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Summary record of the 2846th meeting

Topic:
Diplomatic protection

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prejudice and presented as a form of international public policy. Each case therefore called for contextual analysis and careful characterization.

10. A distinction could therefore be drawn between two qualitatively different situations: first, where the alleged illegality would, in principle, form part of the merits and thus would not fall within the Commission's mandate to deal with diplomatic protection; and secondly, where it was invoked as a principle of international public policy which constituted a bar to the admissibility of a claim, in which case the admissibility in question did not fall under the rubric of diplomatic protection. It was an international public policy point that could, of course, be raised *ex parte* by a respondent State, but it was not a form of diplomatic protection.

11. Since the Special Rapporteur had concluded that the issue should not be covered in the draft articles, the Sixth Committee should be provided with an explanation of why the Commission had decided to omit the clean hands doctrine. Another possibility would be to provide for a reservation referring to general international law, simply stating that the draft articles were without prejudice to the application of general international law to questions of admissibility in other situations. Very broad wording along those lines would satisfy those who thought that the Commission's position on the clean hands doctrine was too neat and tidy.

12. Mr. YAMADA said that he accepted the Special Rapporteur's conclusion but agreed with Mr. Pellet that the logic employed in paragraph 9 was a little odd, as the penultimate sentence seemed to imply that the seriousness of the crimes committed by the nationals in question was a factor that determined whether their hands were clean or not. However, in order to ascertain whether the nationals to be protected had clean hands, it was necessary to establish the existence of a causal link between the act or omission of the national in question and the internationally wrongful act committed by the host State. For example, in the *LaGrand* case, the heinous nature of the crimes committed by the foreign nationals was irrelevant; what counted was whether they had contributed to the failure of the United States authorities to notify the German consular authorities, in other words whether they had misled the United States authorities by hiding their German nationality, or whether they had requested that the German consular authorities not be contacted and had thus been instrumental in preventing the United States authorities from complying with an international obligation.

13. He accepted that there was no evidence establishing that the clean hands principle was the cause of the inadmissibility of a claim. However, as the principle was certainly relevant to the merits of the case, the rule concerning contribution to the injury, termed "contributory negligence" or "comparative fault" in national legal systems and set forth in draft article 39 on State responsibility for internationally wrongful acts, was applicable.¹

14. Mr. KABATSI said that he fully agreed with the Special Rapporteur's conclusion that it was unnecessary

to incorporate a provision on the clean hands doctrine in the draft articles on diplomatic protection.

15. Mr. CANDIOTI endorsed the Special Rapporteur's findings and Mr. Yamada's comment about the applicability of the draft article 39 on State responsibility, especially in an overall context. On second reading, it might be possible to consider a broad provision along the lines suggested by Mr. Brownlie, such as a reference to non-specific provisions on the application of general international law, especially the law of responsibility.

The meeting rose at 10.48 a.m.

2846th MEETING

Tuesday, 31 May 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Diplomatic protection (*concluded*) (A/CN.4/549 and Add.1, sect. F and A/CN.4/546)

[Agenda item 2]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his sixth report on diplomatic protection (A/CN.4/546).
2. Mr. DUGARD (Special Rapporteur) said that the Commission's consideration of his sixth report had been a worthwhile exercise. The clean hands doctrine was an important principle of international law which should be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands. It should be distinguished from the *tu quoque* argument, which allowed a respondent State to assert that the applicant State had also violated a rule of international law, and should instead be confined to cases in which the applicant State had acted improperly in bringing a case to court.
3. He thanked Mr. Pellet for having raised the issue and for having agreed, after consideration, that the doctrine did not, at least principally, belong to the realm of diplomatic protection and therefore did not warrant inclusion in the draft articles.
4. Although no other speaker had contended or even suggested that the clean hands doctrine should be included in

¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 109–110.

the draft articles on diplomatic protection, some members had referred to its place in the international legal order in general, and in international litigation in particular.

5. A number of points in his report had been the subject of fair criticism. For Mr. Gaja and Mr. Sreenivasa Rao, the suggestion in paragraph 16 that the clean hands doctrine might lead to exoneration at the merits stage went too far. Mr. Pellet and Mr. Yamada had argued that the reference in paragraph 9 to the *LaGrand* and *Avena* cases failed to analyse properly their relevance to the conduct of the United States. Mr. Brownlie had contended that paragraph 6 gave too much credit to the importance of the clean hands doctrine, and he was of course right: courts had never really had to give it serious consideration. Mr. Brownlie had also rightly drawn attention to the failure of the report to take up the *Certain Phosphate Lands in Nauru* case or to examine whether the clean hands doctrine had ever been joined to the merits. He personally had never come across such a case of joinder.

6. A number of useful suggestions had also been made. For example, Mr. Brownlie had proposed that a clause be inserted on second reading to the effect that the articles on diplomatic protection were without prejudice to general international law. In the course of his helpful comments, Mr. Pellet had raised two fundamental issues which related, not to the clean hands doctrine, but to the draft articles on diplomatic protection, and he would now consider those issues at some length.

7. First, Mr. Pellet had expressed reservations about the *Mavrommatis* principle, according to which an injury to an individual was an injury to a State; second, he had again raised the question whether it might be appropriate to examine the consequences of diplomatic protection in the draft articles. As the Commission's agenda at its next session was likely to be very full, and as there was general agreement that the draft articles on diplomatic protection must be completed by the end of the quinquennium, it would be wise to consider those two issues immediately, if only in a preliminary manner.

8. Mr. Pellet had correctly noted that the *Mavrommatis* principle was a fiction—something that he himself had repeatedly acknowledged. That had serious implications for the individual. One implication was that, because the claim was seen to be that of the State and not of the individual, it was generally accepted that it had discretion as to whether to bring a claim for diplomatic protection. In his first report, he had tried to persuade the Commission to make it obligatory for States to exercise diplomatic protection where a norm of *jus cogens* had been violated in respect of the individual;¹ however, the Commission had rejected his proposal on the ground that that would have meant engaging in progressive development. Another implication was that the State had discretion as to whether to pay out money which it received by way of compensation as a result of the exercise of diplomatic protection.

9. The *Mavrommatis* principle was of course inconsistent and flawed. For example, how did the Commission

explain the principle of continuous nationality? Why must the injured individual be a national of the claimant State both at the time of injury and at the time of presentation of the claim? If the injury was to the State, then surely the time of injury would be the crucial one, yet that was not the case. Then there was the question of the assessment of damages: if the injury was to the State, why should the damage suffered by the individual be taken into consideration? And why should the individual be required to exhaust local remedies if it was the State's claim? Yet, notwithstanding its flaws, the *Mavrommatis* principle was the basis of customary international law on the subject of diplomatic protection, and the Commission had sought to codify, rather than progressively develop, the principles of diplomatic protection. The Commission could not now abandon the *Mavrommatis* principle and construct a completely new institution which recognized the individual as the real claimant. Many members had criticized the draft articles for being too cautious and conservative and for failing to take account of the fact that the individual was the real claimant, but to discard *Mavrommatis* would be to discard principles of customary international law which had been in existence for more than a century.

10. Secondly, Mr. Pellet had suggested that the draft articles should include a consideration of the consequences of diplomatic protection. Mr. Sreenivasa Rao had also sought guidance on the subject. His response to those comments was that the draft articles focused on two issues: the nationality of claims and the exhaustion of local remedies. That was the accepted scope of diplomatic protection, and the approach which most textbooks adopted. Indeed, he was heartened to find that Mr. Daillier and Mr. Pellet themselves adopted that approach in the seventh edition of their *Droit international public*.² The Sixth Committee also favoured that approach. Almost all speakers in the Sixth Committee had expressed the wish to see the draft articles completed by 2006, and there was general agreement on limiting their scope to nationality of claims and exhaustion of local remedies (A/CN.4/549/Add.1, para. 2). That was also what the draft articles on responsibility of States for internationally wrongful acts had contemplated. Article 44 of those draft articles dealt fleetingly with nationality of claims and exhaustion of local remedies and it had been made clear in the commentary that those matters would be taken up in the supplementary draft articles on diplomatic protection.³

11. A second reason why the Commission should not consider the consequences of diplomatic protection was that they were already covered in the draft articles on responsibility of States. The State responsibility project had initially included an examination of diplomatic protection, and the first Special Rapporteur on State responsibility, Mr. García Amador, had indeed dealt with diplomatic protection as an aspect of that topic.⁴ Later, Mr. Ago had focused attention on secondary rules and moved away from diplomatic protection, but had not

² Daillier and Pellet, *op. cit.* (2839th session, footnote 10), p. 809, para. 495.

³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 121, especially footnotes 683 and 687.

⁴ *Yearbook ... 1956*, vol. II, document A/CN.4/96, chaps. VI–VII, pp. 199–209, paras. 134–191.

¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, pp. 225–226, paras. 87–93.

excluded diplomatic protection completely.⁵ The draft articles on State responsibility adopted on first reading had contained a provision on diplomatic protection and exhaustion of local remedies.⁶ The draft articles adopted on second reading also included a provision on the subject in article 44, which, interestingly enough, assumed that the consequences of diplomatic protection were covered by the draft articles on State responsibility; and it was clearly stated that the two issues which would be dealt with in the draft articles on diplomatic protection were simply an elaboration of nationality of claims and exhaustion of local remedies. In other words, with one exception to which he would revert, everything relating to the consequences of diplomatic protection was already dealt with in the draft articles on responsibility of States, in particular, in articles 30, 31, 32 and 36 (with paragraphs (16) to (34) of the commentary to article 36 focusing exclusively on claims arising out of diplomatic protection); and in articles 37 and 39 (as confirmed in the debate by Mr. Sreenivasa Rao, Mr. Yamada and Mr. Candioti, all of whom had suggested that the clean hands doctrine should be addressed in terms of that article, which made it abundantly clear that it was concerned with reparation arising out of claims based on diplomatic protection). Even articles 40 and 41 were applicable to diplomatic protection. Article 40, on serious breaches of obligations under peremptory norms, would obviously include, for example, the torture of an alien. In other words, many of the draft articles on responsibility of States were directly applicable to diplomatic protection and relied on the jurisprudence on the subject.⁷ Thus, he did not see the need to deal with the question of consequences any further.

12. There was, however, one issue which was not dealt with, and to which Mr. Pellet had referred in passing, namely, the question whether a State was under an obligation to pay over to an injured individual money which it had received by way of compensation for a claim based on diplomatic protection. While he agreed that that was an important issue, he noted that it would be strange, albeit possible, to address only one issue pertaining to consequences in draft articles devoted to nationality of claims and exhaustion of local remedies. The Commission was faced with two options. The first would be simply to codify existing law. In doing so, it would confirm what many members regarded as a retrogressive rule, namely, that the State was not obliged to transfer money to the injured person. That was a consequence of the *Mavrommatis* principle: since the claim was that of the State, the State could retain any money it received and was not obliged to pay it over to the individual. The authorities were clear on the subject. In *Administrative Decision V (United States of America v. Germany)*, Umpire Parker had stated that in exercising control the nation was “governed not only by the interest of the particular claimant but by

the larger interests of the whole people of the nation”; and that “even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it” (p. 152 of the decision). The English cases, too, were clear: according to Ian Brownlie, it was the view of the English courts and the United States Court of Claims that when a claim was presented and compensation was paid over, the State was not a trustee or agent for the nationals with respect to whom the claim had been made.⁸ United States law was equally unambiguous: the *Restatement of the Law, Third, The Foreign Relations Law of the United States* stated that the money received from a foreign Government as a result of an international award, or in settlement, belonged to the United States.⁹ Damrosch, Henkin, Pugh, Schachter and Smit stated in their *International Law: Cases and Materials* that “[t]he entire reparation [was] paid to the claimant State and disbursed to its national claimants at its discretion”.¹⁰ Thus, the present view was clearly that, just as the State had discretion on the question whether to exercise diplomatic protection, it had discretion as to whether to pay over to the injured individual money which it had received by way of compensation in a claim involving diplomatic protection.

13. The other option was to engage in progressive development and enunciate a new rule whereby the State was obliged to pay over to the injured individual money that it had received by way of compensation. He did not think that the Commission would want to choose that option. In the light of its decision not to compel States to exercise diplomatic protection on behalf of an individual, the Commission would presumably not want to engage in progressive development in respect of the payment of monetary compensation received by the State. Generally speaking, he did not detect a willingness on the part of the Commission to progressively develop the law in the face of existing authority, and that was what it would have to do under that option. In practice, he suspected that most States did pay over money received by way of compensation, but at the same time they stressed that they were under no obligation to do so, particularly in the case of lump sum payments. Injured individuals often received much less than their entitlement. He did not think the Commission would be wise, at the current stage, either to try to codify what many regarded as an unfortunate principle, or to attempt to progressively develop a new principle that would be unacceptable to States. In his view, it would be best to leave the draft articles as they currently stood, focusing solely on diplomatic protection in the sense of nationality of claims and exhaustion of local remedies. The consequences of diplomatic protection should be left to the draft articles on State responsibility, and the Commission should leave untouched the question whether the State was obliged to pay over to the injured individual money it had received by way of compensation, just as it

⁵ *Yearbook ... 1969*, vol. II, document A/CN.4/217 and Add.1, pp. 126–127, paras. 1–6, and *Yearbook ... 1970*, vol. II, document A/CN.4/233, pp. 177–179, paras. 1–11.

⁶ *Yearbook ... 1996*, vol. II (Part Two), article 22, p. 60. For the commentary to article 22, see *Yearbook ... 1977*, vol. II (Part Two), pp. 30–50.

⁷ For the draft articles and related commentary adopted by the Commission on second reading, *Yearbook ... 2001*, vol. II (Part Two) and commentary, paras. 76–77, pp. 26–143.

⁸ “... when a claim is presented and compensation is paid over, the state is not a trustee or agent for the nationals with respect to whom the claim was made”, I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford University Press, 1998, p. 597.

⁹ The American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, vol. 2, St. Paul (Minnesota), American Law Institute Publishers, 1987, p. 348, para. 902 l.

¹⁰ L. F. Damrosch *et al.*, *International Law: Cases and Materials*, 4th ed., St. Paul (Minnesota), West Group, 2001, p. 803.

had done in respect of the rule that a State had absolute discretion as to whether to bring a claim by way of diplomatic protection—a matter it had left open in the hope that things might change. In recent years national courts had begun to address the question whether States were constitutionally obligated to exercise diplomatic protection. There had been a number of important decisions in that regard, and it might be said that a rule of customary international law was in the process of emerging; thus the Commission had acted properly in not obstructing its development. In the same way, the question of the payment of money by the State of nationality to the injured party should be left untouched so as to allow customary international law to develop in that area.

14. Mr. BROWNLIE said he found the Special Rapporteur's proposals to be generally sensible and workable; he would, however, like to address the issue of the paying over of compensation by a Government to the individual whose interests had been directly involved in the claim which had given rise to the payment of compensation. The Special Rapporteur had focused on the duty of a Government to pay over that compensation but had not analysed the issue of the position of the individual, and specifically, the general question of the degree of control that an individual, who might well be a corporation or other legal person, should have in respect of an international claim: in other words, the extent to which an individual or legal person could require a Government to make a claim in the first place.

15. That issue was being discussed in the context of the progressive development of international law but, as so often, the question was how to achieve that progressive development. One element was the actual enforcement of legal standards. The individual or corporation concerned, on the basis of its particular economic interests, might take the view that the best course of action would be not to present the claim; alternatively, the interest concerned might try to insist that a claim be made which lacked merit and was unconnected to any real enforcement of legal standards. The question was thus the extent to which individuals and corporations should be able to insist on particular determinations by Governments in those matters. He wondered if the general results of an analysis of such situations would in fact contribute to progressive development; he suspected that the result would be rather mixed.

16. The former European Commission of Human Rights and the European Court of Human Rights had very early on rightly taken the view that claims made on behalf of individuals pursuant to the European Convention on Human Rights were in fact matters involving the public order of Europe. Although there was a question of *locus standi*, aspects other than a claim by the individual entered into play. The underlying logic of that view had been that even if an individual chose not to pursue a claim, as had in fact occurred on a number of occasions, the issue at hand still involved the public order of Europe and the claim would go forward even though the private interests had been removed because the individual had chosen not to pursue the claim. The progressive view in the context of the European Convention on Human Rights had therefore been not to allow an individual to waive

his right to pursue a claim, because the ultimate objective was the effective enforcement of standards. Accordingly, the question of what was progressive in that context must include an assessment of the extent to which individuals and corporations should have control over what Governments did in that respect. That was not a simple question and it was not confined to the end question of what should happen to compensation paid once it had been handed over by the respondent State.

17. Mr. ECONOMIDES agreed with Mr. Brownlie. There were two main issues: the first was whether the State which was exercising diplomatic protection on behalf of one of its nationals, at the final phase of the awarding of compensation, required the consent of the individual concerned when accepting the sum negotiated with the respondent State. He recalled that in the past the Greek Government had, in the exercise of diplomatic protection, negotiated compensation agreements on behalf of Greek nationals whose property had been appropriated in certain Eastern European countries; without first seeking the consent of its nationals it had accepted and distributed to the individuals concerned a lump sum that had been wholly incommensurate with the value of their property. In such cases it was assumed that the State intervened to protect the interests of its nationals, who were the victims, not to secure any benefit for itself. It was therefore logical for the State to ask for the consent of the individual before agreeing to any compensation, thereby securing adequate protection for the interests of the individual, as was currently provided for neither in the draft articles on responsibility of States nor in those on diplomatic protection.

18. A second issue was whether a State had the right to keep all or part of any compensation awarded. There was State practice in that regard: the Greek Government, for example, always distributed all compensation awarded, less costs, to the injured individuals. All such examples of State practice should have been examined with a view to possibly developing rules based thereon. Although he agreed with the Special Rapporteur that those were sensitive and difficult questions which should not be dealt with in undue haste, the Commission should not exclude the possibility of dealing with them in the future. The Commission would be wrong to try to give the impression that all possible problems had been settled when some important aspects of the topic had still to be adequately addressed.

19. Mr. PELLET said that although the Special Rapporteur had maintained his position with regard to the draft articles, he himself remained unconvinced with regard to some issues. He had raised many of those issues on numerous occasions over the past few years, and he continued, for example, to have serious doubts about the Commission's cautious and conservative approach with regard to the *Mavrommatis* principle. He had always been of the view that the Commission's topic was not the conditions for the exercise of diplomatic protection, but diplomatic protection itself, yet the Commission had dealt only with the former.

20. With regard to the *Mavrommatis* fiction, he had bowed to what appeared to be the majority view in the Commission. Consequently, in the absence of any

criticism on the part of States—which seemed unlikely, given that States tended to be even more conservative than the Commission—the draft articles would remain as currently drafted because they tended to endorse States' own approach to the topic. It should be borne in mind, however, that it was not the Commission's task to make States happy but rather to ensure the progressive development and codification of international law. It was thus regrettable that the Commission had chosen to opt for an easy solution that would meet with the approval of States.

21. The *Mavrommatis* fiction had two facets: a State exercised diplomatic protection in exercise of its own right, and also to assert its right to ensure respect for international law in the person of its national. He agreed with the first principle, that diplomatic protection was a right of the State, in the sense that it would be irresponsible or dangerous to propose a general principle of an obligation of a State to exercise diplomatic protection. The State had full discretionary power to decide whether or not to pursue a claim of diplomatic protection on the basis of general policy considerations and the general interest, which was not always the same as the interest of the individual concerned. The Commission could have discussed the question of the limits within which a State could decide whether or not to exercise diplomatic protection, but unfortunately it had chosen not to do so.

22. The second principle was far more questionable and constituted the real fiction in the *Mavrommatis* principle. The State's right to ensure respect for international law in the person of its national was an outdated concept. The *Mavrommatis* principle dated back to 1924, when the fundamental purpose of diplomatic protection had been to guarantee the monopoly of States as subjects of international law. A situation had arisen in which some capital-exporting States of the North with investments in Latin America and elsewhere had felt the need to protect the interests of their nationals. The solution had been the emergence of diplomatic protection, whereby States exercised their own right to ensure respect for international law in the person of their national, and the countries of the South had been required to provide compensation for any injury.

23. However, it seemed unacceptable, 80 years later, to adhere to a fiction which had been created in response to that specific historical context. Individuals were now recognized as subjects of international law; only a total reactionary could refuse to recognize that individuals had some degree of international legal personality. Individuals had direct remedies available to them in areas such as human rights and investments, and diplomatic protection should serve only as a safety net where no direct remedy for individuals was available. In such cases, it was absolutely essential that States should retain the right to exercise diplomatic protection, but there was no need to maintain the fiction. It would be infinitely simpler to say that a State could choose whether or not to act on behalf of its national, and that would be a far better reflection of present-day needs. The Commission had missed an opportunity to offer States that choice, while also making it clear that when a State chose to exercise that right, it was acting on behalf of its national and not in order

to ensure respect for international law in the person of that individual.

24. As to the Special Rapporteur's implied assertion that the Commission had completed its task, he did not agree; the Commission had codified the conditions for the exercise of diplomatic protection but not the consequences of such exercise. The Special Rapporteur had given three reasons for that omission: the need to complete the draft articles by the end of the quinquennium; the fact that the consequences of diplomatic protection were already covered in the draft articles on responsibility of States; and his view that to attempt to codify the remaining point would be to confirm a retrogressive rule.

25. The first argument was simply not credible: if the task of the Commission was to codify international law, it must take the time needed to do so even if that task proved difficult. There would have been ample time at the present session to deal not only with the clean hands doctrine, but also with the other, more fundamental, problems he had raised.

26. As for the argument that the consequences of diplomatic protection were already covered in the draft articles on responsibility of States, that went without saying. The purpose of diplomatic protection was to ensure that the consequences of the responsibility of States were drawn. The consequence of diplomatic protection was to trigger the responsibility of the State. The commentary to those draft articles cited examples of direct injury to a State and, by means of the Vattelian fiction, of indirect injury to a State in the person of one of its nationals. Those draft articles did not, however, deal with the special consequences attached to the exercise of diplomatic protection and did not distinguish between responsibility arising from direct injury caused to a State by another State and that arising from indirect injury to a State in the person of one of its nationals. In codifying diplomatic protection the Commission might reasonably be expected to deal with the specific consequences of such indirect injury. If it was really enough simply to say that the draft articles on responsibility of States already dealt with the consequences of diplomatic protection, why should the same argument not be used, for example, with regard to the exhaustion of local remedies, which was dealt with in article 44 (b)? Yet the Special Rapporteur had quite rightly addressed that matter at length in his draft articles. Moreover, the reference to article 39 was particularly perplexing, as in his opinion that article basically referred to the question of clean hands, about which he would, however, say no more.

27. The Special Rapporteur had himself conceded that one important question was missing from his draft articles, namely, the question of restitution of compensation to the individual where diplomatic protection was exercised. The Special Rapporteur noted that in most cases the State was under no obligation to pay over that compensation to the injured individual, and took the view that if the Commission attempted to codify the issue of payment of compensation to the individual, it would have to endorse a retrogressive rule. However, the Commission's mandate was not limited to the codification of international law; had it had the courage to discard the *Mavrommatis* fiction, it would not be faced with the present dilemma.

28. There were of course intermediate solutions, as indicated by Mr. Economides and others. Nonetheless, the Commission was undoubtedly setting an unfortunate precedent in declining to deal with such an allegedly thorny topic. The Commission should say to States that their position of absolute sovereignty of action was no longer appropriate in the new international context and propose that that position be either abandoned or modified.

29. The third argument put forward by the Special Rapporteur for not addressing the consequences of the exercise of diplomatic protection was that the paying over of compensation to individuals was an isolated problem and that the other consequences had been addressed in the draft articles on responsibility of States. However, while some of the consequences were touched on, many other problems had not been dealt with. For instance, did the exercise of diplomatic protection prevent the individual from taking further action? Were individuals bound to accept the compensation agreed by the State, or could they pursue their claims on the grounds that the State had not properly exercised diplomatic protection and that they had not received redress for the injury suffered? What were the consequences of the successful exercise of diplomatic protection for an individual's right of appeal? What method was to be used for calculating the amount of compensation? Should compensation be based on the harm suffered by the individual, as was the current practice, or on the harm suffered by the State, which would be in line with the *Mavrommatis* fiction? Was the individual bound by an agreement reached by the State on its own behalf? All those questions should be dealt with in the draft.

30. In sum, while he appreciated the Special Rapporteur's openness to discussion, he regretted his and the Commission's inflexibility with regard to the consequences of the exercise of diplomatic protection, which posed a number of serious problems of practical importance to States.

31. Mr. Sreenivasa RAO commended the Special Rapporteur's balanced and scholarly summary of the debate. Nonetheless, a number of issues related to the broader subject of diplomatic protection, notably the issue of the interests of the individual, merited further discussion. While he believed strongly that the State's discretion in the matter should not be circumscribed by an obligation to sponsor claims by individuals in every individual case, he would be willing to support any proposal by the Special Rapporteur to encourage States to ensure that, where appropriate, any compensation received was passed on to the individual concerned. He did not see any contradiction between leaving the State with the discretion to exercise diplomatic protection and ensuring that appropriate and equitable compensation was paid to the individual. While the Special Rapporteur had correctly sensed that some members of the Commission were not in favour of the progressive development of international law in respect of diplomatic protection, he personally would keep an open mind, should the Special Rapporteur judge it appropriate to move in that direction with regard to the payment of compensation to individuals.

32. Mr. ECONOMIDES said that one way of attenuating the effects of the exercise of diplomatic protection

would be to include, during the second reading of the draft articles, a final clause to the effect that, where a right of individual recourse for compensation existed under a human rights convention, such recourse would take precedence over diplomatic protection. Individuals could then pursue their case as they saw fit and would receive any compensation due. Diplomatic protection was in any case a cumbersome political procedure: even when all the conditions for exercising it were met, a Government would often not pursue the matter beyond the initial *démarche*. The inclusion of a final clause would obviate the need to consider the question whether the individual must consent to the exercise of diplomatic protection.

33. Mr. PELLET said that a "without prejudice" clause had already been adopted at the fifty-sixth session, in draft article 17, although that article could perhaps be amended to stipulate that the draft articles were without prejudice to the specific consequences of the exercise of diplomatic protection. He had always been puzzled by what precisely constituted "diplomatic protection". According to the *Mavrommatis* principle, diplomatic protection could be exercised either through judicial or through diplomatic channels. In his view, even informal approaches to States responsible for an internationally wrongful act were a form of diplomatic protection; diplomatic protection procedures were far more flexible than court procedures, and certainly need not be cumbersome, as Mr. Economides claimed. The failure to specify the procedures or minimum formalities for the exercise of diplomatic protection was yet another serious gap in the draft articles.

34. The CHAIRPERSON, speaking as a member of the Commission, said that Mr. Economides had made the distinction between undertaking the diplomatic protection procedure, which might or might not have an immediate effect, and judicial proceedings, which were much more protracted and costly.

35. Mr. BROWNLIE said that scholarly discourses on the status of the individual in international law were not very instructive; the Commission should pay less attention to abstractions and more to the real world. Individuals were sounding boards for group interests; indeed, in the past, the United Kingdom Parliament had been a sounding board for the interests of white settlers in Kenya, used as a way of validating the mistreatment of other individuals. It was deplorably unrealistic to talk about "individuals" in the abstract, when in the real world diplomatic protection involved the manipulation of individuals in pursuit of certain interests. Even if the Commission decided at some time in the future to consider the separate question of what were the practical consequences of the legal status of the individual in international law, it would not necessarily be contributing to the progressive development of international law: merely talking about the legal status of the individual was not in itself "progressive", but simply revealed a total lack of realism and knowledge of history.

36. Mr. ECONOMIDES, responding to Mr. Pellet's comments, said that of course every diplomatic protection procedure was initiated by a diplomatic *démarche*, such as summoning a country's ambassador to the foreign ministry. That action drew the attention of the Government to a given case; the Government then decided

whether to exercise diplomatic protection. Negotiations at the diplomatic level were the next step, and judicial remedies were available after the negotiations had been completed. However, an initial *démarche* did not in itself constitute the exercise of diplomatic protection; if the Government took the matter no further, diplomatic protection was not exercised.

37. Mr. PELLET said he took it that Mr. Economides was saying that a step taken before the exhaustion of domestic remedies did not constitute diplomatic protection, but he himself continued to believe that a *démarche* taken after that point, even informally, fell within the ambit of the topic.

38. He took issue with Mr. Brownlie for suggesting that the speakers in the debate were out of touch with reality: in fact, they had a wealth of practical experience between them. Moreover, everyone was well aware that the word “individuals” was a convenient way to refer to private individuals in general. He had himself always preferred to avoid taking examples from the field of human rights, in the belief that examples from the field of investment—the origin of diplomatic protection, after all—were more illuminating.

39. Mr. DUGARD (Special Rapporteur) said he suspected that many of the points raised in the debate would be raised again in the coming year by States and academics. He was grateful to members of the Commission for their suggestions, particularly on how to deal with the question of the payment of compensation to the injured individual. It had been a great pleasure to hear Mr. Pellet speak on behalf of the “*droits-de-l’homme*” school, to which he normally disclaimed any allegiance.

The meeting rose at 11.30 a.m.

2847th MEETING

Wednesday, 1 June 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Cooperation with other bodies

[Agenda item 11]

STATEMENT OF THE OBSERVER FROM THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON invited Ms. Villalta Vizcarra, Observer from the Inter-American Juridical Committee, to describe the Committee’s activities.

2. Ms. VILLALTA VIZCARRA (Observer from the Inter-American Juridical Committee) retraced the history of the Inter-American Juridical Committee since its establishment in Rio de Janeiro in 1906, described its principal objectives and operating procedures and then elaborated on the topics on its agenda. The first was legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions. While States acknowledged that international decisions had a binding character, most did not possess the necessary internal mechanisms for implementing them. At the request of the General Assembly of the OAS, the Committee had drawn up a questionnaire which it had transmitted to the legal advisers of the foreign ministries of OAS member States, *inter alia*, on the following subjects: international tribunals or other comparable international bodies to whose jurisdiction the State was subject under treaties or other international instruments; constitutional and legislative provisions and administrative practices that mandated, permitted or facilitated the application of the decisions concerned; decisions, sentences and other international rulings handed down in disputes to which the State was a party, accompanied, where possible, by a summary of the main provisions; the form in which such decisions were applied, including legal texts adopted exclusively for that purpose (such as laws, decrees and administrative decisions); and, where appropriate, legal grounds for non-application. Responses had already been gathered from 11 member States and the Committee would submit its report on the matter in 2006.

3. Under the second topic on the agenda, legal aspects of inter-American security, the Committee was considering the rules applicable to OAS action in the area of international peace and security, taking into account, as the General Assembly of OAS had requested in its resolution AG/RES 2042 (XXXIV-O/04), the Declaration on Security in the Americas adopted at the Special Conference on Security held in Mexico City in October 2003 and the multi-dimensional nature (political, economic, social and cultural) of the issue. The Committee had concluded that the Declaration on Security in the Americas was a tangible expression of the political will of the States members of OAS to give impetus to the progressive development of international law.

4. The third topic, one of interest also to the Commission, related to the inter-American specialized conferences on private international law, which were devoted to the progressive development of international law. For the Seventh Conference the Committee, which contributed to the preparatory work for the conferences, had considered the question of the applicable law and competency of international jurisdiction in respect of non-contractual civil liability. It had concluded that favourable conditions existed for elaborating a model law or convention on non-contractual civil liability with respect to traffic accidents, based on the San Luis Protocol relating to civil responsibility resulting from traffic accidents between the States Parties of MERCOSUR, which applied to all States members of MERCOSUR, and with respect to products and transboundary environmental damage. The Seventh Inter-American Specialized Conference would also consider the issue of electronic commerce.