on the topic, the text of which appeared in paragraph 103 of the report.

50. Mr. PELLET, referring to his earlier statement, said that he did not entirely agree with the proposed new wording of draft article 1 that appeared in paragraph 21, since it contained the words "in its own right", which had, in fact, been accidentally omitted from the French version.

#### Organization of the work of the session (*continued*)

[Agenda item 1]

51. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources) announced that the Working Group on Shared natural resources, which was to resume its work, was composed of the following: Mr. Yamada (Special Rapporteur), Mr. Baena Soares, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Mansfield, Mr. Matheson, Mr. Operti Badan, Mr. Sreenivasa Rao and Ms. Xue, who, as Rapporteur, was a member *ex officio*.

*The meeting rose at 1.05 p.m.*

## 2869th MEETING

*Wednesday, 3 May 2006, at 10.05 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

#### Diplomatic protection (*continued*) (A/CN.4/560, sect. D, A/CN.4/561 and Add.1-2, A/CN.4/567, A/CN.4/575, A/CN.4/L.684 and Corr.1-2)

[Agenda item 2]

#### SEVENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. GALICKI said that, while the flexibility and spirit of compromise displayed by the Special Rapporteur in his seventh report (A/CN.4/567) were commendable, he should resist the temptation to accede too readily to some of the opinions and views expressed by Governments on the set of draft articles on diplomatic protection adopted by the Commission on first reading at its fifty-sixth session.<sup>35</sup> As to the amendments proposed by the Special Rapporteur, he personally doubted whether introducing a reference to the concept of consular assistance alongside that of diplomatic protection in draft article 1 would really help to draw a clear distinction between those two institutions. He agreed with Mr. Gaja that the term "consular assistance" required more precise definition.

2. The principal difference appeared to reside in the fact that it was an internationally recognized right of States to exercise diplomatic protection, whereas not only was it the right of States to provide consular assistance, but it was also the unquestionable right of individuals to seek, enjoy and claim such assistance from their State of nationality, a right that was guaranteed constitutionally in some countries. Yet in practice the two institutions overlapped, as the *LaGrand* and *Avena* cases had illustrated. Furthermore, the argument in paragraph 20 of the report that "[s]uch assistance is preventive in the sense that it aims to prevent the commission of an international wrong" was unconvincing, for, although the commission of an international wrong was a precondition for the operation of diplomatic protection, the commission of such an act did not preclude the possibility of rendering consular assistance to persons injured by an internationally wrongful act committed by another State. Consular assistance did not therefore seem to be exclusively preventive in nature.

3. The addition to draft article 2 of a second paragraph pursuant to which a State was under an obligation to "accept" a claim of diplomatic protection made by another State was possibly contentious, as it was unclear whether "accept" referred to the right to exercise diplomatic protection, or to the substance of the claim brought by the State exercising that right. Care should therefore be taken in the formulation of such an obligation, and the meaning, scope and legal effects of such acceptance should be precisely defined. In practice, striking a proper balance between the right of a State to advance certain claims in the interests of its nationals and the obligation of other States to accept such claims might prove difficult.

4. The suggested amendments to draft article 5 concerning continuous nationality would greatly limit a State's right to exercise diplomatic protection and might also adversely affect the potential benefits to individuals. For example, one possible consequence of the changes

<sup>35</sup> See footnote 7 above.