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Comments and observations received from Governments

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Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, No. 8791, p. 267.
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## Introduction

1. The International Law Commission completed the first reading of a set of 19 draft articles on diplomatic protection at its fifty-sixth session, held in 2004.<sup>1</sup> The Commission subsequently decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006. By a note dated 19 October 2004, the Secretariat invited Governments to submit their written comments by 1 January 2006.

2. On 2 December 2004, the General Assembly adopted resolution 59/41, entitled "Report of the International Law Commission on the work of its fifty-sixth session",

<sup>1</sup> See *Yearbook ... 2004*, vol. II (Part Two), p. 18, para. 59. The articles, along with commentary, are reproduced in paragraph 60, pp. 20 *et seq.*

which, *inter alia*, drew the attention of Governments to the importance for the Commission of having their views, in particular, on the draft articles and commentary on diplomatic protection. The Assembly again drew the attention of Governments to the matter in its resolution 60/22 of 23 November 2005.

3. As at 12 April 2006, written comments had been received from the following 14 States: Austria, Belgium, El Salvador, Guatemala, Italy, Mexico, Morocco, the Netherlands, Norway (on behalf of the Nordic countries Denmark, Finland, Iceland, Norway and Sweden), Panama, Qatar, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uzbekistan. Their comments are reproduced below, on an article-by-article basis.

## Comments and observations received from Governments

### General remarks

#### Austria

1. The law of diplomatic protection is undoubtedly a classical topic of international law that lends itself to codification. It meets with all the conditions that are decisive for a useful work in this regard. Of course, it could be asked to what extent this legal regime still plays a major role in international law in view of the emergence of the system of human rights. However, as practice reveals, even in recent cases before ICJ it is still of major importance for the protection of individuals.

2. Austria appreciates that the Commission boiled down the draft articles to basic rules and concentrated on the secondary norms regarding diplomatic protection; any other approach, such as the attempt to define the breaches of substantive law, would have faced insurmountable difficulties. Consequently, Austria favours the exclusion of any draft article on denial of justice since that is a matter

of primary law. The obligation to exhaust local remedies must be distinguished from the State's obligation to offer access to its courts. Likewise, Austria concurs with the Commission that the draft articles neither address the issue of the Calvo clause nor the clean hands doctrine. Both clauses seem to suffer from the absence of general acceptability.

3. It seems that the Commission concentrated only on one aspect of diplomatic protection, namely as a right of a State to make certain claims in the interest of its nationals. That right is, however, balanced by the corresponding obligation of the other States to accept such claims by a State. The legal regime on diplomatic protection also stipulates under which conditions a State has to accept such interventions by another State. Such a view undoubtedly sheds some new light on that legal regime and reveals different aspects of it, which the text of the Commission does not sufficiently take into account.

4. It could further be asked whether other issues should also have been included under the topic, such as the right of international organizations to exercise diplomatic protection, in particular in view of the draft article on the relevant right of the flag State of a vessel. Originally, Austria favoured such a broadening of the topic. However, international organizations still pose major problems with respect to their legal structure, as can be seen in the context of the responsibility of international organizations. For that reason, it seems better to put the focus on States alone in order to achieve a manageable legal regime. Nevertheless, this restriction should not be understood as a denial of the necessity to eventually embark on the problem of international organizations which perform an increasing role in international relations even with respect to the protection of individuals.

5. A further issue that deserves particular consideration is the problem of the relation between the individual whose rights are protected and the State exercising the right to diplomatic protection. Addressing the problem of the result of the exercise of diplomatic protection and the access of the individual to such a result could also be considered. Of course, on the one hand, it could be argued that this is a matter of the relation between a State and its nationals; on the other hand, however, it should be ensured that the injured individual in whose interest the claim was raised will benefit from the exercise of diplomatic protection.

#### Belgium

Belgium would like to point out that it views diplomatic protection, in respect of which the Commission adopted on first reading, a very useful set of draft articles, as one of a series of mechanisms for the protection of human rights and fundamental freedoms emanating from international treaty law and customary international law, several of which provide for the right of any State to intervene in respect of any individual (including a non-national) whose rights have been violated.

#### El Salvador

1. El Salvador considers that a clear distinction should be drawn between the scope of the diplomatic protection envisaged in the draft articles and the protection referred to in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. Otherwise, since the Commission is engaged in the codification and progressive development of international law in this area, El Salvador believes that it would be necessary to take due account of the relevant provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, particularly the provisions of article 36 of the latter Convention, which refers to the consular protection to be afforded to a national detained in another State, guaranteeing, moreover, that such nationals shall be granted due process. That provision is of such importance that it has elicited advisory opinions both from inter-American bodies, such as advisory opinion OC-16/99 of the Inter-American Court of Human Rights,<sup>2</sup>

<sup>2</sup>The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, Series A, No. 16 (1999).

and from universal organs, such as the ICJ judgment in the case concerning *Avena and Other Mexican Nationals*.<sup>3</sup>

2. El Salvador raises the above points because, according to the definition of diplomatic protection proposed in draft article 1, such protection is limited to cases in which a State in its own right adopts the cause of a national and exercises diplomatic protection in accordance with the draft articles in question, which could be interpreted to mean that some consular functions under the Vienna Convention on Consular Relations would be excluded, since there are situations in which the State does not adopt in its own right the cause of a national.

3. In view of the above, El Salvador believes it is important to bear in mind that, at the international level, the concept of diplomatic protection should be distinguished from other concepts of international law that relate to the protection of individuals, particularly in the field of human rights, which imposes precise obligations on States, namely, *jus cogens* and *erga omnes*.

#### Italy

Italy congratulates the Commission for its work, and endorses the approach adopted by the Commission in formulating the draft articles.

#### Mexico

1. As Mexico has noted on previous occasions, diplomatic protection is a key, high-priority concern in Mexico's foreign policy. Mexico has, accordingly, followed with much interest the development of the Commission's draft articles. Although, in broad terms, it finds the draft articles acceptable, Mexico wishes to highlight several points in relation to draft articles 9, 14, 16 and 19 (see below).

2. Mexico wishes to reiterate its comments on the subject of the clean hands doctrine in the light of the present draft articles on diplomatic protection. As the Commission establishes in draft article 1, diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

3. In that context, Mexico considers that if an individual is or is presumed to be responsible for reprehensible conduct abroad, his State of nationality might, on account of that unfortunate circumstance, decide not to resort to the exercise of diplomatic protection. Nevertheless, this is by no means the same as saying that "clean hands" is a *sine qua non* for a State's exercise of diplomatic protection. For that reason, Mexico welcomes the Commission's decision to withdraw this topic from the draft articles.

#### Netherlands

1. The Netherlands generally supports the draft articles and thus applauds the work of the Commission to date.

<sup>3</sup>*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 38, paras. 45–47.

2. The Netherlands notes that in his first report, the Special Rapporteur of the Commission, Mr. John Dugard, had already included diplomatic protection within the context of the protection of human rights when he wrote “diplomatic protection remains an important weapon in the arsenal of human rights protection”.<sup>4</sup> The Special Rapporteur also wrote in his fifth report that “the customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal—the protection of human rights”.<sup>5</sup> The Netherlands fully endorses this position as expressed by the Special Rapporteur.

3. Seen from the above perspective, the Netherlands regrets that such complementarity of diplomatic protection has not been thoroughly elaborated either in the draft articles or in the commentary. The formulation of some of the draft articles is consonant with current protection of human rights and other developments in international law. The Netherlands considers that the draft articles as they now stand do not provide sufficient elements of or scope for progressive development. Several of the proposals by the Netherlands for the text of the draft articles—draft article 3 for instance—are rooted in the general approach outlined here.

4. The Netherlands hopes that further discussion will prompt the Commission to pay closer attention to the position of the individual.

5. The Netherlands endorses the conclusions of the Special Rapporteur in regard to the clean hands doctrine.

#### **Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)**

1. The complete set of draft articles meets the general satisfaction of the Nordic countries.

2. The Nordic countries support the chosen approach, on the basis of the main premise that States have a right, not a duty, to exercise diplomatic protection. Moreover, they emphasize that principles and rules of diplomatic protection are without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea.

3. Furthermore, the Nordic countries take note of the view of the majority of the members of the Commission with regard to the clean hands doctrine and share the view that the doctrine should not be included in the draft articles.

#### **Panama**

1. Panama believes that the draft articles have fully encompassed in their provisions the issues that have

traditionally been covered by the topic of diplomatic protection as a mechanism designed to secure redress for an injury to the national of a State. The draft articles deal in detail with the rules governing the nationality of claims and the exhaustion of local remedies.

2. Panama accordingly supports the focus of the draft in that it codifies customary rules regarding the conditions for the exercise of diplomatic protection in the most traditional and classical sense. It clearly, for this reason, leaves outside its scope functional and other types of protection, which are provided for by other rules, institutions and procedures.

3. Panama agrees with the Commission that the general provisions of the draft articles should maintain the distinction between primary rules and secondary rules, with the latter governing the circumstances in which diplomatic protection may be exercised and the preconditions for its exercise. Panama therefore believes that the aim of the draft is not to address the question of the effects of diplomatic protection and that for this reason it sets aside the application of rules on reparation.

#### **United Kingdom of Great Britain and Northern Ireland**

1. The United Kingdom reiterates its support for the work of the Commission on diplomatic protection. There exists a large body of well-established State practice on much of the subject matter of the draft articles.

2. The United Kingdom agrees with the Commission’s decision that the present review of diplomatic protection is not an appropriate situation for any review of the functional protection to be accorded to international organizations. The draft articles are intended to be without prejudice to any rights a State may have to exercise consular protection in respect of its nationals abroad; however, the United Kingdom believes that this should be made clearer either in the draft articles themselves or at least in the commentary.

#### **Uzbekistan**

1. Uzbekistan believes that the draft articles on diplomatic protection legalize the long-standing and rather widespread practice of “political lobbying” for property and other interests under foreign jurisdiction. The draft articles are based on the principle that local remedies must be exhausted before diplomatic protection may be exercised by a State. In that respect, Uzbekistan considers the draft articles on diplomatic protection as a means of harmonizing existing practice currently carried out on an individual basis.

2. It is necessary to define clearly in the draft articles the rights, obligations and responsibilities of States parties with respect to the exercise of diplomatic protection in the case of an injury arising from a wrongful act of another State.

<sup>4</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, p. 215, para. 32.

<sup>5</sup> *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/538, p. 54, para. 37.

## PART ONE

## GENERAL PROVISIONS

*Draft article 1. Definition and scope***Austria**

The gist of draft article 1 is acceptable. However, even though “diplomatic action” does not seem to have a generally accepted meaning, it is necessary to clarify that certain acts, such as protective measures by consulates, do not fall under this term.

**Belgium**

Draft article 1 defines diplomatic protection as action by a State adopting in its own right the cause of its national “in respect of an injury to that national arising from an internationally wrongful act of another State”. This is a very broad interpretation of diplomatic protection. Belgium proposes that the end of the phrase should read as follows: “in respect of an injury to that national arising from an internationally wrongful act of another State whose international responsibility is therefore formally called into question.” This clarification enables States to resort to informal procedures which do not fall within the strict framework of diplomatic protection.

**Guatemala**

With regard to paragraph (7) of the commentary to draft article 1, it is clear that the rules on diplomatic protection are not applicable in cases where a State in whose territory a diplomatic or consular agent exercises his or her functions fails to comply with the obligations relating to such persons incumbent upon it pursuant to the relevant articles of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The above is confirmed by the last sentence of paragraph (4) of the commentary to draft article 15. However, in the view of Guatemala, diplomatic protection should be applicable to injury caused by that State to such persons outside the exercise of their functions and the application of the aforementioned draft articles. Guatemala is of the opinion that diplomatic protection should, for example, be applicable to the expropriation without compensation of property personally owned by a diplomatic official in the country to which he or she is accredited.

**Italy**

1. Italy believes that draft article 1, in giving a definition of the concept of “diplomatic protection” and of its scope of application, adopts a wording which is too traditional, especially when it speaks of a State “adopting in its own right the cause of its national”. The wording implies not only that the right of diplomatic protection belongs only to the State exercising such protection, but also that the right that has been violated by the internationally wrongful act belongs only to the same State. However, the latter concept is no longer accurate in current international law.

ICJ, in the *LaGrand* case<sup>6</sup> and in *Avena and Other Mexican Nationals*,<sup>7</sup> has established that the breach of international norms on treatment of aliens may produce both the violation of a right of the national State and the violation of a right of the individual. The same conclusion has been reached by the Inter-American Court of Human Rights, in its advisory opinion OC–16/99.<sup>8</sup>

2. Therefore Italy suggests that draft article 1 be modified in order to codify more clearly current international law. The new wording (which has been extracted from the *Avena* case, para. 40) could be the following:

“Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation of its own rights and the rights of its national in respect of an injury to that national arising from an internationally wrongful act of another State.”

It should be noted that this wording leaves unchanged the basic concept according to which the right to exercise diplomatic protection belongs to the State.

**Netherlands**

1. The draft article excludes consular assistance. This exception should perhaps be explicitly indicated in the commentary.

2. The draft articles differentiate between “diplomatic action” and “other means of peaceful settlement”. It is not always clear whether a draft article relates to one or both of these. The Netherlands suggests that the commentary indicate that several draft articles relate only to “other means of peaceful settlement”.

3. Under paragraph (2) of the commentary to draft article 1, a “wrongful act” must have occurred before diplomatic protection can be exercised. The commentary might state that, outside the framework of these draft articles, a State naturally has many other options for taking the necessary steps to protect its subjects before a “wrongful act” has actually occurred.

4. The Netherlands considers that the term “its national” is too restrictive because the scope of the draft articles is widened in later ones. Accordingly, a sentence should be added to the commentary which makes it clear that draft article 1 is not intended to exclude draft article 8.

<sup>6</sup> *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 494, para. 77.

<sup>7</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 35, para. 40. See also ILM, vol. 43 (2004), p. 581.

<sup>8</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC–16/99, Inter-American Court of Human Rights, Series A, No. 16 (1999), paras. 80–84.

### Panama

With regard to who has the right to exercise diplomatic protection and the possibility of doing so, Panama feels it is important to make it clear that this right belongs to States and that, accordingly, the State's legal interest in exercising diplomatic protection stems from the bond of nationality between the State and the person injured through the wrongful act of another State. Consequently, Panama considers it appropriate to incorporate into draft article 1 the provision describing the legitimate and peaceful measures that may be adopted by the State when it resorts to diplomatic protection and the distinction maintained in the provision between the two procedures, namely, diplomatic action and other means of peaceful settlement.

### Uzbekistan

The term "nationality of a legal person" is used in draft article 1 [Russian text], which is unacceptable, as nationality is an attribute of natural, not legal, persons. Nations are a historically developed form of community of persons with a common language, national character and distinct culture. In this respect, it seems appropriate to change the term "nationality of a legal person" to "State of origin of a legal person", meaning the State where the legal person is established.

*Draft article 2. Right to exercise diplomatic protection*

### Austria

Although the structure of diplomatic protection as a right of a State has always been discussed—as it is only a fiction that the State is injured through its nationals—draft article 2 raises no major concerns. It reflects the long-standing practice in this regard.

### El Salvador

*(See General remarks above.)*

### Italy

1. Italy believes that the exercise of diplomatic protection is, as a rule, a right that belongs only to the State and that international law does not provide either for a right of the injured individual to obtain diplomatic protection from its State or for a corresponding duty upon that State. However, an exception to that rule would be appropriate in some particular and very limited circumstances, from the perspective of the progressive development of international law, when the protection of fundamental values pertaining to the dignity of the human being and recognized by the international community as a whole is at stake.

2. The Special Rapporteur, Mr. John Dugard, following the above approach, provided for a similar exception in cases of breach of *jus cogens* norms. By contrast, Italy maintains that a more precise and more limited exception should be included in draft article 2 under the following conditions: (a) in the case of grave violations of fundamental human rights and, more precisely, with respect to the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and the prohibition of racial discrimination; and (b) if, in addition, following those violations it is impossible for the individual victim to resort to international judicial or

quasi-judicial organs able to afford reparation. When the two cumulative conditions are present, the national State should have the duty to exercise diplomatic protection in favour of the injured individual and the subsidiary duty to provide, in favour of the individual, for an effective domestic remedy against its own refusal.

3. In the above-mentioned exceptional circumstances, the fact that certain international primary rules on human rights (which surely have the nature of *jus cogens*) also confer individual rights and the fact that their breach (which entails a very serious form of State responsibility) also violates individual rights cannot but have an impact on the secondary rules concerning diplomatic protection, by affecting the relationship between the national State and the injured individual. It should also be considered that, in those exceptional and residuary circumstances, diplomatic protection is the only remedy available for the individual, so that its denial by the national State would impair those fundamental principles on the dignity of the human being that the entire international community strongly intends to protect.

4. Therefore, Italy suggests that two paragraphs be added to article 2, which could be worded in the following way:

"2. Notwithstanding paragraph 1, a State has a legal duty to exercise diplomatic protection on behalf of the injured person upon request:

"(a) If the injury results from a grave breach, attributable to another State, of an international obligation of essential importance for safeguarding the human being, such as protection of the right to life, the prohibition of torture or of inhumane or degrading treatment or punishment, and the prohibition of slavery and racial discrimination.

"(b) If, in addition, the injured person is unable to bring a claim for such an injury before a competent international court or tribunal or quasi-judicial authority.

"3. In the cases set out in paragraph 2, States are obliged to provide in their municipal law for the enforcement of the individual right to diplomatic protection before a competent domestic court or other independent national authority."

### Netherlands

Paragraph (3) of the commentary to draft article 2 states that "[t]he right of a State to exercise diplomatic protection may only be carried out within the parameters of the present articles". Exactly what these parameters are is unclear. The Netherlands believes that, in view of the wording of draft article 2, paragraph (3) should be either deleted or clarified.

### United Kingdom of Great Britain and Northern Ireland

The United Kingdom welcomes the Commission's characterization of diplomatic protection as a right of the State that the State is under no obligation to exercise. It agrees that every State retains the discretion, subject to its internal laws, as to how this right of diplomatic protection is exercised, if at all. That there is no duty to do so is also made clear in the commentaries to draft articles 2, 3 and 8.

## PART TWO

## NATIONALITY

**Morocco**

With regard to the draft articles dealing with the question of nationality, it would be advisable for the Commission to take State practice in that area into account when considering these draft articles at the second reading.

## CHAPTER I. GENERAL PRINCIPLES

*Draft article 3. Protection by the State of nationality***Austria**

Draft article 3, which sets out the fundamental rule of the requirement of the bond of nationality between the injured person and the State exercising diplomatic protection and reflects a basic understanding, raises no major problems.

**Netherlands**

1. The Netherlands proposes that paragraph 1 be reformulated to read as follows: "The State of nationality is the State entitled to exercise diplomatic protection." This places greater emphasis on the perspective of the individual.

2. In addition, it is important to see draft article 3 in the light of European citizenship (that is, of the European Union). There is currently no reason to be more specific on this point, but future developments cannot be predicted.

(See also *General remarks above*.)

**United Kingdom of Great Britain and Northern Ireland**

Draft article 3 reaffirms the customary international law rule that the State entitled to exercise diplomatic protection is the State of nationality of the injured person. However, the United Kingdom does not agree that the exception to this rule in article 3, paragraph 2, discussed further in relation to article 8, reflects customary international law.

(See also *comments on draft article 2 above*.)

## CHAPTER II. NATURAL PERSONS

*Draft article 4. State of nationality of a natural person***Austria**

1. Draft article 4 must be understood *cum grano salis* since nationality is not acquired by State succession but as a consequence of State succession. As a rule, nationality is acquired through the law of the respective State.

This law can use as a decisive criterion for the acquisition of nationality one of the facts enumerated in this draft article. In the case of State succession, different criteria could be applied in order to grant nationality, as can be seen from the work of the Commission in this regard. It is therefore proposed to reformulate draft article 4 accordingly.

2. In this context, Austria would like to refer to a problem that does not seem to be addressed in the draft articles. In recent times, the practice has evolved that States delegate their right to exercise diplomatic and consular protection to other States. The best example of this practice is article 8c of the Treaty on European Union<sup>9</sup> according to which a European Union member State other than the national State may exercise such protection if the national State is not represented in the receiving State. Of course, it could be argued that this is not a case of genuine diplomatic protection; it would, however, certainly fall within the purview of the definition of draft article 1 as it is worded now. As a consequence, either it must be clarified that such protection is not addressed by the draft articles, or they would also have to address this problem. At the moment, the draft articles give no clear guidance in this respect.

**Belgium**

Belgium observes that the draft articles do not require the effective nationality of the claimant State or States, although, pursuant to draft article 7, the nationality of the claimant State must predominate over the accused State in the case of a claim against the State of nationality. While Belgium notes the progress made in this area, particularly with regard to the judgment in the *Nottebohm* case,<sup>10</sup> it fears an increase in "nationality shopping". In order to minimize that risk, the commentary could refer to the right of the accused State to challenge the exercise of diplomatic protection where there is no genuine link of nationality, it being understood that the burden of proof lies with that State.

(See also *comments on draft article 7 below*.)

**El Salvador**

The principles on nationality enshrined in the doctrine of private international law need to be taken into account, as there is a need to establish the relationship to both the positive and negative conflicts of nationality that arise from persons having dual or multiple nationalities or having no nationality. El Salvador therefore believes that draft article 4 should distinguish between nationality by birth, whether by *jus soli* or *jus sanguini*, and acquired nationality, as the latter refers to naturalization.

<sup>9</sup> Subsequently included as article 20 in the Consolidated Version of the Treaty establishing the European Community.

<sup>10</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

### Qatar

The draft article is not only clear, but extremely explicit, in that it affirms the absolute right of States to determine, in accordance with their domestic law, who qualifies for their nationality. This is consistent with the position enunciated in international law that “[i]t is for each State to determine under its own law who are its nationals”.<sup>11</sup>

### United Kingdom of Great Britain and Northern Ireland

Draft article 4 contains the generally accepted bases for conferment of nationality in international law. The United Kingdom agrees with the implication of draft article 4 that it is primarily for the State of nationality to determine which individuals it considers to be its nationals in accordance with its own domestic law. Its own rules applying to international claims (see the annex to the present report) require that the injured party must be a United Kingdom national if the United Kingdom is to present a claim on his or her behalf. However, the United Kingdom does not require an additional “effective link” between the claimant and the State of nationality. It supports the Commission’s conclusion that ICJ in the *Nottebohm* case<sup>12</sup> did not intend to establish a rule of general application and that the requirement for an effective or genuine link cannot readily be applied in other situations.

### Uzbekistan

Draft article 4 indicates the means of acquiring nationality, with the stipulation that those means must be consistent with international law. It seems necessary to point out that the procedures for obtaining nationality are established by national, not international, law and that the means of acquiring it must therefore be consistent with the domestic law of the State in question. These comments relate to draft article 5, paragraph 2.

#### *Draft article 5. Continuous nationality*

### Austria

With respect to draft article 5, Austria concurs with the general substance of the draft provision. Nevertheless, it must be kept in mind that it could sometimes be difficult to prove that nationality was acquired in a manner not inconsistent with international law. The wording of this draft article suffers from a certain inconsistency with the definition contained in draft article 1: whereas draft article 5 speaks of “bringing a claim”, which indicates a rather formal and even judicial procedure, draft article 1 gives diplomatic protection a broader meaning, also encompassing acts other than merely the bringing of a claim. Harmonization would be useful.

### Belgium

1. With regard to paragraph 1, and, more specifically, the open question of whether or not nationality has to be

retained between injury and presentation of the claim, Belgium takes the view that a lack of continuous nationality does not have any bearing on the right to exercise diplomatic protection provided that the nationality existed at the time of the injury and that it exists (again) when the claim is presented.

2. Furthermore, Belgium regrets the fact that the question of the relationships between State succession and diplomatic protection was not addressed, even in the commentary to draft articles 5 and 7. Two situations should be discussed:

(a) Cases in which the predecessor State wishes to exercise diplomatic protection in respect of one of its nationals who has involuntarily acquired the nationality of the successor State without having lost the nationality of the predecessor State, provided that the nationality of the predecessor State is predominant;

(b) Cases in which the successor State wishes to exercise diplomatic protection in respect of one of its nationals who has involuntarily retained the nationality of the predecessor State provided that the nationality of the successor State is predominant.

### El Salvador

Although draft article 5 does refer to the basic rule of continuous nationality, El Salvador is somewhat concerned by paragraph 2. It believes that change of nationality should be addressed in more precise terms in order to ensure that there is no deviation from the basic rule set forth in paragraph 1 of this draft article.

### Guatemala

(See comments on draft article 8 below.)

### Netherlands

1. The Netherlands endorses the regulation proposed in this draft article because it attempts to protect the position of the individual. The Netherlands has studied the question of whether the decision of the International Centre for Settlement of Investment Disputes (ICSID) in the *Loewen* case is a reason to amend draft article 5. Paragraph 225 of the *Loewen* decision reads as follows:

Claimant TLGI [The Loewen Group Inc.] urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest—the beneficiary of the claim—is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.<sup>13</sup>

2. The Netherlands, however, considers that it is not clear whether the *Loewen* case truly reflects the law as it currently stands. Moreover, application of that rule would have undesirable consequences in cases involving a third

<sup>11</sup> Convention on Certain Questions relating to the Conflict of Nationality Laws, art. 1.

<sup>12</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

<sup>13</sup> *The Loewen Group Inc. v. United States of America, ICSID Reports*, vol. 7 (Cambridge, Grotius, 2005), p. 485. See also ILM, vol. 42 (2003), p. 847.

country. The following hypothetical situation can serve as an example: Luxembourg undertakes action against an individual of Dutch nationality, which causes injury to that individual. The Netherlands then decides to exercise diplomatic protection, but before the court or arbiter can issue a judgement, the person loses Dutch nationality and acquires German nationality. Application of the *Loewen* criteria would mean that neither the Netherlands nor Germany could then exercise “full” diplomatic protection.

3. It would be preferable to replace the words “shall not be exercised” in paragraph 3 with “may not be exercised” because “may not” is more in line with the discretionary authority of the State in respect of exercise of diplomatic protection. In addition, “may not” also appears in draft articles 7 and 14. For the rest, “injury caused” is used in the other draft articles and not “injury incurred” as here. Consistency in language is recommended.

#### **Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)**

In draft article 5, a requirement for the exercise of diplomatic protection is continuous nationality. An issue is whether this requirement should apply until the resolution of the dispute or the date of an award or a judgement, and not only until the time of the official presentation of the claim. In practice, however, it can be very difficult to fix the exact point in time of resolution of the dispute. Therefore, the Nordic countries support the chosen approach of the Commission, whereby a State may exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

#### **Qatar**

1. Qatar supports the continuous nationality rule that a State is entitled to exercise diplomatic protection in respect of a person who was its national from the time of the injury up to the date of the official presentation or at most until the adjudication of the claim. However, the paucity of cases in which a person can change his or her nationality in such circumstances cannot be used as justification for draft article 5, paragraph 2, since the fact that a case is rare does not preclude the application of the legal principle to all cases, especially those envisaged during the elaboration of the draft articles.

2. Qatar is stressing this point because it would like to prevent individuals from attempting to change their nationality to that of a State with greater international influence. The adoption of the principle of continuous nationality would close off this option, enhancing the credibility of the rules on the implementation of the principle of diplomatic protection.

#### **United Kingdom of Great Britain and Northern Ireland**

1. Draft article 5, paragraph 1, is consistent with customary international law in that it requires the claimant to be a national at the date of injury and at the date of presentation of the claim. The United Kingdom’s claims rules (see the annex to the present report) require the individual

to be a national continuously from the date of injury up to the date of presentation of the claim; however, in practice it has been sufficient to prove nationality at the date of the injury and at the date of presentation of the claim.

2. Draft article 5, paragraph 2, would represent a change in existing customary international law provisions. The United Kingdom’s own claims rules (see the annex to the present report) allow it to take up the claim of a national who ceases to be or becomes a national after the date of the injury. Where the United Kingdom decides to bring a claim in such circumstances, it will normally only be brought in concert with the State of former or subsequent nationality. The United Kingdom believes that it is important to maintain the rule on continuous nationality of claims so as to preclude claimants changing their nationality to that of a State which may be more likely to bring a claim on his or her behalf. The United Kingdom therefore welcomes the inclusion of the requirements of loss of nationality and acquisition of nationality for reasons unrelated to the claim in draft article 5, paragraph 2, as being necessary to protect against potential manipulation of claims rules by future claimants.

#### **United States of America**

1. Draft article 5, paragraph 1, would require that a person be a national of a State at the date of injury and the date of official presentation of the claim for that State to exercise diplomatic protection in respect to the national’s claim. The commentary accompanying the draft article explains that the date of injury will normally coincide with the date on which the injurious act occurs. The commentary also states that “the date of presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection”.<sup>14</sup> The article as drafted would leave open the question of whether nationality must be maintained continuously between the period the claim arose and the date on which the claim was brought.

2. Draft article 5, paragraph 2, would create an exception to the continuous nationality rule where the person seeking diplomatic protection has lost his former nationality, has acquired a new nationality for reasons unrelated to the claim, and has acquired the new nationality in a manner not inconsistent with international law. Draft article 5, paragraph 3, then would limit this exception by not permitting claims against the former State of nationality where the injury was suffered while the person was still a national of that former State. The draft commentary explains that these rules are designed to allow for claims on behalf of individuals who lost their nationality through State succession, adoption or marriage.

3. Draft article 10, paragraph 1, would require that a corporation be a national of a State exercising diplomatic protection at both the “time of the injury” and the “date of the official presentation of the claim”. This draft article also would leave open the question of whether nationality must be maintained continuously between the period the claim arose and the date on which the claim was brought.

<sup>14</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 24, para. (4) of the commentary to article 5.

4. The United States believes that these draft articles do not accurately reflect customary international law and are not drafted in a manner most tailored for the goals sought to be advanced by the draft articles. It strongly urges, therefore, that draft article 5, paragraph 1, be changed to state:

“A State is entitled to exercise diplomatic protection only in respect of a person who was a national of that State, or any predecessor State, continuously from the date of injury through the date of resolution of the claim.”

Likewise, draft article 10, paragraph 1, should state:

“A State is entitled to exercise diplomatic protection only in respect of a corporation that was a national of that State, or any predecessor State, continuously from the date of injury through the date of resolution of the claim.”

5. These suggested revisions differ from the Commission’s draft in four important respects, as explained below. First, the word “only” is proposed to be added to both proposed draft articles to clarify that these articles limit the scope of diplomatic protection to only those claims where the national in question satisfies the continuous nationality requirement. Secondly, the end date for the period of continuous nationality requirement should be described as the “date of resolution of the claim” to bring the draft in line with customary international law. Thirdly, nationality should be required continuously between the date of the events giving rise to the claim and the date of resolution of the claim in order to create consistency between the draft and traditional formulations of the rule. Fourthly, it is proposed that the effect of a change in nationality brought about by the succession of one State by another should be addressed simply and directly by recognizing that the right to assert diplomatic protection also passes by State succession, thereby obviating the need for draft article 5, paragraph 2, in that respect; there is an insufficient basis to venture into the other areas addressed by draft article 5, paragraph 2, to warrant retaining it. The concerns that prompt these suggestions are addressed more fully below.

6. First, draft articles 5, paragraph 1, and 10, paragraph 1, intend to limit the right of diplomatic protection found in draft articles 2–3 to claims held by persons who meet the continuous nationality requirement. The addition of the word “only” is necessary to achieve that goal, as without that word it is not clear that these articles are meant to limit the scope of draft articles 2–3.

7. Secondly, the United States questions the end point for the nationality requirement used in draft articles 5 and 10. The draft commentary states that while there may be a requirement of nationality to the date of resolution, “the paucity of such cases in practice”<sup>15</sup> led to the adoption of “date of presentation of the claim”<sup>16</sup> as the end point for the nationality requirement. The United States is aware, however, of eight specific instances in the context of arbitral decisions and claims presented through diplomatic channels in which the effect of a change in nationality

between the presentation and the resolution of the claim was raised and addressed.<sup>17</sup> In each of those instances, the nationality of the claimant or the person on whose behalf the claim was presented changed after the date the claim was officially presented to the respondent State but before the claim’s final resolution.<sup>18</sup> In each of the cases, the international claim was dismissed or withdrawn when it became known that the claim was now being asserted on behalf of a national of a State other than the claimant State. The arbitral tribunal in the *Loewen* case most recently affirmed this principle, stating: “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim ... through the date of the resolution of the claim.”<sup>19</sup>

<sup>17</sup> See Hackworth, *Digest of International Law*, vol. V, p. 805, where American claimant Ebenezer Barstow died after his claim was presented to the government of Japan, and the United States declined to continue to espouse the claim because the deceased’s wife, who was the new owner of the claim, was Japanese; *Minnie Stevens Eschauzier (Great Britain) v. United Mexican States* (24 June 1931), UNRIAA (Sales No. 1952.V.3), vol. V, p. 207, dismissing the claim by a former British national who became a United States citizen by marriage after filing the claim; *María Guadalupe* (unpublished) (Franco-Mexican Commission 1931), discussed in Feller, *The Mexican Claims Commissions, 1923–1934: A Study in the Law and Procedure of International Tribunals*, p. 97 (tribunal denied claim where French nationality was lost “not only subsequent to the filing but also after the specific claim had been listed as receivable in the Supplementary French–Mexican Convention of 1930”); *Benchiton case, Affaire des biens britanniques au Maroc espagnol (Spain v. Great Britain)* (1 May 1925), UNRIAA, vol. II (Sales No. 1949.V.1), p. 706 (claim denied where claimant lost protected status after first British démarche to Spain concerning claim: “the claim must remain national up to the time of the judgment, or at least up to the time of the termination of the argument relating thereto”) (translation in *Annual Digest of Public International Law Cases, years 1923 to 1924* (London, Longmans, Green, 1933), p. 189); *Exors. of F. Lederer (deceased) v. German Government, Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les Traités de Paix*, vol. III (Paris, Sirey, 1924), pp. 762 and 765 (Anglo-German Mixed Arbitral Tribunal 1923) (where after notification of claim British claimant died leaving German beneficiaries, claim refused: to allow such relief would “be inconsistent with the meaning of the Treaty, for it would lead in effect to payments ... by Germany to German nationals” (p. 770); *F. H. Redward and Others (Great Britain) v. United States (Hawaiian Claims)* (10 November 1925), UNRIAA, vol. VI (Sales No. 1955.V.3); also reported in Nielsen, *American and British Claims Arbitration*. In the *Hawaiian Claims* case before the Arbitral Tribunal (Great Britain–United States), the British Government voluntarily withdrew three claims, “the claimants having acquired American nationality” (*ibid.*, p. 30) during the fourteen years between the date the claims were first filed and the date the memorial was submitted; *Chopin*, UNRIAA, vol. X (Sales No. 1955.V.3), p. 68 (*French and American Claims Commission, 1880–1884*, vol. 60, Records of Claims (claim formally presented by France through diplomatic channels on 30 August 1864, withdrawn by 24 May 1883 motion to dismiss claim as to one beneficiary who had since become a United States national by marriage); Report of Robert S. Hale, Esq., *Papers relating to the Treaty of Washington*, vol. VI (Washington, D.C., Government Printing Office, 1874), p. 14 (report of agent before the American–British Claims Commission that the commission was unanimous that the claimant in the *Gribble* case lacked standing as a British subject because he “had filed his declaration of intention [to seek United States citizenship] ... before the presentation of his memorial, had subsequently, and pending his claim before the commission, completed his naturalization, and was at the time of the submission of his cause a citizen of the United States”).

<sup>18</sup> While most of the examples provided involve cases where the national being protected became a national of the respondent State, in at least one case the national became a citizen of a third State. In *Minnie Stevens Eschauzier*, the United Kingdom brought a claim against Mexico, but had the claim dismissed when the national being protected became a United States citizen after the claim’s presentation, but prior to its resolution (see footnote 17 above).

<sup>19</sup> *The Loewen Group Inc. v. United States of America*, *ICSID Reports*, vol. 7 (Cambridge, Grotius, 2005), p. 485, para. 225. See also ILM, vol. 42 (2003), p. 847.

<sup>15</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 24, para. (5) of the commentary on article 5.

<sup>16</sup> *Ibid.*

8. These cases evidence a clear customary international law rule. In each of these cases, the dismissal or withdrawal of the claims reflected a sense of legal obligation. In each case decided by an arbitral tribunal, the issue was governed by customary international law rather than the specific terms of a treaty. In each case where the claim was withdrawn, it was withdrawn against the interest of the claimant State in receiving compensation from the respondent State for an act it alleged to be internationally wrongful. These cases, in short, reflect consistent State practice. Moreover, as a policy matter this rule is preferable, as it avoids a situation where the respondent State owes the claimant State for an injury to a person that is no longer the legal concern of that State. Draft article 5, paragraph 1, and draft article 10, paragraph 1, should be modified to reflect this rule of international law.

9. Thirdly, the United States believes that draft article 5, paragraph 1, should be modified to require nationality to be maintained continuously from the date of injury through to the date of resolution. While the United States acknowledges the Commission's concern that there has been limited practice applying this rule, its proposal is based upon the customary wording of the continuous nationality requirement made by most scholars and international adjudicatory bodies. As noted above, the tribunal in the *Loewen* case defined the nationality requirement as one of "continuous\* national identity from the date of the events giving rise to the claim ... through the date of the resolution of the claim".<sup>20</sup> In addition to consistency with practice, great dissonance would be created by crafting a continuous nationality requirement and then not requiring continuity of nationality as part of the requirement. The United States therefore urges the Commission to bring draft article 5, paragraph 1, into line with customary descriptions of the rule made by scholars and tribunals.

10. Finally, the United States is cognizant of the issue posed with respect to the requirement of continuous nationality by State succession, which does result in a change in designated nationality. However, the United States believes that the right of diplomatic protection passes in State succession, and the right to diplomatically protect in this situation should not be viewed as an exception to the general requirement. As a result, it proposes deletion of draft article 5, paragraph 2. Rather, the United States believes that the issue can best be addressed through the addition of a reference to the "predecessor State" in draft article 5, paragraph 1, and draft article 10, paragraph 1. This proposal makes clear that there is no interruption of

continuous nationality created by State succession, as the successor State retains the right to assert protection with respect to the claims of its citizens that were citizens of the predecessor State, provided all other requirements are met. Retention of what is now draft article 5, paragraph 3, ensures that a successor State cannot espouse a claim of a citizen against his former State of nationality.

11. While the proposed modification to draft article 5, paragraph 1, addresses problems posed by State succession, deleting draft article 5, paragraph 2, leaves unaddressed diplomatic protection of claims of persons whose citizenship has compulsorily changed due to adoption or marriage. The United States questions the factual predicate for this provision since the commentary does not cite any laws mandating loss of citizenship upon marriage to or adoption by a foreigner. In addition, draft article 5, paragraph 2, is in tension with the theoretical underpinnings of diplomatic protection. That paragraph would allow a State to exercise diplomatic protection in respect of an injury suffered when the person who suffered the injury was a national of another State, and thus where the injury in question was one that had an impact only on the international law rights of that other State. This is in contrast to State succession where the new State has succeeded to the international law rights and obligations of the predecessor State and thus is deemed to have had its rights under international law infringed. For the above reasons the United States proposes the deletion of paragraph 2. The proposal by the United States would retain the right of newly created States to exercise diplomatic protection on behalf of their citizens, while avoiding permitting States to exercise diplomatic protection over injuries suffered by other States.

### **Uzbekistan**

(See comments to draft article 4 above.)

In draft articles 5 and 10, it is proposed to establish in respect of nationals or legal persons a requirement of affiliation with the State presenting the claim, at the time of the injury and at the time a decision on the violation of rights is rendered; that would allow the rights of such parties to be clearly protected.

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

### **Austria**

Whereas paragraph 1 of draft article 6 does not arouse special comments, paragraph 2 requires further comment. In the view of Austria, there is no need of such a provision as there is certainly no doubt that two or more States may jointly act when exercising the right of diplomatic protection. Even if such a clause as that contained in paragraph 2 is lacking, the State to which the claim is presented must accept such a joint démarche. The real problem lies in the possibility that two States may exercise the right of diplomatic protection in a different manner. The commentary deliberately leaves the issue open because of its complexity; in the view of Austria, however, it would be the particular task of the Commission to address even more complicated issues and to provide a solution for

<sup>20</sup> *Ibid.* The panel in *Loewen* is far from the only tribunal or scholar to use this formulation. For example, Brownlie states that the continuous nationality rule requires that a person whose claim is being protected be a national of the claimant State "continuously and without interruption" from date of injury to date of resolution (*Principles of Public International Law*, p. 483). Likewise, García-Amador, Sohn and Baxter state that "the predominant opinion both in diplomatic practice and in international case-law" requires that "the injured person was its national at the moment when the damage was caused and retains\* its nationality until the claim is decided" (*Recent Codification of the Law of State Responsibility for Injuries to Aliens*, p. 82). See also Ralston, *The Law and Procedure of International Tribunals*, pp. 188–189 (criticizing the French-American Claims Commission for failing to apply the continuous nationality rule where France asserted claim on behalf of a national who became American and then French again during the period in which the claim was pending).

them once the Commission refers to the possibility of multiple diplomatic protections. Otherwise, it would be better not to address the issue of joint diplomatic protection since this reference automatically raises the questions just mentioned.

### Belgium

(See comments on draft articles 4 above and 7 below.)

### El Salvador

El Salvador believes that the text should take account of the rules of private international law on dual and multiple nationality, which provide that States must honour the nationality which is effectively being used. This also relates to the international jurisprudence of ICJ in the *Nottebohm* case, which established the precedent of “effective nationality”.<sup>21</sup>

### Guatemala

With regard to the last part of paragraph (4) of the commentary on draft article 6, it would be interesting to receive some clarification regarding the “general principles” referred to: what are they or where can they be found?

### Qatar

1. Qatar considers that it might be useful to review paragraph 2 in order to make it clearer, so that it either identifies one State as having the right of protection, or lays down criteria to avert any problems that could arise from the filing of separate claims by two or more States. In this regard, Qatar proposes the following:

“(a) That the two States of nationality agree to file a joint claim;

“(b) That the two States of nationality agree that one of them shall file the claim;

“(c) That the predominant [effective] nationality be the one that is taken into consideration.”

2. This approach is in line with that taken by Mr. F. V. García Amador in his third report on international responsibility submitted to the Commission, where he stated that: “In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties.”<sup>22</sup>

### United Kingdom of Great Britain and Northern Ireland

Draft article 6 provides that where there is dual nationality either State may exercise the right of diplomatic protection against any State other than the other State of nationality. This provision may extend beyond existing customary

international law. The United Kingdom may take up the claim of an individual who is a dual national, although in certain circumstances it may be appropriate for the claim to be taken in concert with the other State or States of nationality or to be taken solely by the other State of nationality. The proposed rule differs from the United Kingdom’s own treaty obligations, including article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, which allows the State with which the individual is most closely connected to bring the claim. Although not indicative as to the circumstances in which the United Kingdom will exercise diplomatic protection, it will normally only extend consular protection to a dual national in a third State where the individual is travelling using travel documents issued by the United Kingdom.

### Uzbekistan

1. Draft article 6, paragraph 1, should be worded as follows:

“The State with which a dual or multiple national is most closely connected may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.”

2. Such wording would help to avoid duplication of effort by the States of which the person is a national aimed at protecting his or her rights.

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

### Austria

In draft article 7, the Commission has opted for a progressive view in the case of dual nationality. Although that view is inconsistent with the suppression of the requirement of a genuine link in draft article 3, Austria is nevertheless in favour of this draft provision.

### Belgium

Belgium considers that the predominant nationality requirement cannot be satisfied merely by providing proof of its bona fide acquisition, as the commentary on the draft articles appears to suggest by referring to the practice of the United Nations Compensation Commission, which was established by the Security Council to provide for compensation for damages caused by Iraq’s occupation of Kuwait. Belgium takes the view that the practice of that Commission is justified by specific considerations that should not be applied wholesale to diplomatic protection. The reference to this practice does not therefore seem appropriate.

(See comments on draft articles 4–5 above.)

### El Salvador

El Salvador has certain observations to make regarding the scope of predominant nationality (effective nationality). In its view, this is a very broad term which may give rise to very subjective interpretations.

<sup>21</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 22.

<sup>22</sup> *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 61, art. 21, para. 4.

### Italy

1. Italy, with regard to the possibility of a State exercising diplomatic protection against another State, suggests the reintroduction of the genuine link criterion instead of that of the predominant nationality. The genuine and effective link criterion appears more in conformity with the elements outlined by the international jurisprudence.<sup>23</sup>

2. For the above reasons, Italy suggests that the final text of draft article 7 could be the following:

“A State of nationality may exercise diplomatic protection in respect of a person against a State of which that person is also a national if there is a genuine link between that person and the former State, both at the time of the injury and at the date of the official presentation of the claim.”

### Morocco

1. Draft article 7 raises the question of predominant nationality, but does not clearly specify the criteria used to distinguish predominant nationality from nationality pure and simple. Furthermore, this sort of hierarchy among nationalities compromises to some extent the sovereign equality of States, which is an immutable principle of both customary law and codified law.

2. It would therefore be more prudent in this case to refer to the concept of effective nationality as described in the *Nottebohm* case<sup>24</sup> rather than the concept of predominant nationality, which is not defined in international law, and remains a subjective and ambiguous formulation. This approach would at least have the merit of not challenging the principle of the sovereign equality of States and is, moreover, enshrined in international law.

### Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries strongly support the approach of the Commission in draft article 7. In the case of multiple nationality, the State of nationality that is “predominant” both at the time of the injury and at the date of the official presentation of the claim should be entitled to exercise diplomatic protection against another State of nationality of the person concerned. In the view of the Nordic countries, draft article 7 constitutes a codification of existing customary international law. It should be added, for the sake of full clarity, that this rule has no bearing on possibilities to provide consular assistance, which are not governed by the law pertaining to diplomatic protection.

<sup>23</sup> See the ICJ decision of 6 April 1955 in *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 25–26; the decision of the Italian–United States Conciliation Commission in the *Mergé* claim (10 June 1955), UNRIAA, vol. XIV (Sales No. 65.V.4), pp. 246–247, also in ILR (year 1955), p. 455. See also the awards of the Iran–United States Claims Tribunal of 29 March 1983 in case No. 157, *Nasser Esphahanian v. Bank Tejarat, Iran–United States Claims Tribunal Reports*, vol. 2 (Cambridge, Grotius, 1984), pp. 166 *et. seq.*, and in case No. 211, *Ataollah Golpira v. The Government of the Islamic Republic of Iran, ibid.*, pp. 174–175.

<sup>24</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 22.

### Qatar

In the view of Qatar, draft article 7 diverges somewhat from the traditional notion of diplomatic protection, which is essentially exercised by the State of nationality against a foreign State that has committed a breach of international law. Qatar also believes that the criterion of predominant nationality is inappropriate in this case, since the two or more States of nationality of the person concerned would have equal legal standing.

### United Kingdom of Great Britain and Northern Ireland

Draft article 7 sets out a general rule of international law that a State will not support the claim of a dual national against another State of nationality. The United Kingdom will not normally take up the claim of a national if the respondent State is the State of second nationality. However, exceptionally, it may take up the claim of a person against another State of nationality where the respondent State has, in the circumstances leading to the injury, treated that person as a British national. However, the United Kingdom considers that the test for “predominant nationality” included in draft article 7 requires further clarification.

### Uzbekistan

Draft article 7 uses the phrase “the nationality of the former State is predominant”. It is not clear in which cases nationality may be predominant. Evidently, there is a need to take into account that the predominance of one nationality or another depends on the extent to which a national is connected with one State or another (place of residence, work and so on).

### Draft article 8. Stateless persons and refugees

#### Austria

1. In the light of the increasing number of refugees, draft article 8 is of particular importance. With regard to stateless persons, the requirement of lawful and habitual residence sets a relatively high standard, but is certainly needed in order to prevent abuse of such rights.

2. As to the refugees addressed in paragraph 2, it may be asked whether the conditions for the exercise of diplomatic protection are not too restrictive since not only lawful and habitual residence in the State exercising the right of diplomatic protection is required, but also recognition by that State of the person as a refugee. It is conceivable for such a person to be lawfully resident in a State different from the one that has granted refugee status; this situation could occur within the European Union. In such a case, the refugee would not enjoy any diplomatic protection. It could therefore be asked whether that State would be entitled to exercise diplomatic protection where the person is lawfully and habitually resident once this person has been granted refugee status.

3. Contrary to the commentary to draft article 8, Austria proceeds from the assumption that the term “refugee” used in this draft provision is that of the Convention relating to the Status of Refugees. A State cannot be expected to attach two different meanings to that term.

It must also be borne in mind that the legal effect of the right to exercise diplomatic protection consists in the duty of the other State to accept a claim made under this legal title. An open meaning of the term “refugee”, as the commentary suggests, would certainly cause problems since the State to which the claims are addressed would depend on the definition of the term “refugee” by the claimant State. It is therefore advisable to modify the commentary accordingly.

### Belgium

1. Belgium is of the opinion that the concept of “refugee” should have the meaning assigned to it by international law.

2. With regard to paragraph 3 and in keeping with its comment on draft article 1, Belgium considers that, if the broad interpretation of diplomatic protection is to be retained, this paragraph should be deleted in order to allow for certain informal remedies against the State of nationality of the refugee. Otherwise, paragraph 3 creates an unjustified distinction between refugees in the State of residence and nationals of that State. In addition, the State whose protection is requested remains free to decide whether or not to grant it.

### El Salvador

The scope of the term “refugees” used here goes far beyond that which is provided for in the Convention relating to the Status of Refugees and its Protocol, which is the universally accepted definition. Although El Salvador does not oppose this usage, it should be carefully considered, as it would constitute a new definition which would need to be introduced and made compatible with the Convention.

### Guatemala

With regard to paragraphs 1–2 of draft article 8, Guatemala takes the view that an exception should be made to the continuous nationality rule established in draft article 5, paragraph 1, in respect of a stateless person or a refugee protected by virtue of paragraphs 1–2 of draft article 8 if, between the time of the injury and the date of the official presentation of the claim, that person, without being covered by draft article 5, paragraph 2, acquires the nationality of the protecting State.

### Morocco

Although the provision is not part of customary international law or codified international law, but rather represents progressive development of the law, it raises no real difficulty given that, on a practical level, the status of that category of persons is of limited duration.

### Netherlands

Draft article 8 is one of the few progressive elements in the draft articles. The Netherlands considers this draft article to be a step in the right direction and appreciates the arguments given by the Commission in paragraph (7) of the commentary.

### Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

1. The Nordic countries are particularly pleased that the Commission has drafted a provision on diplomatic protection on behalf of stateless persons and refugees in certain cases. Draft article 8 deviates from earlier opinions to the effect that a State should exercise diplomatic protection only on behalf of its nationals. It is highly important to be able to offer diplomatic protection to these vulnerable categories of persons.

2. The Nordic countries support the element of flexibility that appears in the commentary to draft article 8, where it follows that the term “refugee” is not necessarily limited to those persons who fall within the definitions in the Convention relating to the Status of Refugees and its Protocol. The commentary leaves it up to a State to “extend diplomatic protection to any person that it considered and treated as a refugee”.<sup>25</sup> It is the position of the Nordic countries that a State may exercise diplomatic protection on behalf of persons fulfilling the requirements of territorial connection to the State exercising diplomatic protection, and who in that State’s judgement clearly are in need of protection without necessarily formally qualifying for status as a refugee.

3. A particular question may be raised with regard to the suggested temporal requirement for the exercise of diplomatic protection in that the stateless person or refugee concerned must have lawful and habitual residence in the State exercising diplomatic protection at the time of the injury and at the date of the official presentation of the claim. Such a requirement would, in the view of the Nordic countries, appear to set an excessively high threshold. In many cases where there is a need of effective diplomatic protection, the injury will in fact have occurred prior to the entry of the person concerned into the territory of the State exercising diplomatic protection.

4. Thus, the Nordic countries would suggest a consideration of an adjustment of the suggested criteria. Rather than criteria of “lawful and habitual residence” in draft article 8 criteria of “lawful stay” might be considered. This is the exact wording used in article 28 of the Convention relating to the Status of Refugees with regard to the issuing of travel documents to refugees.

### Panama

Panama believes that within the traditional system of diplomatic protection, draft article 8, in particular, on diplomatic protection for stateless persons and refugees, is not only relevant and justified, but also contributes effectively to the progressive development of international law. Indeed, the adoption of the same norm of protection for both stateless persons and refugees, for which the connecting factor is those persons’ lawful and habitual residence in a given State—provided that other additional requirements (family ties, centre of interests, occupational activity and the like) indicating a genuine link between the individual and the State are met—is the appropriate solution for both categories of persons.

<sup>25</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 28–29, para. (8) of the commentary to article 8.

### Qatar

Paragraph 2 restricts the granting of legal status to a refugee by the protecting State without taking account of how the term “refugee” is defined under international law. Recently, there have been large waves of migration for a variety of reasons, and Qatar considers that this paragraph should be studied more closely with a view to establishing objective criteria for the protection of refugees in accordance with international norms.

### United Kingdom of Great Britain and Northern Ireland

In relation to draft article 8, the protection of stateless persons and refugees is not a matter which the United Kingdom regards as falling within the scope of the concept of diplomatic protection as that is understood in current international law. The United Kingdom considers that the provisions of draft article 8 are *lex ferenda*. Whether the United Kingdom would exceptionally, for example on humanitarian grounds, be prepared to make representations or take other action on behalf of stateless persons or refugees would depend on the circumstances of the case and would be in its own discretion, but it would not *sensu stricto* be an exercise of diplomatic protection. In any event, any such representations would not be conclusive or indicative of the status of the individual as a refugee or national of the United Kingdom or the prospect of such status being granted.

(See comments on draft articles 2–3 above and 15 below.)

### United States of America

(See Other comments and suggestions, below.)

### Uzbekistan

1. In paragraphs 1–2, the term “lawfully and habitually resident in that State” should be replaced by “lawfully and permanently resident in that State”. In those paragraphs, the phrase “habitually resident” may be interpreted in two ways: either as customarily resident or as permanently resident. Uzbekistan therefore proposes that it should read “permanently resident”.

2. In paragraph 2, the words “and has been granted asylum” should be added after the words “as a refugee”.

## CHAPTER III. LEGAL PERSONS

### Draft article 9. State of nationality of a corporation

#### Austria

1. Draft article 9 raises major problems by requiring the fulfilment of two conditions: the registered office on the one hand and the seat of the management or some similar connection on the other. Such a requirement for the existence of two criteria would certainly deprive some corporations of diplomatic protection. Nevertheless, as the commentary indicates, the two criteria are those to which ICJ referred in its judgment on the *Barcelona Traction*

case.<sup>26</sup> However, it is interesting to note that the Commission referred, in this context, to some sort of genuine link in conformity with the ruling of ICJ in the *Barcelona Traction* case whereas in the case of natural persons no such link is required, contrary to the *Nottebohm* case.<sup>27</sup>

2. It must nevertheless be emphasized that in certain situations to which ICJ also referred, other criteria, such as that of control over the corporation, could apply: according to draft article 18 such exceptions necessarily need a conventional base as a *lex specialis*. It could be asked whether the *lex specialis* rule should be confined only to treaties or could also be based on customary international law, as it is imaginable that a State considers itself entitled to apply the concept of control in its claims against a State, if both States use this concept of control in their established practice in order to determine the nationality of corporations. Austria would therefore suggest softening the rigidity of this rule reflected in draft article 9.

#### El Salvador

El Salvador wishes to know what would happen in the case of a corporation which establishes its registered office or headquarters in a State other than the State in which it was incorporated. Would there be no possibility of diplomatic protection for such corporations?

#### Guatemala

1. Draft article 9 appears too elliptical. This can be rectified by dividing it into two paragraphs, the first of which would be paragraph 1 of the text of draft article 17 that appears in footnote 71 of the report of the Commission on its fifty-fifth session.<sup>28</sup> The second paragraph would be a slightly modified version of the current text of draft article 9.

2. If the above proposal is accepted, draft article 9 would read as follows:

“1. A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.

“2. 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.”

3. However, there is a problem with paragraph 2 above. The problem arises when, as commonly occurs, a corporation has its registered office or the seat of its management or some similar connection in one State, but was formed under the law of another State. In this case, it would seem that no State can exercise diplomatic protection in respect of the corporation. The difficulty could be resolved by replacing the “and” in paragraph 2 with “or”. However, if that change is made in the hypothetical case considered,

<sup>26</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3.*

<sup>27</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 4.*

<sup>28</sup> *Yearbook ... 2003, vol. II (Part Two), p. 25, para. 70.*

two States would be entitled to exercise diplomatic protection. To resolve this new problem, a new third paragraph should be added, which would read as follows:

“3. 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.”

4. At first sight, the other issues of concern to Guatemala in relation to corporations appear to be merely linguistic, but, in reality, they go deeper.

5. Anyone with even the most rudimentary knowledge of Anglo-American law knows that under that system the term “corporation” does not apply only to what in French and Spanish are called, respectively, *société anonyme* and *sociedad anónima*, a term found in the original French version of the ICJ judgment in the *Barcelona Traction* case<sup>29</sup> and which corresponds, in the English version of the judgment, to the term “limited company whose capital is represented by shares”.

6. However, Guatemala is inclined to believe that the word “corporation” in the English version of the draft articles does not cause problems. It is clear that, in that version, that term has the meaning most commonly assigned to it in English-speaking countries, that is, limited company. However, it might be as well to include in the English version of the final text a footnote indicating that in that version the word “corporation” should be understood to mean “limited company whose capital is represented by shares”.

7. Nevertheless, with regard to the French and Spanish versions of draft articles 9–12 inclusive, Guatemala is of the opinion that, if those articles are to correspond with the English text, the words “*société*” and “*sociedad*” should be replaced by “*société anonyme*” and “*sociedad anónima*” respectively.

### Italy

1. Italy doubts that the granting of nationality to a corporation for the purposes of diplomatic protection should be subject both to the place of incorporation and to the place of the registered office (*siège social*, in the French text) or to the place of its management or some similar connection. It is true that the ICJ decision in the *Barcelona Traction* case<sup>30</sup>—a decision that is the unique precedent to which the Commission refers—takes into account simultaneously the two connecting factors. However, the Court was dealing with a case wherein the two connecting factors coincided in fact. Moreover, the Court also held that “in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance”.<sup>31</sup> Aside from *Barcelona Traction*, what worries Italy is the case wherein a corporation is incorporated in one State and then transfers its registered office or management

office to another State. The case is not a theoretical one. For instance, article 8 of Council of the European Union regulation of 8 October 2001 ((EC) No. 2157/2001), on the statute for a European company,<sup>32</sup> deals exactly with such a case. It is difficult to imagine what the Court would have decided in 1970 had it been confronted with a corporation availing itself of the possibilities addressed by article 8 of the European Community regulation!

2. There is no doubt that if the incorporation takes place in a State different from the one to which the corporation is attached on the basis of the other connecting factors envisaged by draft article 9, the simultaneous application of the criterion of the State of incorporation and the other criteria results in the lack of any diplomatic protection. From the comments to draft article 9, it is not clear to what extent the Commission has considered this possibility. In any case, Italy suggests that, in order to fill such a gap, draft article 9 should not consider the place of incorporation for the purpose of diplomatic protection; rather, one among the other connecting factors envisaged by draft article 9 should be considered. Although this may lead to a situation in which more than one State is considered for the purpose of diplomatic protection, it should be preferred to one in which no State can be considered as the State of nationality. Obviously, coordination among different States of nationality could be achieved by applying the criteria envisaged by draft article 6 for natural persons.

### Mexico

Mexico recognizes, in reading the text, that the comments it has contributed in the past few years concerning the determination of the nationality of corporations for purposes of the exercise of diplomatic protection have been taken into account by the Commission.

### Morocco

As it is worded, the draft article uses the (specified) criteria to determine the State of nationality of the corporation. It should nevertheless be noted that the draft article does not specify which State has the right to exercise diplomatic protection with respect to a corporation formed in one State which has had its registered office transferred to another State.

### Netherlands

1. The Netherlands considers that the Commission should research the draft article more thoroughly and that taking into account comparative corporate law and current economic developments would be useful. As the draft article now stands, it excludes the possibility of corporations having dual nationality. In this respect, the Commission’s attention may be drawn to corporations with dual nationality in the Netherlands like Fortis and Unilever.

2. The Netherlands suggests deleting the expression “or some similar connection” because it is too vague. The

<sup>29</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 37, para. 50.*

<sup>30</sup> *Ibid.*, p. 42, para. 70.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Official Journal of the European Communities*, No. L 294 (10 November 2001), p. 4.

criteria used in the *Barcelona Traction* case<sup>33</sup> have already been sufficiently adapted in this draft article to fit into different national legal systems. Adding this criterion only creates confusion.

### **Qatar**

1. Qatar considers, as a matter of principle, that any corporation established under the law of a State must register and have the seat of its management in that State in order for that State to exercise the right of diplomatic protection of said corporation. The draft article is therefore both logical and practical, and obviates, as far as possible, the need to explore the issue of a multiple nationality of corporations.

2. The phrase “or some similar connection” at the end of the draft article is vague, and could be open to interpretation in the future. It might be preferable, therefore, to consider deleting that phrase or replacing it with one that is more precise.

### **United Kingdom of Great Britain and Northern Ireland**

Draft article 9 appears to introduce a new requirement for the exercise of diplomatic protection on behalf of a corporation: the existence of another connecting factor, additional to the place of incorporation. No such requirement exists under customary international law. ICJ in the *Barcelona Traction* case found that customary international law did not require a “genuine connection”<sup>34</sup> between the State and the corporation for the State to exercise diplomatic protection in respect of the corporation. Moreover, the United Kingdom concurs that the concept of “genuine connection” advanced by ICJ in relation to natural persons in the *Nottebohm* case<sup>35</sup> has no application in the realm of diplomatic protection of corporations. In determining whether to exercise the right of diplomatic protection, the United Kingdom may consider whether the company has in fact a real and substantial relationship with the United Kingdom. However, this is as a matter of policy and not the result of any legal requirement.

### **Uzbekistan**

The term “State of nationality of a corporation” should be replaced by “State of origin of a corporation”, and a definition of that concept should be inserted in a draft article entitled “Use of terms” (see other comments and suggestions below). Draft article 10 and draft article 11 (b), require the same changes.

*Draft article 10. Continuous nationality of a corporation*

### **Austria**

With respect to draft article 10, the commentary characterizes the case of State succession as one that does not need to be addressed because of its exceptional nature. Recent developments, however, have proved a need for

regulation similar to that concerning natural persons. Austria cannot see a reason why in the case of companies no regulation is sought whereas in that of natural persons such a situation is covered. In regard to the application of the continuity rule to corporations in the situation of State succession, the following problems could arise: in most cases of State succession, the internal legal order of the predecessor State continues to exist as the law of the newly established State. Hence, corporations incorporated under the law of the predecessor State simply continue to exist under the laws of the new State. However, at the same time, the corporations acquire a new nationality. In such circumstances, the existing wording of draft article 10 could result in the loss of the benefit of diplomatic protection.

### **Netherlands**

The comments on draft article 5 above also apply to draft article 10.

### **Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)**

Consistent with the view (expressed in relation to draft article 5 (see above)), the Nordic countries support the approach taken by the Commission when applying the same solution in draft article 10 also with regard to corporations. The exception in draft article 10, paragraph 2, whereby a State may continue to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury has ceased to exist, appears to be sound.

### **United Kingdom of Great Britain and Northern Ireland**

With regard to protection in situations where a corporation has ceased to exist, as provided for in draft articles 10, paragraph 2, and 11 (a), the United Kingdom sees little basis for distinguishing the State which may exercise protection in terms of whether the corporation has ceased to exist as a result of the injury. In general, where a company has ceased to exist for whatever reason, the State of incorporation may have little incentive to protect the capital of shareholders that are not its nationals, while the State of nationality of the shareholders will usually have a stronger interest in doing so.

### **United States of America**

*(With respect to paragraph 1, see comments to draft article 5 above.)*

1. The commentary accompanying the draft articles acknowledges that the rule in paragraph 2 does not reflect customary international law, but rather is an attempt to address difficulties that may arise when the continuous nationality rule is applied to extinct corporations. However, the commentary does not provide a basis for assessing the likelihood these difficulties would arise, leaving an insufficient policy basis for draft article 10.

2. The United States disagrees with the Commission that the diplomatic protection of extinct corporations requires

<sup>33</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 42, para. 70.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 23.

an exception to the continuous nationality rule. To begin with, 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.<sup>36</sup> Many municipal systems allow for corporations to continue to raise and defend claims that arose during corporate life for a finite period of time after dissolution, meaning that legal personality persists until that period expires.<sup>37</sup> Thus, the problem of espousing claims of extinct corporations would arise infrequently, as the vast majority of claims can be considered while the corporation maintains a legal personality.

3. After the corporation ceases to exist, however, there is a salient policy reason that may oppose the exception proposed. The exception ignores the municipal law policy reasons for allowing the legal personality of corporations to lapse. Municipal survival and corporate wind-up statutes include a finite wind-up period to allow those involved with a corporation to obtain the benefits of finality, knowing that after the wind-up period has ended claims for and against the corporation will cease.<sup>38</sup> Draft article 10, paragraph 2, threatens to undermine this finality, and the resource allocation decisions that accompany it, by allowing for claims involving the corporation to persist indefinitely after the life of the corporation has ended.

### Uzbekistan

(See comments to draft articles 5 and 9 above.)

<sup>36</sup> ICJ explained in *Barcelona Traction* that the company there had not “ceased to exist” because it remained free to exercise its legal rights in Spanish courts, its financial problems notwithstanding. As the Court stated, “a precarious financial situation cannot be equated with the demise of the corporate entity ... the company’s status in law is alone relevant” (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J Reports 1970*, p. 41, para. 66).

<sup>37</sup> In most jurisdictions in the United States, for example, corporations may sue and be sued for up to three years after dissolution (Model Business Corporation Act, chap. 14.07 (2002)); see also the Delaware Code, Title 8: Corporations, chap. 278 (2005) (three-year period for claims after corporate dissolution). The Model Business Corporation Act and the Delaware Code are considered the reference codes for United States corporation law. Other States allow claims that arose during the life of the corporation for periods ranging from two years after dissolution to forever, subject to the statute of limitation for the claim. See 2005 Illinois Code-805 ILCS 5/ Business Corporation Act of 1983, sect. 12.80 (claims for or against corporation that arose prior to dissolution may be pursued for up to five years after dissolution); New York Business Corporation Law, para. 1006 (a) (4) (any claims for or against corporation that arose prior to dissolution enforceable with no time limit); Pennsylvania Consolidated Statutes, part 15, para. 1979 (two-year limit to claims for or against corporations after dissolution). Other nations have similar laws to address the legal personality of a corporation following dissolution. In the United Kingdom, corporations may sue or be sued for up to two years after dissolution with court permission (Companies Act 1985 (c. 6), sect. 651). In Canada, court permission is also required before a dissolved corporation may sue or be sued, although no time period appears to limit that right (Canada Business Corporations Act, R.S.C. 1985, chap. C-44, para. 209). The French Commercial Code permits claims to be considered for and against corporations for up to three years after dissolution (art. L.231-1–237-31).

<sup>38</sup> It is for this reason that, at least in the United States, claims that remain unresolved during the corporate wind-up period are generally abated when that period ends (Fletcher, *Fletcher Cyclopaedia of the Law of Private Corporations*, para. 8144.40).

### Draft article 11. Protection of shareholders

#### Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

1. With regard to the exercise of diplomatic protection on behalf of shareholders, the Nordic countries are content that the Commission has ensured overall consistency with the case law of ICJ, based on the *Barcelona Traction* case.<sup>39</sup>

2. The ICJ judgment of 1970 strikes a fair balance between the interests of the company and the interests of the shareholders, and enhances legal clarity. The Nordic countries agree against overturning the basic rule that diplomatic protection on behalf of a company primarily be made by the State of nationality of the company. Moreover, inability to claim protection from their own government is perhaps one of the commercial risks that shareholders undertake when buying shares in foreign companies.

#### United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom broadly supports draft articles 11–12 regulating the protection of shareholders in a corporation. As reflected in the views of the majority in the *Barcelona Traction* case,<sup>40</sup> international law recognizes two exceptions to the general rule that the State of nationality of a shareholder does not possess a separate right to exercise diplomatic protection: first, when the corporation is defunct; and secondly, where the State of incorporation itself causes the injury.

2. Draft article 11 contemplates the possibility that multiple claims may emerge based on the existence of shareholders of several nationalities, thus entitling several States to exercise diplomatic protection. Where the United Kingdom may be entitled to make such a claim, it would, as a matter of practice rather than law, normally seek to do so in concert with other States. It may also refrain from making representations unless the States whose nationals hold the bulk of the share capital will support the United Kingdom in making representations. More generally, the United Kingdom urges the Commission to give greater consideration to situations involving multiple claims, including the need to coordinate claims.

3. Draft article 11 is restricted to the interests of a shareholder in the corporation, based on the clear intention of ICJ that the decision in the *Barcelona Traction* case was to apply only to corporations with limited liability whose capital was represented by shares. Consideration should be given to the interests of a corporation’s investors other than its shareholders, such as debenture holders, nominees and trustees. The United Kingdom’s claims rules (see the annex to the present report) permit the United Kingdom to intervene where a United Kingdom national has an interest in a company, whether as a shareholder or otherwise.

<sup>39</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J Reports 1970*, p. 3.

<sup>40</sup> *Ibid.*

*Subparagraph (a)***Austria**

As to draft article 11 (a), it may be asked why the wording only refers to “State of incorporation” instead of nationality, as is done in the other relevant draft articles taking into account the double criteria required for nationality. The effect of this paragraph is very broad, since its wording addresses situations where a company has the nationality of State A and is terminated in that State “according to the law of the State of incorporation”, but is injured by State B. If shareholders of the company have the nationality of States C and D, which could give rise to a multiplicity of claims, the restriction of “a reason unrelated to the injury” makes very little sense, since the State where the company is terminated differs from the injuring State. This clause is useful only if this provision is meant also to address corporations that were the national of the injuring State at the time of the injury and that, as a result of the injury, have ceased to exist according to the law of that State. In order to be as clear as necessary, Austria suggests formulating the two issues in two separate paragraphs.

**El Salvador**

With regard to draft article 11 (a), which addresses the case of the protection of shareholders when the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury, but does not provide for the case of shareholders of a corporation that ceases to exist as a result of the injury, it would appear that the more the rights of shareholders are injured, the less their States of nationality can exercise diplomatic protection.

**Norway, on behalf of the Nordic countries  
(Denmark, Finland, Iceland, Norway and Sweden)**

The Nordic countries support, at the same time, the exceptions suggested in draft article 11 (a)–(b).

**United Kingdom of Great Britain  
and Northern Ireland**

As the United Kingdom has observed, it agrees that the State of nationality of a shareholder may intervene on behalf of the shareholder where the corporation is defunct. However, the United Kingdom is concerned that the requirement that the claim be unrelated to the reason that the corporation has been rendered defunct narrows unduly the exception acknowledged in the *Barcelona Traction* case. The right of the State of nationality of the shareholders should not be contingent upon why or how the corporation ceased to exist.<sup>41</sup>

(See comments on draft article 10 above.)

**United States of America**

The United States strongly urges the Commission to delete draft article 11 (a), because it creates the anomalous

situation of granting States of shareholders a greater right to espouse claims of a corporation than the State of incorporation itself. At least under United States law, shareholders do not have any right to assert the expired rights of a dissolved corporation,<sup>42</sup> because the corporation is the primary vehicle for protecting its own rights. It is for that reason that ICJ in *Barcelona Traction*<sup>43</sup> held that the State of incorporation should exercise diplomatic protection with respect to injuries to the corporation. The commentary provides no justification for creating a category of claims where States of shareholders can espouse corporate claims and the State of incorporation cannot. Owing to this rule’s inconsistency with basic corporate law principles, it should be deleted. Doing so would in no way infringe upon the right of States of shareholders to espouse claims for the direct injuries suffered by shareholders, of course, which is permitted by draft articles 2–3.

*Subparagraph (b)***Austria**

Draft article 11 (b), raises the question of the injury since it is not clear which kind of injury is meant in this context, in particular, whether it should be understood in the sense of draft article 1 that speaks of “injury to that national arising from an internationally wrongful act of another State”. Read in conjunction with the introductory phrase, it becomes clear that the injury referred to in draft article 11 (b) must be inflicted upon the company. Since the company, however, has the nationality of the State causing “injury”, this injury could hardly be one “arising from an internationally wrongful act of another State”. The commentary does not provide an answer to this question; in order to remove any doubts on this issue, it would be advisable to clarify this issue in the commentary.

**Belgium**

Belgium takes the view that the restrictive condition imposed on the diplomatic protection of shareholders, whereby the incorporation of the corporation under the law of the State responsible for causing injury is required by the latter as a precondition for doing business there, does not reflect a rule of customary international law. This condition should therefore be removed.

**Netherlands**

1. The draft article seems to have stirred controversy in the Sixth Committee. The Commission has attempted to codify the two exceptions as formulated in the *Barcelona Traction* case.<sup>44</sup> The Netherlands agrees with the

<sup>42</sup> Fletcher, *op. cit.*, para. 8144.40, describing how United States law does not permit shareholders to raise expired rights of a dissolved corporation. The United States is generally one of the more permissive States regarding shareholder actions on behalf of the corporation, suggesting other States may not permit shareholder suits to enforce the rights of deceased corporations either. See Grossfeld, “Management and control of marketable share companies”, p. 107, explaining that the United States is generally more favourable than other States towards representative suits by shareholders.

<sup>43</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

<sup>44</sup> *Ibid.*

<sup>41</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

Commission that the State of nationality of the shareholder in cases of Calvo corporation would be entitled to exercise diplomatic protection.

2. Subparagraph (b) reads “alleged to be responsible for causing injury”. In draft article 14, paragraph 2, the wording is different: “alleged to be responsible for the injury”. The wording of the draft articles should be consistent.

**Norway, on behalf of the Nordic countries  
(Denmark, Finland, Iceland, Norway and Sweden)**

(See comment to subparagraph (a) above.)

1. A State should not be allowed to require foreign interests to incorporate under local law as a condition for doing business in that State and then plead such incorporation as the justification for rejecting the exercise of diplomatic protection from the State of nationality of the foreign interests.

2. According to the commentary to draft article 11 (b), this exception applies to cases where the requirement of incorporation under local law as a precondition for doing business is a formal requirement contained in the local legislation. There are, however, as a part of the progressive development of international law, good reasons to extend this exception also to cases where the requirement of incorporation is not a formal one, but follows from pressure of an informal or political nature on the foreign interests. The Nordic countries suggest that the existing wording of draft article 11 (b), “was required by it as a precondition for doing business there” should also cover such requirements of an informal nature. This should then be reflected in the commentary to draft article 11 (b).

**United Kingdom of Great Britain  
and Northern Ireland**

The United Kingdom considers that the right of the State of nationality of the shareholders to exercise protection should be allowed irrespective of the reasons for incorporation in the State of incorporation. For example, its own claims rules (see the annex to the present report) provide that where a British national is a shareholder in a corporation incorporated elsewhere and the State of incorporation injures the corporation, the United Kingdom may intervene to protect the interests of the British shareholder. Thus, in the view of the United Kingdom, draft article 11 (b), is unduly restrictive.

**United States of America**

1. The United States has serious concerns about draft article 11 (b). As it has previously explained to the Commission, the proposed exception lacks support in customary international law. In all of the cases provided by the Commission as evidence for the exception, there was in fact a special agreement between two States granting a right to shareholders to claim compensation, or an agreement between the injuring State and its national corporation granting compensation to the shareholders.<sup>45</sup> As a

<sup>45</sup> *Delagoa Bay Railway Co.* (Moore, *A Digest of International Law*, p. 647), resolved through agreement between Portugal, the United Kingdom and the United States, to refer to the international arbitration question of compensation owed United Kingdom and

result of those agreements, the above-mentioned cases provide little support for the existence of a customary international law rule allowing States to espouse claims of shareholders against the State of incorporation where incorporation was mandated for doing business in the State. Likewise, ICJ in *Barcelona Traction*<sup>46</sup> had no occasion to consider the validity of the exception, as the injuring State in that case was not the State of incorporation.

2. Without this customary international law support, the United States has concerns about whether there is a sound public policy basis for this exception. As it has previously stated, this exception would create a regime where shareholders of corporations incorporated in a State have greater rights to seek diplomatic protection of their claims in that State than shareholders of foreign-owned corporations, who would have to rely on the corporation’s State to pursue claims. It is not clear that such a result is just.

**Uzbekistan**

(See comment to draft article 9 above.)

*Draft article 12. Direct injury to shareholders*

**United Kingdom of Great Britain  
and Northern Ireland**

(See comments on draft article 11 above.)

**United States of America**

The United States believes that draft article 12 would codify customary international law by stating that the State of nationality of shareholders is entitled to exercise diplomatic protection on behalf of shareholders where they have suffered direct losses. That statement is superfluous here. Draft articles 2–3 would clarify that a State has the right to exercise diplomatic protection in respect to claims of its nationals where the other requirements of the draft articles are met. Since shareholders are nationals, like all others, there is no reason to adopt a separate article to note that their claims are permissible. Rather, if the Commission feels it is necessary, the commentary to draft articles 2–3 should include a statement that shareholders too are nationals whose injuries are eligible for diplomatic protection.

*Draft article 13. Other legal persons*

**Austria**

Austria emphasizes the importance of draft article 13 in view of the existence of different kinds of legal persons under Austrian national law.

United States shareholders due to Portuguese expropriation of a Portuguese company; *Mexican Eagle (El Aguila)* (Whiteman, *Digest of International Law*, p. 1274, dispute between Mexico and the United Kingdom over Mexican nationalization of oil fields owned by Mexican corporations controlled by British interests resolved through settlement between Mexico and the company; *Romano-Americana* (Hackworth, *op. cit.*, p. 844), dispute settled by Romanian offer to pay Romanian oil company compensation for assets seized; *El Triunfo Company* (1902) UNRIIAA, vol. XV (Sales No. 1966.V.3), p. 467 (protocol between El Salvador and the United States agreed to refer to international arbitration question of compensation owed United States shareholders for El Salvadoran expropriation of assets of El Salvadoran company).

<sup>46</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3.*

### El Salvador

El Salvador would recommend that the draft article should also include a reference, where applicable, to draft articles 11–12, since those other legal persons might also be natural persons comparable to shareholders.

### Guatemala

1. In civil law systems, there exists a type of hybrid commercial company halfway between the corporation or limited company—whose capital is represented by shares that mark the limits of its shareholders' liability and are freely transferable—and the partnership, whose shareholders are fully liable for the company's debts and cannot easily transfer their portion of its assets. This intermediate type of commercial corporation is the limited liability company—*société à responsabilité limitée* in French and *Gesellschaft mit beschränkter Haftung* in German. The shareholders of companies of this type, which apparently also exist in at least some countries governed by common law systems under the name of limited liability companies, are similar to the stockholders of corporations or limited companies in that they are liable for the company's debts up to but not exceeding the level of their equity contribution. However, the capital of the limited liability company is not represented by shares of stocks.

2. There is no doubt that the limited liability company falls within the scope of draft article 13, and consequently draft articles 9–10 are applicable to it, as appropriate. However, from a literal standpoint, draft articles 11–12 are not applicable, because they are not mentioned in draft article 13. Nevertheless, Guatemala takes the view that draft articles 11–12 should be applicable to limited liability companies and their shareholders.

3. Accordingly, in draft article 13, “9 and 10” should be replaced by “9 through 12 inclusive” and, in paragraph (4) of the commentary to draft article 13, explicit

mention should be made of the limited liability company. It would thus be clear that, for the purposes of draft articles 11–12, shareholders of a limited liability company would be equivalent to shareholders of a corporation or limited company.

### Netherlands

The words “engaged in worthy causes” in paragraph (4) of the commentary are unnecessary and should be deleted. The Netherlands believes that the discretionary authority of the State to exercise diplomatic protection provides sufficient scope.

### Qatar

Qatar should like to draw the Commission's attention to the fact that the distinguishing feature of non-governmental human rights organizations, which would be covered by draft article 13, is independence. Qatar fears that the exercise of the right of diplomatic protection by the State of such an organization could undermine that independence, adversely affecting the organization's relations with its international milieu.

### United Kingdom of Great Britain and Northern Ireland

The United Kingdom considers this to be a proposal for the development of the law relating to diplomatic protection, since accepted principles of customary international law are currently restricted to consideration of the nationality of corporations. Many forms of entity are not currently considered to have separate legal personality within the United Kingdom legal system. The previous practice of the United Kingdom, at least in relation to firms, partnerships and associations, has been to base nationality on the nationality of the individuals or partners creating the legal entity. The United Kingdom supports clarification of the law in this area, but considers that further clarification, perhaps in the commentary, would assist.

## PART THREE

### LOCAL REMEDIES

#### *Draft article 14. Exhaustion of local remedies*

#### Mexico

Mexico is particularly interested in the application of the exhaustion of local remedies rule. To ensure the correct application of that rule, it is essential that the exceptions to it should be codified. As already noted in its comments on the Commission's reports since 2003, Mexico is in general agreement with the formulation of both the rule and the exceptions to it in the draft articles currently under review.

#### Netherlands

1. The Netherlands suggests inserting the following passage in the commentary:

“No prior exhaustion of local remedies is required for diplomatic action stopping short of bringing an international claim. See *Restatement (Third) of the Foreign Relations Law of the United States (1987)*, paragraph 703, comment *d*: ‘The individual's failure to exhaust [domestic] remedies is not an obstacle to informal intercession by a state on behalf of an individual.’”

2. The Netherlands also believes that the commentary must make clear whether any distinction is intended between “rule” and “principle”.

3. Finally, the Netherlands notes that the commentary is inconsistent in respect of “claim”. Paragraph (3) is somewhat confusing. When read in conjunction with paragraph (5) of the commentary to draft article 1, and paragraph (6) of the commentary to draft article 5, it is

unclear whether “claim” must be understood as referring only to a formal claim.

#### Paragraph 1

##### Austria

(See General remarks above.)

##### United States of America

1. Draft article 14, paragraph 1, states that an international claim cannot be brought for an injury suffered by a national unless “the injured person has, subject to draft article 16, exhausted all local remedies”. In the commentary accompanying draft article 14, the Commission explains that the article seeks to capture the exhaustion rule provided in the *ELSI* case, which requires that for a “claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”.<sup>47</sup>

2. The United States agrees that the ICJ decision in *ELSI* correctly captures the customary international law exhaustion requirement. The United States believes, however, that draft article 14, paragraph 1, should be revised to state:

“A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before local remedies have been exhausted, subject to draft article 16.”

3. This formulation is a better expression of customary international law than the current draft article because, consistent with *ELSI*, it permits an entity other than the “injured person” to satisfy the exhaustion requirement so long as the essence of the claim was exhausted in a municipal court. In *ELSI*, the United States brought a claim against Italy alleging that Italy had violated the Treaty of friendship, commerce and navigation<sup>48</sup> between Italy and the United States through its requisition of the *ELSI* plant and assets. It was undisputed that *ELSI*, a wholly owned Italian subsidiary of Raytheon and Machlett, United States corporations, had challenged the legality of Italy’s seizure of its plant and assets in an Italian court, without ultimate success. As a preliminary matter, however, Italy argued that the United States could not assert a claim on behalf of Raytheon and Machlett because those American companies had not challenged the seizure separately in Italian courts, alleging that the seizure was a violation of the Treaty.

4. ICJ rejected the suggestion by Italy that the *ELSI* suit could not satisfy the exhaustion of the local remedies requirement. The Court noted that the substance of the claim brought by *ELSI*, challenging the legality of the requisition given its causal link to the *ELSI* bankruptcy, was the same as that brought by the United States

to ICJ. Under those circumstances, the Court held that “the [exhaustion of] local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties”.<sup>49</sup> In other words, the Court acknowledged that a claim could be exhausted for international law purposes when the essence of the claim was considered by municipal tribunals, irrespective of whether the same person or entity pursuing the municipal claim was being diplomatically protected.<sup>50</sup> The proposed reformulation better expresses the holding in *ELSI* by removing a requirement that the “injured person”, who is, presumably, the subject of diplomatic protection, be the party exhausting local remedies.

##### Uzbekistan

1. In accordance with draft article 14, the exercise of the right of a natural or legal person to protection from the State requires the “exhaustion” of local remedies and, that being the case, it would take a certain length of time for the person to receive protection, taking into account the different legal procedures in individual countries. That in turn might lead to a reduction in the effectiveness of diplomatic protection.

2. There is a need to indicate means of securing protection besides the “exhaustion” of local remedies and to amend draft article 16 accordingly.

#### Paragraph 2

##### Austria

Austria understands the meaning of draft article 14 in a sense that excludes the resort to the international courts or tribunals for the protection of human rights and fundamental freedoms from the definition of “local remedies”. Consequently, it is not excluded that a State exercise its right to diplomatic protection simultaneously with the institution of proceedings by an individual against that State before the European Court of Human Rights. That situation can be explained by recognizing that there would be two different disputes that could be addressed in two different forums.

##### Mexico

1. Mexico cannot pass over in silence the definition of the term “local remedies” included by the Commission in paragraph 2 of draft article 14. It covers both judicial and administrative remedies open to an injured person before the courts, whether ordinary or special, of the State alleged to be responsible for the injury.

2. Mexico is pleased to observe in this regard that the Commission has taken into account the ICJ judgment in

<sup>49</sup> See footnote 47 above.

<sup>50</sup> Indeed it was in *ELSI*. The Court did consider whether Italian law afforded the American companies a unique remedy not available to *ELSI* that they were obligated to exhaust. The Court concluded that Italy did not prove the existence of any such remedy, and thus held that remedies were exhausted, allowing the Court to proceed to the merits (*ibid.*, pp. 46–48, paras. 60–63).

<sup>47</sup> *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 46, para. 59.

<sup>48</sup> Signed in Rome on 2 February 1948 (United Nations, *Treaty Series*, vol. 79, No. 1040, p. 171).

the *Avena* case,<sup>51</sup> in paragraph (6) of its commentary on draft article 14 concerning the exhaustion of local remedies. As the Commission states, while it is true that administrative remedies must also be exhausted, this applies only to those that may result in redress. The injured person is not required to petition the executive power of the State where he exhausts local remedies to grant him relief through the exercise of discretionary powers, since local remedies do not include remedies as of grace, such as executive clemency or a request for a pardon.

#### Uzbekistan

1. It seems necessary to insert draft article 14, paragraph 2, in a draft article entitled “Use of terms” (see other comments and suggestions below) in order to define the concept of “local remedies”.

2. This paragraph also needs revision. To make the text clearer the following wording could be used:

“‘Local remedies’ means legal remedies which are open to an injured person. This may include recourse to judicial or administrative courts or ordinary or special bodies of the State alleged to be responsible for the injury.”

#### Draft article 15. *Category of claims*

#### Austria

1. Austria wonders whether the title of this provision corresponds to the substance of the draft article since the gist of this draft article is connected with so-called mixed claims and the question whether a State claims direct injury where no exhaustion of local remedies is required or indirect injury where the exhaustion is required. The recent ICJ decision in the *Avena* case<sup>52</sup> has clearly exposed the problem of this distinction. That judgment only highlights the necessity for a rule as is contained in this draft article.

2. In its oral comments in the Sixth Committee, Austria asked whether a specific reference to a “request for a declaratory judgement” should be maintained in this draft article since the sole decisive criterion in this context was whether or not there was a direct injury to the State. The introduction of a possible further criterion would only create confusion. The text of the draft provision seemed to suggest that a “request for a declaratory judgement” was to be distinguished from any other “international claim”. However, in view of the extensive explanation in the commentary, Austria no longer raises this issue.

#### United Kingdom of Great Britain and Northern Ireland

The United Kingdom supports the adoption of the preponderance test since it agrees that the emphasis should be on the nature of the injury suffered. However, to the extent that draft article 15 refers to claims on behalf of non-nationals as provided for in draft article 8, the United Kingdom reiterates its previous comments in relation to that article that the right to bring a claim

on behalf of a non-national is not reflected in customary international law.

#### Draft article 16. *Exceptions to the local remedies rule*

#### El Salvador

Although El Salvador agrees with the substance of the draft article, it believes that the wording is complicated in some places and vague in others, and might lead to confusion between its various provisions. El Salvador therefore considers that clearer and more precise wording would help present the exceptions to the rule more effectively.

#### Mexico

(See comments on draft article 14 above.)

1. With regard to the exceptions to the local remedies rule, Mexico considers that there is an exception that has not been covered by any of the four subparagraphs in draft article 16. It applies to cases in which it is not necessary to exhaust local remedies in situations if there will be a repetition of the injury.<sup>53</sup> This exception is based on the futility of exhausting local remedies if there is a definite possibility that the act that caused the injury may be repeated.

2. Mexico considers it important to stipulate in the draft articles that it is the responsibility of the respondent State to prove that local remedies have not been exhausted by specifying the remedies that still remain open to the claimant. In the event that it can be shown that there are still local remedies to which recourse can be had, the burden of proof as to the existence of some exception to the requirement that local remedies must be exhausted will be on the claimant.<sup>54</sup>

#### Uzbekistan

(See comment on draft article 14, paragraph 1, above.)

#### Subparagraph (a)

#### Austria

Austria understands draft article 16 (a), as referring also to the availability of local remedies, similar to the wording adopted by the Commission in article 44 (b) of the articles on responsibility of States for internationally wrongful acts<sup>55</sup> (that is, “any available and effective local remedy”). For the sake of terminological conformity with those articles it would seem sensible to use the same wording here.

#### Italy

1. Italy believes that the first exception to the local remedies rule, which is also the most important one, is phrased too summarily and restrictively.

2. First, it should be considered that international practice and case law have, over time, developed a series of exceptions, namely the “non-existence”, “inaccessibility”,

<sup>51</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12.

<sup>52</sup> *Ibid.*

<sup>53</sup> See Amerasinghe, *Local Remedies in International Law*, p. 206.

<sup>54</sup> See Jennings and Watts, *Oppenheim's International Law*, p. 526.

<sup>55</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 29, para. 76.

“ineffectiveness” and “inadequacy” of local remedies. These are four specific, precise and autonomous concepts, and it is very difficult to take account of all of them within the so-called criterion of the “futility rule” or within a similar criterion, such as that used in draft article 16 (a) (“no reasonable possibility of effective redress”). Actually, the wording in subparagraph (a) does not include all the above-mentioned exceptions, but rather deals with a slightly different problem: that is, to find the most suitable test or interpretative criterion to evaluate concretely, each time, the futility of local remedies, especially from the point of view of their ineffectiveness. Therefore, the wording of subparagraph (a) is too vague, uncertain and generic, and it risks not covering all the above-mentioned exceptions, to the detriment of the individual victim. Italy suggests modifying subparagraph (a) in the following way:

“The local remedies are inexistent or inaccessible or ineffective or inadequate.”

3. Secondly, if the Commission does not accept the above-mentioned suggestion and prefers to maintain a single and comprehensive expression, Italy believes that the present wording of subparagraph (a) is too restrictive, considering the most recent developments of the local remedies rule not only in the field of diplomatic protection in the strict sense, but also in the field of human rights. In fact, practice is moving towards a more flexible interpretative criterion, which would be better expressed by the wording: “The local remedies offer no reasonable prospect of success.” This wording had been taken into consideration, but then unfortunately rejected, by the Special Rapporteur, Mr. John Dugard. However, Italy is of the view that the present wording of subparagraph (a) goes against the trend of international practice and risks making more rigid, and less favourable to individuals, the future application of the local remedies rule.

#### **Qatar**

1. Qatar views the exceptions set out in subparagraphs (a), (b) and (c) of draft article 16 as being so broad and vague as potentially to render draft article 14 inoperative. They will also contribute to violations of the rule on the exhaustion of local remedies, which is a necessary condition for exercising the right of diplomatic protection. Moreover, these exceptions might lead to differing and conflicting international legal rulings being issued, since the courts would have to examine each case on its own merits in order to determine whether or not local remedies had been exhausted, having no explicit criterion to rely on to determine whether the exceptions set down in draft article 16 apply.

2. Qatar considers that the exceptions might be acceptable when cases relating directly to fundamental human rights and freedoms are being considered.

#### **United Kingdom of Great Britain and Northern Ireland**

Draft article 16 (a), elaborates further the notion of an “effective” remedy, with the Commission attempting to resolve the appropriate formulation for when a remedy

will be ineffective. In selecting the option of “no reasonable possibility of effective redress”, the Commission has developed existing principles. The United Kingdom would interpret this provision as not placing a claimant under an obligation to pursue an appeal to a higher court where it can be established on the facts that such an appeal would have no effect. Similarly, a claimant should not be required to exhaust justice in a State where there is no justice to exhaust. The United Kingdom also considers that obstruction or prejudice to a claimant in the process of exhausting domestic remedies may amount to a denial of justice to that claimant, and it reserves the right to intervene on behalf of a claimant who is a British national to secure redress for such injustice. Subject to these comments, the United Kingdom generally supports the Commission’s development of this area of diplomatic protection.

#### **United States of America**

1. In the commentary accompanying draft article 16, the Commission explains that it considered three different standards before arriving at the “reasonable possibility of effective redress” standard. The Commission rejected an “obvious futility” standard on grounds that it set “too high a threshold” for proving futility. Likewise the Commission dismissed the European Commission of Human Rights standard of “no reasonable prospect of success”<sup>56</sup> because it would have allowed claimants to bypass local remedies in too many instances. Instead, the Commission believes that its proffered standard splits the difference and is consistent with international practice.

2. The United States respectfully disagrees with the Commission’s conclusion that the obvious futility standard sets “too high a threshold” for proving futility. Properly understood, the United States believes it sets a bar that both respects State sovereignty and is consistent with customary international law. The United States believes that this draft article should state:

“Local remedies do not need to be exhausted where the local remedies are obviously futile or manifestly ineffective. Exhaustion of local remedies is not obviously futile or manifestly ineffective where a forum was reasonably available to provide effective redress.”

3. Under applicable customary international law principles, a claimant may establish that he need not exhaust local remedies only in the most limited circumstances. It is not enough that a claimant demonstrate that the possibility of success is low or that further appeals are difficult or costly. Rather, for a State to be held liable without exhaustion of local remedies, “the test is obvious futility or manifest ineffectiveness, not the absence of a reasonable prospect of success or the improbability of success, which are both less strict tests.”<sup>57</sup> Under draft article 16 (a), the

<sup>56</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 38–39, para. (3) of the commentary to article 16.

<sup>57</sup> Amerasinghe, *op. cit.*, p. 206. See also, for example, *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (1934)*, UNRIIAA, vol. III (Sales No. 1949.V.2), p. 1504 (rule excusing exhaustion is “most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief”); and Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 824

focus of the futility inquiry would be on whether redress is possible, thereby steering consideration towards the possibility of a successful outcome, which Amerasinghe notes is incorrect under international law. Moreover, the assessment of whether a successful outcome is possible is an extremely difficult undertaking. By contrast, the second sentence of the proposed alternative formulation focuses on whether there is a forum reasonably capable of providing redress. Doing so recognizes that the proper test of futility is whether the municipal court system itself is reasonably capable of providing relief. Thus, the focus should be on the availability of a suitable forum rather than on the likelihood of success in that forum.

4. Moreover, as a policy matter the United States believes the formulation above is preferable to the draft article. The purpose of the local remedies rule is to ensure that a State has the opportunity to address within its own legal system violations of international law.<sup>58</sup> Most, if not all, States have legal systems that have this self-correcting capacity. Under those circumstances, respect for State sovereignty demands that a claimant take advantage of the State's legal system as a condition precedent to invocation of State responsibility for a breach of international law. The formulation advocated by the United States, in addition to being consistent with international law, has the advantage of ensuring that in all but the most extreme circumstances a State has the opportunity to rectify within its own legal system violations of international law. By contrast, the draft article allows claimants to move claims of alleged breaches of international law to international forums before this corrective process is complete, thereby undermining State sovereignty as well as development of the rule of law in municipal judicial systems.

#### Uzbekistan

It is necessary to specify which national or international body would define the "reasonableness" or "unreasonableness" of resorting to local remedies.

*Subparagraph (b)*

#### Italy

Italy believes that not only undue delay in the remedial process, but also the denial of justice itself should be included in subparagraph (b). In fact, international practice shows that there is an exception to the local remedies rule when (at any stage during the remedial process) local courts refuse to render justice<sup>59</sup> or do not have the necessary independence,<sup>60</sup> or give a manifestly

unjust judgement or a *mala fide* judgement, or violate the fundamental procedural rights of the individual.<sup>61</sup> By contrast, the exception of denial of justice cannot be easily inferred from article 16 (a). Therefore, subparagraph (b) should be modified in the following way:

"There has been a denial of justice or there is undue delay in the remedial process which is attributable to the State alleged to be responsible."

#### Qatar

(See comments to subparagraph (a) above.)

#### United Kingdom of Great Britain and Northern Ireland

The United Kingdom supports draft article 16 (b), as a codification of the existing rule regarding undue delay.

*Subparagraph (c)*

#### Austria

Although Austria supports the limitation to diplomatic protection in subparagraph (c) it would, nevertheless, prefer a more elaborated definition of the particular circumstance of the absence of a relevant connection. It is also not clear when the lack of relevant connection must be given: it could be imagined that a person at the moment of the injury was present in the State where it suffered the injury, but then left the territory. Could, in such a circumstance, the State whose nationality the person possesses benefit from the exception spelled out in subparagraph (c), or was the relevant connection given as required for the need to exhaust local remedies? The wording of the subparagraph does not provide a clear answer. Unless it is made clear that it is at the moment of injury when the relevant connection must be absent, it could be proposed to link the absence of a relevant connection with "reasonableness" so that no exhaustion would be required only if there were no relevant connection between the injured person and the State alleged to be responsible and the exhaustion of local remedies would be unreasonable. In view of such an approach it could also be suggested to drop the first part of this subparagraph and confine the subparagraph to the situation where the circumstances of the case make the exhaustion of local remedies unreasonable. The commentary could then exemplify this situation by a reference to the absence of a relevant connection. However, that solution would exclude a misuse of this subparagraph by a person that suffered an injury and simply leaves the State allegedly responsible in order to circumvent the need for exhaustion of local remedies. The individual could then easily deprive the State allegedly responsible of the possibility to remedy the injury through its own procedures. Taking into account the basic objective of the rule of exhaustion of local remedies, namely to give the State an opportunity to make up for the injury, it is certainly necessary to preclude such an abuse.

("A claimant is not ... relieved from exhausting his local remedies by alleging his inability, through poverty, to meet the expenses involved; his ignorance of his right of appeal; the fact that he acted on the advice of counsel; or a pretended impossibility or uselessness of action before the local courts.")

<sup>58</sup> See *Interhandel, Preliminary Objections*, I.C.J. Reports 1959, p. 27.

<sup>59</sup> *Cotesworth & Powell case*, in Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 2050.

<sup>60</sup> *Robert E. Brown (United States) v. Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 124 *et. seq.*; *Don Pacifico case*, Moore, *A Digest of International Law*, p. 853; *Panevezys-Saldutiskis Railway, P.C.I.J., Series C, No. 86*, p. 195; *I.C.J. Pleadings, Aerial*

*Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom v. Bulgaria)*, p. 327.

<sup>61</sup> *Salem case (Egypt, United States)* (8 June 1932), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1202; *B. E. Chattin (United States) v. United Mexican States* (23 July 1927), *ibid.*, vol. IV (Sales No. 1951.V.1), pp. 288 *et. seq.*

### Italy

1. Italy thinks that the provision in subparagraph (c) should be separated into two different paragraphs, since it deals with two different exceptions to the local remedies rule: (a) “[t]here is no relevant connection between the injured person and the State alleged to be responsible”; and (b) “the circumstances of the case ... make the exhaustion of local remedies unreasonable”. There are no meaningful connections between the two exceptions. Moreover, according to the present wording, it is not clear whether the lack of relevant connections works by itself as an exception, or whether it works only when it makes unreasonable the exhaustion of local remedies (as could perhaps be inferred from paragraph (7) of the commentary to draft article 16).

2. That being said, Italy believes that the second above-mentioned exception (that relating to the circumstances of the case) should be phrased in a more extensive and, at the same time, more precise way, both by explicitly adopting the well-known terminology of “special circumstances”<sup>62</sup> and by expressly listing in draft article 16 (or at least in the commentary) the most important “special circumstances” that can be inferred from international practice.

3. The terminology of “special circumstances” can be found in the practice existing in the field of diplomatic protection in a strict sense and even more often in the field of human rights. Moreover, the practice of both fields allows one to single out the main special circumstances, of an objective and a subjective character, which makes it extremely difficult for the injured individual to exhaust local remedies. They are (a) serious and objective difficulties of practical or spatial character;<sup>63</sup> (b) situations of danger, risks of reprisals or serious damages and exorbitant judicial costs;<sup>64</sup> (c) general conditions of dysfunctioning of the system of administration of justice or of instability of the whole governmental machinery;<sup>65</sup> (d) unlawful legislative measures or administrative practices;<sup>66</sup> and (e) situations of grave and systematic human rights violations.<sup>67</sup> The last three circumstances are the most important and relevant in recent practice.

<sup>62</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1, p. 72, art. 15, para. 2.

<sup>63</sup> *John W. Carmalt*, in La Pradelle and Politis, *Recueil des arbitrages internationaux*, p. 126; *M. S. Perry*, *ibid.*, p. 127; *I.C.J. Pleadings, Nottebohm*, Vol. I (Liechtenstein v. Guatemala), p. 416.

<sup>64</sup> *Neptune*, in Schwarzenberger, *International Law*, p. 244; and in La Pradelle and Politis, *op. cit.*, pp. 139 *et seq.*; *Nottebohm* (see footnote 63 above), p. 408.

<sup>65</sup> *Akdivar and Others v. Turkey*, European Court of Human Rights, *Reports of Judgments and Decisions 1996–IV*, p. 1211, para. 69; *Aksoy v. Turkey*, *ibid.*, pp. 2276–2277, paras. 52–57; *Godínez Cruz* case, Inter-American Court of Human Rights, Series C, No. 5 (1989), para. 58; and others.

<sup>66</sup> *Donnelly and others v. the United Kingdom*, Council of Europe, *Yearbook of the European Convention on Human Rights* (1976), p. 146; *Akdivar* (see footnote 65 above), p. 1210, para. 67; *Velásquez Rodríguez*, Inter-American Court of Human Rights, Series C, No. 4 (1988), para. 68; and others.

<sup>67</sup> *Dermit Barbato v. Uruguay*, decision of 21 October 1982, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40)*, annex IX, p. 124; *Free Legal Assistance Group v. Zaïre*, African Commission on Human and Peoples’ Rights, *International Human Rights Reports* (1997), p. 92; *Amnesty International v. Sudan*, *ibid.* (2001), p. 261; and others.

4. However, Italy notes that draft article 16 (c), as it is presently phrased, gives only a marginal and residual importance to this exception. This is confirmed also by the commentary, which is very concise and which, by citing as examples only a few circumstances, neglects the most important ones.

5. Instead, Italy assigns great importance to this exception and believes that the insertion in the draft of an explicit and autonomous exception concerning the “special circumstances”, followed by an exemplifying list that also takes into account the recent practice in the field of human rights, would make a remarkable contribution to the progressive development of international law with regard to the exceptions to the local remedies rule.

### Netherlands

The Netherlands considers that the commentary in paragraph (11) should be adopted so that the draft article covers both “legal denial” and “factual denial”.

### Qatar

(See comments on subparagraph (a) above.)

### United Kingdom of Great Britain and Northern Ireland

The United Kingdom considers that draft article 16 (c) represents a proposal for the progressive development of existing customary international law which, at present, contains no need for a voluntary link or territorial connection, or provision for hardship. The United Kingdom suggests that greater clarification is needed, particularly in respect of the required “relevant connection”.

### United States of America

1. Draft article 16 (c) would allow a claimant to avoid exhaustion of local remedies either where there is “no relevant connection” between the injured person and the injuring State or where exhaustion of local remedies is “unreasonable”. The commentary accompanying the draft article explains that the former exception is designed to address the situation where a claimant did not intend to interact with the respondent State, but is nonetheless injured by an action of that State. The classic examples provided are that of cross-border pollution and straying aircraft. The latter exception is, according to the commentary, an attempt to allow for case-by-case exceptions to the local remedies rule where its application appears “unreasonable”.

2. The United States agrees that an exception in this area is warranted where there is no relevant connection between the injured person and the injuring State. It, however, proposes that the “unreasonable” component be eliminated to avoid vagueness and excessive breadth. The United States urges that draft article 16 (c) be rewritten to state:

“Local remedies do not need to be exhausted where there is no relevant connection between the injured person and the State alleged to be responsible.”

3. The revision proposed by the United States eliminates the clause providing an exception to the exhaustion of local remedies rule where “the circumstances of the case otherwise make the exhaustion of local remedies unreasonable”. That exception is not supported by customary international law or sound public policy concerns. The United States believes that the formulation in subparagraph (c) is vague and introduces too much uncertainty to the application of the exhaustion of local remedies rule. The exceptions provided in the rest of draft article 16 accurately encompass the situations where the exhaustion requirement should not be applied, including those listed in paragraph (11) of the commentary. A lack of factual access to the courts, criminal obstruction of the judicial process and prohibitive cost could all render a remedy “obviously futile”, thereby excusing the exhaustion of local remedies requirement pursuant to draft article 16 (a). Thus, no further open-ended exceptions are necessary here.

4. The United States also believes that the commentary should be clarified to indicate that overflight alone over the territory of a State does not constitute a “relevant connection” requiring exhaustion of local remedies. While the commentary is clear that aircraft that stray into the airspace of a State have no “relevant connection” with the State, the United States believes that where an aircraft merely flies over a State as part of its planned flight path, no “relevant connection” has been established. The requirement of exhaustion is too burdensome in such circumstances, given the remote link between the injured person and injuring State. By contrast, a merchant trucking goods through a State en route elsewhere does have a more tangible link with the State, including the benefit of using local courts in the through-State to protect his property. Under those circumstances, a “relevant connection”—here, commercial and territorial—has been established, thus mandating exhaustion of local remedies.

*Subparagraph (d)*

#### **Guatemala**

1. The principle that a State must expressly waive a right is well established in customary international law. However, paragraphs (12), (15), (16) and (17) of the commentary on draft article 16 raise a number of questions concerning the applicability of the principle to waivers of a State’s right to require the exhaustion of local remedies.

2. Nevertheless, it should be pointed out that in many, if not most, cases, the above-mentioned problem will not be a problem at all. Where an arbitration agreement is concluded to resolve an already existing dispute in a case in

which, under normal circumstances, the rule of exhaustion of local remedies would be applicable to one of the two States parties, it cannot be said that the State has waived, expressly or tacitly, its right to such exhaustion. In fact, something completely different has happened: a rule of customary international law, namely, that requiring the exhaustion of local remedies, has, by virtue of the principle that exceptional circumstances prevail over normal circumstances, been superseded by contradictory provisions contained in a treaty. The mere fact that the waiver is essentially unilateral illustrates that it is incorrect to talk of a waiver in such cases. When treaties provide for the settlement by arbitration of future disputes in matters in which, under normal circumstances, local remedies must be exhausted, such treaties are interpreted in order to determine whether or not they prescribe the inapplicability of the relevant rule. If it is found that one of those treaties does impose such inapplicability, it cannot, by the same token, be concluded that the local remedies rule has been waived.

#### **Morocco**

Morocco proposes to delete subparagraph (d) on the grounds that the provision would diverge from an important principle of international law and, moreover, has no practical significance.

#### **Qatar**

The exception in subparagraph (d) is acceptable since it is consistent with general principles of law.

#### **United Kingdom of Great Britain and Northern Ireland**

Draft article 16 (d), providing for waiver of the requirement that local remedies be exhausted, requires further consideration. Waiver of such a fundamental requirement of customary international law should be express; to allow waiver to be implied in the absence of an express intention to do so is contrary to the current position in international law. Any rule on waivers adopted must be strictly interpreted since it also protects interests other than those of the State waiving the requirement. The Commission may also wish to consider whether there could ever be a waiver in the face of an express treaty obligation to exhaust domestic remedies.

#### **Uzbekistan**

The following phrase should be added after the word “exhausted”: “or its actions or inaction are tantamount to a waiver.”

## PART FOUR

## MISCELLANEOUS PROVISIONS

## Uzbekistan

Part four should be called “Other provisions” rather than “Miscellaneous provisions”.

*Draft article 17. Actions or procedures other than diplomatic protection*

## Austria

Draft article 17 protects other legal devices through which the rights of individuals can be ensured. This could lead to a duplication of proceedings in different forums with the possibility of divergent decisions. However, that risk has to be accepted in the interest of effective protection of the rights of individuals.

## El Salvador

The fact should be taken into account that diplomatic protection exists for cases where the State adopts in its own right the cause of one of its nationals, not the right of nationals for their State to exercise diplomatic protection on their behalf as a result of injury caused by another State. Diplomatic protection cannot therefore be placed at the same level as the existing protection measures provided for in international human rights law. El Salvador therefore believes that the wording of draft article 17 should reflect this point.

## Italy

1. The article includes a savings clause allowing the State, or the person to be protected, to resort to actions or procedures other than diplomatic protection under international law. The commentary (para. (4)) reports, among such procedures, those envisaged in the various international conventions on human rights, or those aimed at creating mechanisms to protect investments. Also in the commentary (para. (6), last sentence), the Commission warns that even in the case in which the State avails itself of an alternative procedure, it will still be able to exert its right to the diplomatic protection of its national.

2. Italy underlines the importance of the last part of paragraph 6 of the commentary. However, its opinion is that such part can be improved and made more specific and that the specification should be included in the text of draft article 17. Indeed, when an alternative procedure—whether resorted to by the State or by the individual to be protected—entails a binding decision adopted by a fully independent and impartial judge, the right to exert diplomatic protection should no longer exist. There should be no ground to exert the diplomatic action in such a case, since the action undertaken warrants a more secure elimination of the consequences of any wrongful act that might have been committed. Such outcome would not arise when the alternative procedure is undertaken before an institution (for instance the Human Rights Committee, established under article 28 of the International Covenant

on Civil and Political Rights) that is not competent to make binding decisions. In this case, the State cannot be forced to give up its right to exert diplomatic protection, given that the offending State, whose offence has been ascertained by the institution, is not obliged to comply with such decision nor suffer its consequences.

3. Therefore Italy suggests that an approach be adopted in draft article 17 allowing for diplomatic protection and alternative procedures to be coordinated on the basis of the aforementioned criterion. Italy is aware that the Commission has rejected a proposal of one of its members aimed at considering remedies on human rights matters as being *lex specialis* with respect to the rules on diplomatic protection (see commentary, para. (7)), and acknowledges that in reference to any alternative remedy, such a proposal would certainly be excessive. However, Italy considers such a proposal more than reasonable if it refers only to the above-mentioned narrower category of jurisdictional remedies.

## Netherlands

1. The words “under international law” should be deleted. The Netherlands is of the opinion that the right to, *inter alia*, submit an *amicus curiae* brief in domestic proceedings, as the European Union has done in American legal cases, must remain unchanged.

2. The Netherlands also suggests that draft article 17, like draft article 19, should be amended as follows:

“The rights of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act are not affected by the present draft articles.”

## Qatar

1. There is no need to reaffirm the right of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, since this is already considered an inalienable right of States and individuals under the rules of international law.

2. If draft article 17 refers to the right of States and individuals to invoke international human rights conventions, then it adds nothing new either. In any event, the fact that States and individuals can resort to international human rights law offers more safeguards than diplomatic protection, because the former is based on appropriate and flexible legal principles that help and enable individuals to exercise their rights when their fundamental rights and freedoms are violated.

3. On the basis of the foregoing, Qatar concurs with the view that draft articles 17 and 18 should be merged, and proposes that the resulting draft article should read as follows:

“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.”

### United Kingdom of Great Britain and Northern Ireland

The United Kingdom supports draft article 17 to the extent that it protects existing rights under human rights and other instruments and principles of customary international law. The United Kingdom suggests that further consideration be given to the likelihood of several claims arising in different forums.

(See comments on draft article 18 below.)

### Uzbekistan

The provisions of draft article 17 should be inserted in a draft article entitled “Use of terms” (see Other comments and suggestions, below) in order to define the term “other means of peaceful settlement” (as per draft article 1).

*Draft article 18. Special treaty provisions*

### Austria

Austria refers to its comments made in connection with draft article 4 concerning nationality. It cannot be excluded that some of the provisions, such as those relating to the issue of nationality, could be replaced by bilateral or regional customary law. It is therefore suggested only to refer to *lex specialis* or simply to “special rules of international law” as was done in the *lex specialis* provision in the framework of the articles on responsibility of States for internationally wrongful acts (art. 55).<sup>68</sup>

### El Salvador

El Salvador believes that the draft article reflects an idea similar to that contained in draft article 17, and would therefore be in favour of combining them into a single draft article.

### Morocco

1. The formulation of the draft article gives rise to ambiguities on two fronts. First, [French text] Morocco does not know what “il est incompatible” refers to. If the phrase refers to “présents articles”, it should be recast in the plural.

2. Secondly, the draft article refers to special treaties, implying that there are ordinary treaties and special treaties. Nevertheless, in international law, in particular in the Vienna Convention on the Law of Treaties, there is no mention of “special treaties”. Accordingly, one might either refer to special rules, as was done for the responsibility of States and the responsibility of international organizations, or amend the latter part of the sentence to read: “inconsistent with special regimes provided for under bilateral and multilateral treaties regarding the protection of investments.”

### Qatar

(See the comments on draft article 17 above.)

### United Kingdom of Great Britain and Northern Ireland

The United Kingdom approves of the relocation of draft article 18 to the end of the draft articles and considers it an improvement upon previous versions. It considers that clarification in the commentary of the relationship between draft article 18 and draft article 17, which also potentially applies to investment treaties, would be helpful.

*Draft article 19. Ships' crews*

### Austria

The idea underlying draft article 19 is certainly confirmed by practice. The structure of the draft article, however, should be reconsidered since the present wording could lead to unintended results. It could be asked whether the right of the State of nationality of crew members to exercise diplomatic protection is affected if the condition expressed in the last part of the phrase is not met. That result is certainly not intended. It is therefore suggested first to stress the right of both categories of States to exercise diplomatic protection and then to state that the right of the one State does not affect the right of the other.

### Belgium

Belgium takes the view that, as part of a gradually evolving process and in view of the growth of air transport and the increasingly multinational character of cabin crews, an extension of this provision to cover aircraft cabin crews is justified.

### Mexico

1. With regard to draft article 19 concerning ships' crews, Mexico recognizes that the Commission's codification appropriately reflects international law and practice in this sphere. Likewise, it notes with satisfaction that the Mexican delegation's comments on this particular topic in recent years have been taken into account and incorporated by the Commission in this work.

2. The capacity of the State of nationality to exercise diplomatic protection and the right of the flag State to seek redress on behalf of the ship's crew undoubtedly represent a fundamental development towards ensuring full respect for the human rights of ships' crews. However, paragraph (8) of the commentary on draft article 19 does not resolve the issue of competing claims if both States should seek redress.

3. For the above reason, Mexico requests the Commission to study this hypothesis so that it may then incorporate in the draft articles or the commentary on draft article 19 a reference that will resolve the issue of dual reparation by the offending State.

<sup>68</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 30.

### Netherlands

(See the comments on draft article 17 above.)

The Netherlands recommends that the draft article be incorporated into draft article 8. This is more consistent with the structure of the draft articles.

### Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

The Nordic countries fully support the approach in draft article 19, whereby the right to exercise of diplomatic protection by the flag State does not exclude the same right to be exercised by the State of nationality of the members of the crew of a ship and vice versa. This is a very important principle. This solution means that important protective measures established by the law of the sea are consequently not undermined.

### United Kingdom of Great Britain and Northern Ireland

The amendments to draft article 19 reflect the decision in the *Saiga* case.<sup>69</sup> Like the Commission, the United Kingdom recognizes the existence of practical considerations supporting the bringing of claims by the flag State in the context of the United Nations Convention on the Law of the Sea. To the extent that this article is controversial in that it may develop existing customary international law, the United Kingdom considers that the article could be omitted from the present draft articles on diplomatic protection since it does not relate to the exercise of diplomatic protection as currently understood in international law.

### United States of America

1. Draft article 19 would affirm the right of the State of nationality of ship crew members to exercise diplomatic protection on behalf of its nationals without derogating from the right of the State of the nationality of the ship to seek redress on behalf of crew members irrespective of their nationality when they have been injured through an international wrong to the ship. The commentary accompanying the draft article notes that international law is inconclusive on the question of whether a State can extend protection to non-national crewmen, but concludes that international jurisprudence leans towards recognition of a right of redress. The commentary is careful to note that this right to seek redress is not diplomatic protection, but explains that the right closely resembles such protection.

2. The United States welcomes the commentary's clarification that draft article 19 would not intend to confer a right of diplomatic protection to the State of nationality of a ship for non-national crew members. As the United States explained in its May 2003 comments,<sup>70</sup> there is great uncertainty as to whether customary international law allows the State of nationality of a ship to protect crew members from a third State.

3. However, given the fact that the Commission now clearly recognizes in its commentary that this provision does not concern diplomatic protection, the United States believes the draft article is outside the scope of the present project and should be omitted. General Assembly resolution 51/160 of 16 December 1996, inviting this project, asked the Commission to consider "diplomatic protection" alone. Consistent with that mandate, a working group of the Commission reported to the forty-ninth session of the Commission that the draft articles would be limited to "diplomatic protection *stricto sensu*".<sup>71</sup> Given that the draft articles were intended to codify rules of diplomatic protection alone, extension of the project into rights of States to seek redress for crew members risks creating confusion about the scope of the draft articles as a whole and, thus, is unwarranted. Rather, this issue is better left to other international law instruments, such as the United Nations Convention on the Law of the Sea.

4. The commentary to draft article 19 also states that a purpose of the article is to affirm that the State of nationality of a ship's crew member can espouse his claim. While the United States agrees that this principle is customary international law, its statement here is superfluous. Draft articles 2–3 would clarify that a State has the right to exercise diplomatic protection in respect of claims of its nationals where the other requirements of the draft articles are met. Since crew members are nationals, like all others, there is no reason to adopt a separate draft article to note that their claims are cognizable. Rather, if the Commission feels it is necessary, the commentary to draft articles 2–3 should include a statement that crew members too are nationals whose injuries are subject to diplomatic protection.

### Other comments and suggestions

#### Netherlands

1. In chapter IV of the fifth report of the Special Rapporteur are two proposed "savings clauses" that might be alternatives to draft articles 17–18. The first proposal, an alternative for draft article 17, reads:

#### Article 26

These articles are without prejudice to the right that a State other than a State entitled to exercise diplomatic protection or an individual may have as a result of an internationally wrongful act.<sup>72</sup>

The Netherlands considers that this draft article can be supported.

2. The second proposal includes alternative wording for draft article 21 that merges draft articles 17 and 18 into one:

These articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act [that might also give rise to a claim for diplomatic protection by the State of nationality of the injured person].<sup>73</sup>

<sup>69</sup> *M/V "Saiga" case (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10.

<sup>70</sup> On file with the Codification Division, United Nations, New York.

<sup>71</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 176.

<sup>72</sup> *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/538, chap. IV.A, p. 54.

<sup>73</sup> *Ibid.*, chap. IV.B, p. 55.

The Netherlands considers that this “omnibus savings clause”<sup>74</sup> can also be supported.

3. The sixth report on diplomatic protection<sup>75</sup> deals with the “clean hands” doctrine. The Netherlands endorses the conclusions of the Special Rapporteur.

#### **United States of America**

1. The United States has not been in a position to review every assertion, footnote and citation provided in the commentaries. Its review of the commentaries has uncovered, however, numerous instances where cases or treatises appear to be cited for propositions that they do not support. The United States urges the Commission to review carefully the accuracy of the commentaries and characterizations of the materials cited therein.

2. The United States would like to request that the Commission make clear in the commentaries which draft articles it considers progressive development of the law, as opposed to codification of customary international law. For example, while the United States does not

find draft article 8 objectionable, it is clearly a progressive development of the law and should be characterized as such.

#### **Uzbekistan**

In the view of Uzbekistan, it is necessary to provide an explanation, in a separate draft article entitled “Use of terms”, of the following terms used in the draft articles: “nationality of a legal person” [Russian text]; “nationality of a corporation”; “incorporation”; “State of incorporation”; “personal injury”; “damage to property”; “damage to personal non-property rights”; and the like.

#### *Comments on final form*

#### **Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)**

The Nordic countries believe that there is merit in proceeding rather swiftly to the adoption of the draft articles on second reading. Moreover, the Nordic countries do also believe that the provisions on diplomatic protection should, in a relatively short time, be adopted in the form of a convention. This would enhance legal clarity and predictability in this important field of law.

<sup>74</sup> *Ibid.*, para. 42.

<sup>75</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/546, p. 1.

## Annex

**UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND  
RULES APPLYING TO INTERNATIONAL CLAIMS**

## 1. BASIS OF THE RULES

The UK's rules and the comments have appeared in a number of published works, for example, the *International and Comparative Law Quarterly*, vol. 37 (1988), pp. 1006–1008. These rules are based on general principles of customary international law.

It may sometimes be permissible and appropriate to make informal representations even where the strict application of the following rules would bar the presentation of a formal claim.

The rules do not deal with the more complex question of what conduct on the part of a State amounts to a breach of international law for which it is responsible. This is covered more fully in chapter 4.

## 2. RULES REGARDING NATIONALITY OF CLAIMANT

**Rule I**

HMG [Her Majesty's Government] will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury.

*Comment*

International law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim, both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of the injury and of presentation of the claim (see "Nationality of claims: British practice" by I. M. Sinclair, *British Year Book of International Law*, 1950, vol. 27, pp. 125–144).

The term "United Kingdom national" includes:

(a) All British nationals who fall into one of the following categories under the British Nationality Act 1981 (or one of the corresponding categories under earlier legislation):

- (i) British citizens
- (ii) British Dependent Territories citizens
- (iii) British Nationals (Overseas)
- (iv) British Overseas citizens
- (v) British subjects under Part IV of the Act
- (vi) British protected persons;

(b) Companies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible.

**Rule II**

Where the claimant has become or ceases to be a UK national after the date of the injury, HMG may in an appropriate case take up the claim in concert with the government of the country of his former subsequent nationality.

**Rule III**

Where the claimant is a dual national, HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other government entitled to do so). HMG will not normally take up the claim of a UK national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a UK national.

**Rule IV**

HMG may take up the claim of a corporation or other juridical person which is created and regulated by the law of the United Kingdom or of any territory for which HMG are internationally responsible.

*Comment*

This rule rests on the principle that a juridical person (such as a company, corporation or other association having a legal personality distinct from its members) has the nationality of that country whose law has formally created it, which regulates its constitution and under whose law it can be wound up or dissolved. This principle was endorsed by the International Court of Justice in the *Barcelona Traction* case (Belgium v. Spain) in 1970. Certain States determine nationality of a corporation by different tests: in place of central administration (*siège social*) or the place of effective control (to determine which, the residence of the majority of shareholders as well as of the directors may be taken into account). The Court however said that no one of these tests of "genuine connection" has found general international acceptance.

In determining whether to exercise its right of protection, HMG may consider whether the company has in fact a real and substantial connection with the United Kingdom. (This question and other points arising from rules IV–VI are discussed further in Mervyn Jones' paper "Claims on behalf of nationals who are shareholders in foreign companies", *British Year Book of International Law*, 1949, vol. 26, p. 225.)

**Rule V**

Where a UK national has an interest, as a shareholder or otherwise, in a company incorporated in another State, and that company is injured by the acts of a third State, HMG may normally take up the claim only in concert with the government of the State in which the company is incorporated. Exceptionally, as where the company is defunct, there may be independent intervention.

**Rule VI**

Where a UK national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, HMG may intervene to protect the interests of that UK national.

*Comment*

In some cases the State of incorporation of a company does not possess the primary national interest in the company. A company may be created for reasons of legal or economic advantage under the law of one State though nearly all the capital is owned by nationals of another. In such circumstances, the States in which the company is incorporated may have little interest in protecting it, while the State to which the nationals who own the capital belong has considerable interest in so doing. In the *Barcelona Traction* case, the International Court of Justice denied the existence under customary international law of an inherent right for the national State of shareholders in a foreign country to exercise diplomatic protection. However, the majority of the Court accepted the existence of a right to protect shareholders in the two cases described in rules V and VI (when the company is defunct, and where the State in which the company is incorporated, although theoretically the legal protector of the company, itself causes injury to the company).

Where the capital in a foreign company is owned in various proportions by nationals of several States, including the United Kingdom, it is unusual for HMG to make representations unless the States whose nationals hold the bulk of the capital will support them in making representations.

**Rule VII**

HMG will not normally take over and formally espouse a claim of a UK national against another State until all the legal remedies, if any, available to him/her in the State concerned have been exhausted.

*Comment*

Failure to exhaust any local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal

tribunal would have had no effect. Nor is a claimant against another State required to exhaust justice in that State if there is no justice to exhaust.

**Rule VIII**

If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice.

**Rule IX**

HMG will not take up a claim if there has been undue delay in its presentation to them unless the delay results from causes outside the control of the claimant, but no time limits are fixed and they are subject to equitable rather than legal definition.

## 3. RULE REGARDING REMEDIES UNDER A TREATY

**Rule X**

Where an express provision in any treaty is inconsistent with one or more of rules I to IX, the terms of the treaty will, to the extent of the inconsistency, prevail. In case of ambiguity, the terms of any treaty or international agreement will be interpreted according to these rules and other rules of international law.

## 4. RULE REGARDING DEVOLUTION OF CLAIMS

**Rule XI**

Where the claimant has died since the date of injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependant of a deceased person for damages for his death.

*Comment*

Where the personal representatives are of a different nationality from that of the original claimant, the rules set out above would probably be applied as if it were a single claimant who had changed his/her national status.