

## Chapter VII

### DIPLOMATIC PROTECTION

#### A. Introduction

158. The Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.<sup>1121</sup> In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above Assembly resolution, established at its 2477th meeting a Working Group on the topic.<sup>1122</sup> The Working Group submitted a report at the same session which was endorsed by the Commission.<sup>1123</sup> The Working Group attempted to (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.<sup>1124</sup>

159. At its 2510th meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.<sup>1125</sup>

160. The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

161. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.<sup>1126</sup> At the same session, the Commission established an open-ended working group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.<sup>1127</sup>

<sup>1121</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, document A/51/10, para. 248, and annex II, addendum 1.

<sup>1122</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

<sup>1123</sup> *Ibid.*, para. 171.

<sup>1124</sup> *Ibid.*, pp. 62–63, paras. 189–190.

<sup>1125</sup> *Ibid.*, p. 63, para. 190.

<sup>1126</sup> *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484.

<sup>1127</sup> For the conclusions of the working group, *ibid.*, vol. II (Part Two), p. 49, para. 108.

162. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John Robert Dugard Special Rapporteur for the topic,<sup>1128</sup> after Mr. Bennouna was elected judge to the International Tribunal for the Former Yugoslavia.

163. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur’s first report (A/CN.4/506 and Add.1). The Commission deferred its consideration of document A/CN.4/506/Add.1 to the next session, due to a lack of time. At the same session, the Commission established open-ended informal consultations, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.<sup>1129</sup> The Commission subsequently decided, at its 2635th meeting, on 9 June 2000, to refer draft articles 1, 3, 5, 6, 7 and 8 to the Drafting Committee together with the report of the informal consultations.

#### B. Consideration of the topic at the present session

164. At the present session, the Commission had before it the remainder of the Special Rapporteur’s first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514). The Commission considered chapter III (Continuous nationality and the transferability of claims) at its 2680th and 2685th to 2687th meetings, held on 25 May and 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, held on 12 to 17 July 2001. Due to a lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of the report, concerning draft articles 12 and 13, to the next session.

165. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

166. At its 2688th meeting, the Commission established open-ended informal consultations on article 9, chaired by the Special Rapporteur.

<sup>1128</sup> *Yearbook ... 1999*, vol. II (Part Two), p. 17, document A/54/10, para. 19.

<sup>1129</sup> The report of the informal consultations is reproduced in *Yearbook ... 2000*, vol. II (Part Two), p. 85, document A/55/10, para. 495.

1 ARTICLE 9<sup>1130</sup>(a) *Introduction by the Special Rapporteur*

167. The Special Rapporteur, in introducing chapter III of his first report, dealing with draft article 9 on continuous nationality, observed that while the law of diplomatic protection was an area in which there was a substantial body of State practice, jurisprudence and doctrine, those sources of law all seemed to point in different directions. In large measure, the task facing the Commission was less one of formulating new rules than of choosing among them. The question of continuous nationality was a good illustration of that.

168. According to the traditional view, a State could exercise diplomatic protection only on behalf of a person who had been a national of that State at the time of the injury on which the claim was based and who had continued to be a national up to and including the time of the presentation of the claim. That traditional view was supported by State practice and was to be found in many agreements. The rationale for the traditional view was, *inter alia*, to prevent individuals from seeking the State offering the most advantageous protection, thus preventing powerful States from becoming “claims agencies”.

169. However, the traditional rule had been criticized on several grounds: it was difficult to reconcile with the Vattelian fiction that an injury to the national was an injury to the State itself; several judicial pronouncements existed questioning its validity as a general rule; its content was uncertain as there was no clarity regarding key notions such as “date of injury” (the *dies a quo*) and the date until which nationality must have continued (the *dies ad quem*); its rationale was no longer valid in that States were very cautious about conferring nationality, and ICJ noted in the *Nottebohm* case<sup>1131</sup> a claimant State had to demonstrate an effective link with the national on whose behalf it submitted a claim; the rule was unjust in that it could lead to the denial of diplomatic protection to individuals who had changed nationality involuntarily, whether as a result of succession of States or for other reasons, such as marriage or adoption; and it failed to acknowledge that the individual was the ultimate beneficiary of diplomatic

<sup>1130</sup> Article 9 proposed by the Special Rapporteur reads as follows:

“Article 9

“1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

“2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.

“3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

“4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.”

<sup>1131</sup> *Nottebohm, Second Phase* (see footnote 207 above).

protection. In the light of such criticism, it seemed necessary that the Commission reconsider the traditional position and adopt a more flexible rule, giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection.

170. The Special Rapporteur stated further that, while it was possible to retain the rule with an exception made in the case of involuntary change of nationality, that would be insufficient. He thus proposed abandoning the traditional rule in favour of a new approach whereby a State would be allowed to bring a claim on behalf of a person who had acquired its nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. Several safeguards against abuse were retained: the original State of nationality would still have priority; the requirements of acquisition of nationality in good faith and the existence of an effective link between the claimant State and its national would apply; and a claim could not be brought against the previous State of nationality for an injury that had occurred while the individual had been a national of that State—a safeguard that avoided the difficulties raised by, *inter alia*, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act)<sup>1132</sup>, which allowed Cubans who had become naturalized United States citizens to bring proceedings against the Government of Cuba for losses incurred at the hands of that Government while they had still been nationals of Cuba. Paragraph 2 extended the new rule to the transfer of claims.

(b) *Summary of the debate*

171. The Special Rapporteur was commended for his even-handed treatment of the topic in his report. At the same time, it was pointed out that the Special Rapporteur had set himself the difficult task of challenging an established rule of customary international law. Indeed, strong support was expressed in the Commission for the view that the rule of continuous nationality enjoyed the status of customary international law.

172. Support was also expressed for maintaining the traditional rule, particularly since the reasons in its favour, *inter alia*, the concern to avoid abuse on the part of individuals or States, were still applicable. Others pointed out that the main rationale for the continuity rule was not only the danger of abuse through “forum shopping”, but rather the *Mavrommatis*<sup>1133</sup> approach to diplomatic protection, i.e. that the State was “in reality asserting its own rights”. That implied that at the time of the breach the individual must have had the nationality of the State which brings the claim. In addition, the strength of State practice and the lack of evidence of an emergent principle or new practice militated against changing the rule.

173. Furthermore, it was suggested that, if the Commission were to follow the suggestion of the Special Rapporteur, one condition would have to be added: that the

<sup>1132</sup> ILM, vol. 35, No. 2 (March 1996), p. 359.

<sup>1133</sup> See footnote 236 above.

obligation should have been in force at the time of the breach between the respondent State and the State bringing the claim on behalf of the individual which had subsequently acquired its nationality, since it was possible that the claimant State could bring a claim for infringement of an obligation which occurred at a time when that obligation was not owed to it.

174. Conversely, there was support for the Special Rapporteur's proposal on article 9. While it was conceded that such a customary rule existed, reference was made to the doubts about the rule that had emerged over time, as expressed in numerous judgements and by several writers. It was stated that even well-established rules could be changed when they no longer conformed to developments in international society, and that it was within the Commission's mandate on the progressive development of international law to propose such changes. From a practical point of view, therefore, there was an interest in the positive evolution of the institution so that it could ensure better protection of the interests of people and citizens than before. Likewise, it was disputed that States would allow themselves to be abused easily as many had adopted complex procedures for the acquisition of nationality.

175. A key issue in the debate was the relationship between diplomatic protection and the protection of individuals under international law. Those members supporting the new approach of the Special Rapporteur agreed with his evaluation that the rule of continuing nationality had outlived its usefulness in a world where individual rights were recognized by international law. It was pointed out that the State, in exercising diplomatic protection, was not ensuring its own rights. Instead, it was seeking respect for the individual's rights. It was stated that in fact only the nationality at the time of the claim mattered.

176. Others were of the view that the general trend in international law of protecting individuals did not provide a justification for changing the rule of continuous nationality. It was emphasized that, while, in exercising such protection the State must take into consideration the human rights of the injured person, diplomatic protection was not a human rights institution *per se*. Nor was diplomatic protection the best mechanism for the protection of human rights, given its inherently discretionary nature. It was also pointed out that modern diplomatic protection, based largely on treaties, was highly dependent upon processes of negotiation between States in which the role of the State as "legislator" of a relationship could not be separated from the role of the State as the ultimate insurer of the rights concerned. The problem was how to provide for the rights of the individual and those of the State without upsetting the delicate balance between them.

177. At the same time, there was agreement that the rule needed to be made more flexible so as to avoid inequitable results. While those supporting the Special Rapporteur's proposal were of the view that this required revising the rule itself, most members preferred a middle course whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State. It was proposed that the ba-

sic exceptions should relate to involuntary changes of nationality of the protected person, arising from succession of States, marriage and adoption. It was also proposed to extend this rule to other cases where different nationalities were involved as a result of changes to the claim arising from, for example, inheritance and subrogation. It was also suggested that further exceptions could be provided for stateless persons and for the situation where it would be impossible to apply the rule of continuity owing to, for example, the disappearance of the State of original nationality through dissolution or dismemberment. However, doubts were expressed as to, for example, the distinction between cases of "involuntary" and "voluntary" change of nationality.

178. Concerning paragraph 1 of the Special Rapporteur's proposal, it was suggested that it be recast so as to enunciate the traditional rule. Furthermore, the view was expressed that the requirement of bona fide change of nationality was too subjective and presented problems, particularly in the context of changes in nationality by legal persons. It was proposed that the requirement of an "effective" link, as espoused in the *Nottebohm* case,<sup>1134</sup> would be sufficient guard against abuse. It was also proposed that the reference to "change of nationality" be clarified by indicating that the original nationality had been lost, so as to avoid possible competing claims. It was also observed that the phrase was inadequate because it did not specify the applicable law or the conditions under which such "change" occurred.

179. With regard to paragraph 2, it was suggested that a distinction be drawn between transfer of claims between legal persons and those between natural persons, and that legal persons be excluded from the scope of the draft articles. However, it was recalled that the Commission had, at its previous session, taken the view that it might at a later stage wish to reconsider the question whether to include the protection of legal persons in the draft articles at all.<sup>1135</sup> The Special Rapporteur confirmed his understanding that the scope of his mandate extended to the treatment of legal persons, but not to protection offered by international organizations. He indicated that he intended to prepare specific provisions on the rule of continuing nationality and the transferability of claims in the context of legal persons. Serious doubts were also expressed on whether the concept of assignment was well founded.

180. It was stated that the issue of transferability of claims required more consideration than that provided in the report. The view was expressed that paragraph 2 needed to be more restrictive so as to allow for the rule of continuity to be set aside only in regard to the situation of involuntary transfer of claims, e.g. death of the person injured, and not as regards voluntary transfers. It was also suggested that the words "international claim" be clarified.

181. Concerning paragraph 3, the view was expressed that it was undesirable to disassociate the general interest

<sup>1134</sup> *Nottebohm, Second Phase* (see footnote 207 above).

<sup>1135</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 85, document A/55/10, para. 495.

of the claimant State from that of the particular individual injured. Similarly, it was maintained that the paragraph could create confusion since it seemed to relate as much to the responsibility of States for internationally wrongful acts as to diplomatic protection.

182. While support was expressed for paragraph 4, it was proposed that it be formulated in broader terms. It was also pointed out that the provision could be problematic since under the domestic legislation of some States it was not possible for nationals to lose their nationality. As to the question of the Helms-Burton Act, the view was expressed that the possible wrongful nature of the Act had more to do with its extraterritorial application than with any inconsistency with the rule expressed in the paragraph.

183. It was suggested that the Commission consider the following additional issues relating to the nationality of claims: (a) the case of international organizations, exercising both functional protection and diplomatic protection for one of its officials (as per the advisory opinion on *Reparation for Injuries*<sup>1136</sup>); (b) the right that the State of nationality of a ship or aircraft has to prefer a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned;<sup>1137</sup> (c) the case where one State exercises diplomatic protection of a national of another State because the latter has delegated to the former State its right to do so; and (d) the case where a State or an international organization administers or controls a territory.

#### (c) *Special Rapporteur's concluding remarks*

184. The Special Rapporteur reiterated his view that the Vattelien legal fiction, according to which the State protected its own interest when it acted on behalf of its national, was *not* the foundation of the rule of continuous nationality because it implied that only the State of nationality at the time of injury could be the claimant State, regardless of whether the injured individual still retained that State's nationality at the time the claim was presented. He admitted that his proposal for draft article 9 was innovative and although support had been expressed for his proposal by some speakers, they were in the minority. However, there had been unanimous agreement that flexibility and change in some form were necessary. This was to be brought about by way of the inclusion of reasonable exceptions to the rule, particularly in the context of State succession and marriage. The Drafting Committee would also have to consider whether naturalization after a long period of residence could constitute an exception to the rule. He also recalled that several valid criticisms had been voiced, *inter alia*, in relation to the notion of a bona fide change of nationality, and that some speakers had felt that insufficient attention had been paid to the question of transfer of claims. He also observed that further consideration would have to be given to questions of the *dies a quo* and the *dies ad quem*.

<sup>1136</sup> See footnote 38 above.

<sup>1137</sup> *M/V "Saiga"* case (see footnote 515 above), para. 172.

## 2. ARTICLE 10<sup>1138</sup>

### (a) *Introduction by the Special Rapporteur*

185. The Special Rapporteur, in introducing draft article 10 and the rule of exhaustion of local remedies generally, stated that it was clear that the rule was a customary rule of international law, as affirmed by ICJ in the *Interhandel*<sup>1139</sup> and *ELSI*<sup>1140</sup> cases. It was founded on respect for sovereignty of the host State as well as for its judicial organs. He recalled that a draft article on the exhaustion of local remedies rule had been included in the draft articles on State responsibility (draft article 22) as adopted at the forty-eighth session on first reading,<sup>1141</sup> but that the Commission had since decided to leave the matter to the draft articles on diplomatic protection.

186. Draft article 10 was meant to establish the context for the subsequent articles on the exhaustion of local remedies. Paragraph 1 affirmed the existence of the rule and its application both to natural and legal persons. However, it did not apply in cases involving diplomats or State enterprises engaged in *acta jure imperii*, which involved direct injury to the State and hence would not require exhaustion of local remedies.

187. The Special Rapporteur observed further that it was not always possible to maintain the distinction between primary and secondary rules throughout the draft articles on diplomatic protection. The distinction had been important for the draft articles on responsibility of States for internationally wrongful acts, but was less so in respect of diplomatic protection. This was because the concept of denial of justice had featured prominently in most attempts at codification of the local remedies rule. Although he had previously been of the view that the question of denial of justice involved a primary rule and should not be dealt with, he had since come to think that the matter should be considered.

188. Paragraph 2 dealt with the content of the local remedies rule. All legal remedies had to be exhausted before a claim was brought at the international level. However, difficulties existed concerning the definition of the term "legal remedies". It clearly included all judicial remedies available under the municipal system, as well as administrative remedies, where they were available as of right but not where they were discretionary or available as a matter of grace. He observed further that the *Ambatielos* case had raised difficulties by requiring that the claimant exhaust

<sup>1138</sup> Article 10 proposed by the Special Rapporteur reads as follows:

#### *Article 10*

"1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to article 14, exhausted all available local legal remedies in the State alleged to be responsible for the injury.

"2. 'Local legal remedies' means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special."

<sup>1139</sup> See footnote 684 above.

<sup>1140</sup> See footnote 85 above.

<sup>1141</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, para. 65.

the “procedural facilities” available in municipal courts.<sup>1142</sup> The decision constituted a warning that a claimant who failed to present his or her case properly at the municipal level could not reopen the matter at the international level. He also referred to the principle that the alien was required to raise before the domestic courts all the arguments that he or she intended to raise at the international level. Finally, paragraph 2 required that, for the rule to apply, the remedies in question had to be “available”, both in theory and in practice.

(b) *Summary of the debate*

189. Support was expressed for the exhaustion of local remedies rule as being a well-established rule of customary international law. Support was also expressed for the Special Rapporteur’s approach of dealing with the topic in several articles, instead of one lengthy article, although it was suggested that article 10 could be reformulated as a synthetic definition of the rule to be followed by more specific provisions. At the same time, it was observed that there was a limit to which specificity should be required, since the application of the local remedies rule was highly contextual.

190. Regarding paragraph 1, it was suggested that the reference to “international claim” be clarified and that the words “available ... remedies” required closer scrutiny. In addition, it was observed that the criterion of effectiveness, which had traditionally been a facet of the rule, was missing. The view was expressed that without the addition of the qualifier “effective”, the reference to “all” available local legal remedies would be too broad and would impose an excessive burden on the injured person. Conversely, doubts were expressed concerning the inclusion of an “effectiveness” requirement, since such criterion could prove highly subjective, and would inevitably lead to a discussion on the question of a fair trial—a controversial issue in international law. Furthermore, it was suggested that the reference to “natural or legal person” be deleted on the understanding that the draft articles applied both to natural and legal persons, unless expressly stated otherwise.

191. Concerning the definition of “local legal remedies” in paragraph 2, it was observed that each State regulated its remedies in accordance with its own procedures and, in many cases, constitutional law. It was suggested that the paragraph could state the purpose of the remedies to be exhausted: in some cases local remedies were available so as to prevent an injury, while in others, only in order to provide reparation.

192. As to the word “legal”, it was suggested that it could include all legal institutions from which the individual had a right to expect a decision, a judgement or an administrative ruling. In terms of a further view, the word “legal” was superfluous. While support was expressed for the position of the Special Rapporteur that non-legal or discretionary remedies should be excluded from the ambit of the local remedies rule, it was observed that what was important was the result and not the means by which that result was obtained. It was queried whether the word

“local” could include instituting a complaint before a regional human rights mechanism, such as the European Court of Human Rights.

193. The view was expressed that the Special Rapporteur had given an overly narrow interpretation of “administrative remedies”. A clarification was sought regarding the reference in his report (para. 14) to administrative remedies being obtained from a tribunal, since many such remedies were not obtainable from tribunals. It was also queried whether recourse to an ombudsman would be considered an administrative “local remedy”.

194. Support was expressed for the Special Rapporteur’s view that the distinction between primary and secondary rules was not necessary in all cases, and that a rigid adherence to the distinction could result in the exclusion of the concept of denial of justice. Conversely, it was stated that there was no need to introduce a provision on denial of justice, since it was an example, among others, of cases in which local remedies were not “effective”.

195. Doubts were expressed regarding the “rule” in the *Finnish Shipowners* case,<sup>1143</sup> whereby the litigant was required to raise in municipal proceedings all the arguments he or she intended to raise in international proceedings. It was observed that the rule had to be applied flexibly so as to recognize that while an argument may be sufficient to substantiate a claim at the local level, it might not do so at the international level.

(c) *Special Rapporteur’s concluding remarks*

196. The Special Rapporteur noted that, while article 10 had largely been accepted by speakers, a number of drafting suggestions had been made which would be considered by the Drafting Committee. He accepted the criticism concerning the inclusion of the phrase “natural or legal persons”. He also noted that it had been his intention to deal with the question of effectiveness in a separate article. However, he recognized that it would still be necessary to indicate in article 10 that the remedy should be both available and effective, so as to reflect the prevailing view in international law. While it was true that in many instances the availability test was adequate, examples existed (as in the *Robert E. Brown* case<sup>1144</sup>) of situations where it was necessary to consider the effectiveness of the local remedy in the context of the judicial system of the respondent State, which did mean questioning the standards of justice employed in that State.

197. He explained further that paragraph 2 had been an attempt at producing a broad definition of local remedies so as to indicate that the individual should exhaust the entire range of available legal remedies. The crucial point was not the ordinary or extraordinary character of the legal remedy, but whether it provided the possibility of an effective means of redress.

198. Furthermore, he noted that there had been some criticism of the “rule” that the foreign litigant was required

<sup>1142</sup> UNRIAA, vol. XII (Sales No. 63.V.3), p. 120.

<sup>1143</sup> *Finnish Shipowners* (see footnote 103 above), p. 1484.

<sup>1144</sup> See footnote 295 above.

to raise in the municipal proceedings all the arguments he or she intended to raise in the international proceedings. He admitted that it was not without difficulties and it was for that reason that he had not included it in the provision itself.

199. On the question of maintaining a distinction between primary and secondary rules and the advisability of including a provision on denial of justice, he noted that different views had been expressed regarding the inclusion of such a concept.

### 3. ARTICLE 11<sup>1145</sup>

#### (a) *Introduction by the Special Rapporteur*

200. The Special Rapporteur explained that draft article 11 dealt with the distinction between “direct” and “indirect” claims for the purpose of the exhaustion of local remedies rule. Such a provision was necessary in the draft articles so as to ascertain which cases fell within the scope of the draft articles. The basic principle was that the rule applied only where there had been an injury to a national of the State, i.e. where it had been “indirectly” injured through its national. It did not apply where there had been a direct injury to the State itself.

201. Two criteria were proposed for determining the type of injury involved: (a) a preponderance test; and (b) a *sine qua non* test. He suggested that it might be sufficient to adopt only one of the tests. Under the first test, the issue was whether the injury had been preponderantly to the national of the claimant State, in which case it would be indirect and the exhaustion of local remedies rule would apply. Alternatively, under the *sine qua non* test, it would be necessary to establish whether the claim would have been brought but for the injury to the national of the claimant State. He observed that other criteria had also been proposed in the literature, including: the “subject” of the dispute; the “nature” of the claim; and the nature of the remedy sought. For example, if a State only claimed declaratory relief, this could be an indication that the injury was direct. However, in cases where a State sought a declaratory order as well as compensation for injury to the individual, it would be up to the Court to decide which was the preponderant factor. Furthermore, he remarked that it was necessary to guard against the possibility of a State seeking a declaratory order simply to avoid the exhaustion of local remedies rule. In his view, the additional three factors were to be considered in deciding whether the claim was “preponderantly” direct or indirect. As such, they did not require separate mention in the draft article. However, they were left in between brackets with a view to obtaining guidance from the Commission on their inclusion.

<sup>1145</sup> Article 11 proposed by the Special Rapporteur reads as follows:

*“Article 11*

“Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]”

#### (b) *Summary of the debate*

202. While support was expressed for article 11, which was considered to reflect prevailing practice, it was also suggested that it required further reflection. Proposals included merging articles 10 and 11 and deleting article 11 entirely, as going beyond the scope of diplomatic protection.

203. It was observed that the terms “direct” and “indirect” injury were misleading. Reference was made to the distinction made in the French-speaking world between *dommage médiate* and *dommage immédiat* (“mediate” and “immediate” injury). “Immediate” injury was that suffered directly by the State. “Mediate” or remote injury was that suffered by the State in the person of its nationals.

204. The view was expressed that the main difficulties in the provision related to the evaluation of the “preponderance” in a situation of a mixed claim. It was further pointed out that cases could arise where a test of preponderance could not be applied because the injury suffered by the State was equivalent to that suffered by the individual. The view was also expressed that the two tests should not be seen as applying cumulatively, nor should it be required that the preponderance test be applied before the *sine qua non* test. It was further pointed out that while there was some support in the *ELSI*<sup>1146</sup> case for a subjective test, what was found to be relevant in that case, as well as in the *Interhandel*<sup>1147</sup> case, was whether in substance there was one and the same dispute, and whether it related to an injury to a national.

205. On the question of resort to declaratory relief, it was observed that an injured State had the right to demand the cessation of the violation of the agreement, without having to first resort to local remedies.

206. Concerning the list of additional factors to be considered, the view was expressed that it might be deleted since it was not established practice to include illustrative examples in a codification text. Conversely, it was suggested that since the sentence in brackets set out criteria, rather than examples, and as any decision on the matter was inherently subjective, it would be useful to keep the sentence in brackets.

#### (c) *Special Rapporteur’s concluding remarks*

207. The Special Rapporteur recalled that various drafting suggestions had been made and pointed to some further issues which would have to be considered by the Drafting Committee, including the possibility that only the preponderance test be employed. He observed that there had been a difference of opinion as to the additional factors included in brackets, and also took note of the criticism of the terms “direct” and “indirect” injury. He pointed out that while they were used in his report, they had not been used in the draft article itself.

<sup>1146</sup> See footnote 85 above.

<sup>1147</sup> See footnote 684 above.