

Chapter V

DIPLOMATIC PROTECTION

A. Introduction

104. 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.²³⁵ In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission to further 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, at its 2477th meeting established a working group on the topic.²³⁶ At the same session the Working Group submitted a report which was endorsed by the Commission.²³⁷ 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.²³⁸

105. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.²³⁹

106. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the decision of the Commission to include on its agenda the topic "Diplomatic protection".

107. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.²⁴⁰ At the same session, the Commission established an open-ended working group to consider conclusions which might be drawn on the basis of the discussion as to the approach to the topic.²⁴¹

108. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John Robert Dugard

²³⁵ *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248, and annex II, add.1, p. 137.

²³⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

²³⁷ *Ibid.*, p. 60, para. 171.

²³⁸ *Ibid.*, pp. 62–63, paras. 189–190.

²³⁹ *Ibid.*, p. 63, para. 190.

²⁴⁰ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484.

²⁴¹ For the conclusions of the Working Group see *ibid.*, vol. II (Part Two), p. 49, para. 108.

Special Rapporteur for the topic,²⁴² after Mr. Bennouna was elected a judge to the International Tribunal for the Former Yugoslavia.

109. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report.²⁴³ The Commission deferred its consideration of chapter III to the next session, due to the lack of time. At the same session, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.²⁴⁴ 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 consultation.

110. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report, as well as his second report.²⁴⁵ Owing 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 rest of the report, concerning draft articles 12 and 13, to the next session. At its 2688th meeting, held on 12 July 2001, the Commission decided to refer draft article 9 to the Drafting Committee. At its 2690th meeting, held on 17 July 2001, it decided to refer draft articles 10 and 11 to the Committee.²⁴⁶

111. At its 2688th meeting, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on article 9.²⁴⁷

B. Consideration of the topic at the present session

112. At the session, the Commission had before it the remainder of the second report of the Special Rapporteur,²⁴⁸ concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1). The Commission considered the remaining parts of the second report, as well as the first part of the third report, concerning the state of the study on diplomatic protection and articles 14 and 15, at its 2712th to 2719th and 2729th meetings, held

²⁴² *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 17, para. 19.

²⁴³ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

²⁴⁴ The report of the informal consultations appears in *Yearbook ... 2000*, vol. II (Part Two), p. 85, para. 495.

²⁴⁵ See footnote 3 above.

²⁴⁶ See *Yearbook ... 2001*, vol. I.

²⁴⁷ *Ibid.*

²⁴⁸ See footnote 3 above.

from 30 April to 14 May and on 4 June 2002, respectively. It subsequently considered the second part of the third report, concerning article 16, at its 2725th and 2727th to 2729th meetings, held on 24 May and from 30 May to 4 June, respectively.

113. At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended informal consultation, to be chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

114. At its 2719th meeting, the Commission decided to refer draft article 14, subparagraphs (a), (b), (d) (to be considered in connection with subparagraph (a)) and (e), to the Drafting Committee. At its 2729th meeting, it decided to refer draft article 14, subparagraph (c), to the Drafting Committee to be considered in connection with subparagraph (a).

115. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8] at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, articles 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and article 6 at its 2732nd meeting (see section C below).

116. At its 2745th and 2746th meetings, held on 12 and 13 August 2002, the Commission adopted the commentaries to the aforementioned draft articles.

1. GENERAL COMMENTS ON THE STUDY

(a) *Introduction by the Special Rapporteur*

117. The Special Rapporteur, in introducing his third report, noted that diplomatic protection was a subject on which there was a wealth of authority in the form of codification attempts, conventions, State practice, jurisprudence and doctrine. No other branch of international law was so rich in authority. However, practice was frequently inconsistent and contradictory. His task was to present all the authorities and options so that the Commission could make an informed choice.

118. As to the scope of the draft articles, the Special Rapporteur reiterated his reluctance to go beyond the traditional topics falling within the subject of diplomatic protection, namely nationality of claims and the exhaustion of local remedies. However, he observed that, during the course of debate in the previous quinquennium, suggestions had been made to include a number of other matters within the field of diplomatic protection, such as functional protection by international organizations of their officials; the right of the State of nationality of a ship or aircraft to bring 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; the case where one State exercises diplomatic protection of a national of another State as a result of the delegation of such a right; and the case where a State or an international organization administers or controls a territory. While noting the importance of those issues, he maintained that the Commission should not consider them in the context of the present set of draft articles, especially if

it intended to adopt the draft articles on second reading by the end of the quinquennium. Furthermore, he cautioned that the debate on some of those issues, for example, that of the case where a State or an international organization administered or controlled a territory, could go well beyond the traditional field of diplomatic protection.

119. In addition, he noted that it was difficult for the Commission to complete a study on diplomatic protection without examining denial of justice and the Calvo clause,²⁴⁹ both of which had featured prominently in the jurisprudence on the subject.

120. The Special Rapporteur further confirmed his intention to consider in his next report the nationality of corporations.

(b) *Summary of the debate*

121. The Special Rapporteur was congratulated on his report and on the open-minded manner in which he approached the issues at hand. At the same time, the view was expressed that the Special Rapporteur's approach appeared to be too generalist. Hence, support was expressed for the consideration of the additional issues listed by the Special Rapporteur in his third report.

122. The view was expressed that the question of functional protection by international organizations of their officials should be excluded from the draft articles since it constituted an exception to the nationality principle, which was fundamental to the issue of diplomatic protection. In its advisory opinion in the *Reparation for Injuries* case,²⁵⁰ ICJ had made it clear that the claim brought by the Organization was based not on the nationality of the victim but on his status as an agent of the Organization. Similarly, in its judgement in the *Jurado* case,²⁵¹ the Administrative Tribunal of ILO had stated that the privileges and immunities of ILO officials were granted solely in the interests of the Organization.

123. Conversely, it was proposed that the Commission should consider the consequences for the State of nationality of an international organization's entitlement to exercise protection. ICJ had raised the question of the competing claims of the State of nationality and the United Nations with regard to personal injuries to United Nations officials in its advisory opinion in the *Reparation for Injuries* case. It was proposed that the relationship between functional protection and diplomatic protection be studied closely, with some reference to functional protection being made in the draft articles. Similarly, it was suggested that it be made clear that, as the Court had noted in its advisory opinion, the possibility of competition between the State's right of diplomatic protection and the organization's right of functional protection could not result in two claims or two acts of reparation. Hence the Commission could consider the need to limit claims and reparations.

²⁴⁹ See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 203–204.

²⁵⁰ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174.

²⁵¹ ILO, Administrative Tribunal, Judgement No. 70 of 11 September 1964.

124. It was also noted that the question of functional protection of their officials by international organizations was of interest to small States some of whose nationals were employed by international organizations, for, if the possibility of protection rested solely with the State of nationality, there would be a risk of inequality of treatment.

125. Others questioned whether such protection could be characterized as diplomatic protection. If the Commission agreed to exclude protection of diplomatic and consular officials from the scope of the topic, the same logic would apply to officials of international organizations. Similarly, members of armed forces were normally protected by the State in charge of those forces, but protection as such was not regarded as “diplomatic protection”.

126. From another point of view, the distinction between diplomatic and functional protection did not necessarily apply in the context of diplomatic protection exercised on behalf of members of the armed services. Such cases represented an application of the legal interests of the State to whom the troops in question belonged. While the link of nationality was the major expression of legal interest in States’ nationals, national corporations and agencies, the law recognized other bases for legal interest, such as membership in the armed forces.

127. In support of the proposal to extend the scope of the draft articles to cover diplomatic protection of crew members and passengers on ships, the example was cited of the *M/V “Saiga”* (No. 2) case,²⁵² where ITLOS found that the ship’s State of nationality was entitled to bring a claim for injury suffered by members of the crew, irrespective of their individual nationalities; thus, the State of nationality did not possess an exclusive right to exercise diplomatic protection. At the same time, caution was advised regarding the *M/V “Saiga”* (No. 2) case, which had been brought before ITLOS under the special provisions contained in article 292 of the United Nations Convention on the Law of the Sea, and not as a general case of diplomatic protection.

128. It was also noted that the evolution of international law was characterized by increasingly strong concern for respect for human rights. Hence, it was suggested that, if crew members could receive protection from the State of nationality of the vessel or aircraft, that merely provided increased protection and should be welcomed.

129. Others maintained that the Special Rapporteur was correct to propose that the Commission exclude from the scope of the draft articles the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew or passengers. It was stated that the issue was not how a State should protect its nationals abroad, but rather how to avoid conflicting claims from different States. If the ship flew a flag of convenience, the State of registration would have no interest in exercising diplomatic protection should the crew’s national Governments fail to do so. Such cases would, according to this view, in any event be covered by the law of the sea.

130. It was also observed that the question of the protection of a ship’s crew was covered both by the United

Nations Convention on the Law of the Sea and by earlier international agreements. Closer examination of other international instruments was thus called for.

131. It was also observed that the legal principles regulating questions relating to the nationality of aircraft were already set out in international law, in particular in many instruments, such as the Convention on Offences and Certain Other Acts Committed on Board Aircraft. There, the determining factor was the special link between the State of nationality or the State of registry and a given ship or aircraft. It did not involve persons and, although the international instruments in question in certain instances granted a State the right to exercise prerogatives which might at first glance resemble diplomatic protection, that protection was of another nature. Thus, such questions had no place in the consideration of the subject of diplomatic protection.

132. Disagreement was expressed with the Special Rapporteur’s suggestion that the Commission not consider the case of a State exercising diplomatic protection of a national of another State as a result of the delegation of such a right. At issue was the means of implementing State responsibility. Therefore, there was in principle no reason why a State could not exercise diplomatic protection in such circumstances. Others noted that if diplomatic protection was viewed as a discretionary right of the State, the point could be made in the commentary that the State had a right to delegate to other subjects of international law the exercise of diplomatic protection on behalf of its citizens or of other people with genuine links to it within the framework of the established exceptions to the nationality principle. However, it was important not to confuse the rules relating to diplomatic protection with other types of protection of individuals or their interests.

133. Support was expressed for the Special Rapporteur’s view that the draft articles ought not consider the case where an international organization controlled a territory. It was noted that this case involved a very specific form of protection, one at least as closely related to functional protection as to diplomatic protection; and, as in the case of the articles on State responsibility, the Commission should disregard all issues relating to international organizations. At the same time, support was expressed for the proposal that the draft articles should consider the situation where a State administering or controlling a territory not its own purported to exercise diplomatic protection on behalf of the territory’s inhabitants.

134. In terms of another view, in the case where an international organization administered a territory, the international organization fulfilled all the functions of a State and should accordingly exercise diplomatic protection in respect of persons who might be stateless or whose nationality was not clear. Furthermore, while the link of nationality had been of some importance in the past, when States had been the sole actors on the international stage, it had become less important in a world where international organizations had an increasingly larger role to play alongside States. It was accordingly suggested that the issue be covered by the draft articles. Conversely, it was stated that it was risky to assume that the special and temporary functions which were transferred to, for example,

²⁵² See footnote 5 above.

the United Nations as administrator of a territory were analogous to the administration of territories by States.

135. In terms of yet another view, it was maintained that the core of the issue of diplomatic protection was the nationality principle, namely the link between a State and its nationals abroad. When a State claimed a legal interest in the exercise of diplomatic protection in the case of an internationally wrongful act derived from an injury caused to its national, the link between the legal interest and the State was the nationality of the national. If the proposed additional issues were covered in the draft articles, even as exceptional cases, they would inevitably affect the nature of the rules on diplomatic protection, unduly extending the right of States to intervene.

136. It was also suggested that if the Commission were to decide not to consider those additional issues, they should at least be mentioned in the commentary.

137. The Commission considered several other suggestions for issues that could be included within the scope of the draft articles. It examined the question whether it might be necessary to include a reference in the draft articles to the “clean hands” doctrine. The view was expressed that, while the doctrine was relevant to the discussion on diplomatic protection, it could not be given special treatment in the draft articles. The example was cited of the treatment of the doctrine in the context of the Commission’s work on the topic of State responsibility, where the Commission decided that it did not constitute a circumstance precluding wrongfulness.²⁵³ Similarly, it was suggested that the fact that a person did not have “clean hands” would not warrant a deprivation of diplomatic protection. Further reservations were expressed about the legal status of the “clean hands” concept. It was noted that the concept was little used, and then mainly as a prejudice argument, and the Commission had to be careful not to legitimate it “accidentally”.

138. On the other hand, it was stated that it was legitimate to raise the issue in connection with diplomatic protection. The question whether or not the person on behalf of whom diplomatic protection was exercised had “clean hands” could not be ignored, and, whatever conclusions were drawn from that, it was important for the issue to be raised. Still others noted that it would be better for the Commission not to take any position on the “clean hands” rule.

139. The Commission also considered the necessity of including a provision on denial of justice.²⁵⁴ It was recalled that the Commission had previously not envisaged referring to the concept of denial of justice explicitly in the draft articles. It was also maintained that this concept was part of substantive law and of the subject of the treatment of aliens, and not directly related to diplomatic protection. It happened that, when aliens used the courts, there was sometimes a denial of justice, and that could happen quite apart from any circumstances involving recourse to local remedies as such. To take up the subject would thus be

illogical and would involve the Commission in enormous difficulties.

140. Conversely, it was pointed out that the question of denial of justice touched on a substantive problem inasmuch as it concerned equal treatment of aliens and nationals with regard to access to judicial systems. That subject was extensively treated in private international law, and conventions existed on the subject, particularly at the inter-American level, which provided for the right of aliens to have access to the same remedies as nationals—a right reaffirmed by other more recent texts. As such, it was difficult to disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection.

141. In terms of other suggestions, it was proposed that some thought be given to considering the effects of the exercise of diplomatic protection as part of the present study.

142. Support was also expressed for the Special Rapporteur’s proposal to consider the question of the diplomatic protection of corporations.

143. As to the use of terms, it was pointed out that the concept of “nationality of claims” was confusing and, as a common-law concept, did not have its analogue in certain other legal systems. In response, the Special Rapporteur acknowledged that the phrase had a common-law connotation but pointed out that it also had been used in French by ICJ in the *Reparation for Injuries* opinion.

(c) *Special Rapporteur’s concluding remarks*

144. The Special Rapporteur observed that in general there seemed to be support for his desire to confine the draft articles to issues relating to the nationality of claims and to the rule on the exhaustion of local remedies, so that it might be possible to conclude the consideration of the topic within the Commission’s quinquennium.

145. Regarding the issues identified in his third report which were linked to the nationality of claims but did not traditionally fall within that field, the Special Rapporteur noted that there had been no support for a full study of functional protection by organizations of their officials. However, several speakers had stressed the need to distinguish between diplomatic protection and functional protection in the commentary, with special reference to the reply by ICJ in its advisory opinion to the second question in the *Reparation for Injuries* case, on how the exercise of functional protection by the United Nations was to be reconciled with the right of the State of nationality to protect its nationals. He proposed to deal with the matter in the context of competing claims of protection within the commentary to article 1, although he was still open to the possibility of including a separate provision on the subject.

146. The Special Rapporteur noted that there was a division of opinion on the proposal to expand the draft articles to include the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and passengers. He noted that further consideration would be given to the matter.

²⁵³ See *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 85, paras. 411–415.

²⁵⁴ See also section B.6 below.

147. As to the case in which one State delegated the right to exercise diplomatic protection to another State, he observed that it did not arise frequently in practice and there was very little discussion of it in the literature. He also noted that the issue was partly dealt with in the context of the article on continuous nationality.

148. The Special Rapporteur noted that there had been some, albeit little, support for the proposal to include within the scope of the study the exercise of diplomatic protection by a State which administered, controlled or occupied a territory. Some members had proposed the consideration of the question of protection by an international organization of persons living in a territory which it controlled, such as the United Nations in Kosovo and East Timor. While there had been some support for the idea, in his view the majority of the Commission believed that the issue might be better addressed in the context of the responsibility of international organizations.

149. Regarding the “clean hands” principle, the Special Rapporteur noted that it could arise in connection with the conduct of the injured person, the claimant State or the respondent State, so that it was difficult to formulate a rule applicable to all cases. He also observed that the issue would be covered in section D of his third report and in connection with the nationality of corporations in the context of the *Barcelona Traction* case.²⁵⁵

2. ARTICLES 12 AND 13²⁵⁶

(a) *Introduction by the Special Rapporteur*

150. The Special Rapporteur recalled that articles 12 and 13 had been taken up in his second report, submitted at the fifty-third session of the Commission in 2001, but had not been considered then for lack of time. He observed that the two provisions should be read together, and thus proposed to deal with them jointly. Both concerned the question of whether the rule on the exhaustion of local remedies was one of procedure or of substance—one of the most controversial issues in the field of exhaustion of local remedies.

151. It was noted that the Commission had previously taken a position on the matter, in the context of the topic of State responsibility. He recalled that a provision²⁵⁷ had

²⁵⁵ See footnote 6 above.

²⁵⁶ Articles 12 and 13 proposed by the Special Rapporteur in his second report (see footnote 3 above) read as follows:

“Article 12

“The requirement that local remedies must be exhausted is a procedural precondition that must be complied with before a State may bring an international claim based on injury to a national arising out of an internationally wrongful act committed against the national where the act complained of is a breach of both local law and international law.

“Article 13

“Where a foreign national brings legal proceedings before the domestic courts of a State in order to obtain redress for a violation of the domestic law of that State not amounting to an international wrong, the State in which such proceedings are brought may incur international responsibility if there is a denial of justice to the foreign national. Subject to article 14, the injured foreign national must exhaust any further local remedies that may be available before an international claim is brought on his behalf.”

²⁵⁷ Art. 22; see *Yearbook ... 1977*, vol. II (Part Two), p. 30.

been adopted at the twenty-ninth session of the Commission and confirmed at its forty-eighth session in connection with the draft articles on State responsibility provisionally adopted by the Commission on first reading.²⁵⁸ However, in his view, the rule was essentially one of procedure rather than of substance, and the matter therefore had to be reconsidered.

152. There were three positions: the substantive, the procedural and what he called the “mixed” position. Those in favour of the substantive position, including Borchard and Ago, maintained that the internationally wrongful act of the wrong-doing State was not complete until the local remedies had been exhausted. There, the exhaustion of local remedies rule was a substantive condition on which the very existence of international responsibility depended.

153. Those who supported the procedural position—for example, Amerasinghe—argued that the exhaustion of local remedies rule was a procedural condition which must be met before an international claim could be brought.

154. The mixed position, argued by Fawcett,²⁵⁹ drew a distinction between an injury to an alien under domestic law and an injury under international law. If the injury was caused by the violation of domestic law alone and in such a way that it did not constitute a breach of international law—for instance, through a violation of a concessionary contract—international responsibility arose only from the act of the respondent State constituting a denial of justice (for example, bias on the part of the judiciary when an alien attempted to enforce his rights in a domestic court). In that situation, the exhaustion of local remedies rule was clearly a substantive condition that had to be fulfilled. On the other hand, if the injury to the alien violated international law, or international law and domestic law, international responsibility occurred at the moment of injury, and the exhaustion of local remedies rule was a procedural condition for bringing an international claim.

155. The Special Rapporteur also observed that, while some had argued that the three positions were purely academic, the question of the time at which international responsibility arose was often of considerable practical importance. First, in respect of the nationality of claims, the alien must be a national at the time of the commission of the international wrong. Hence, it was important to ascertain at what time the international wrong had been committed. Second, there might be a problem of jurisdiction, as had happened in the *Phosphates in Morocco* case,²⁶⁰ where the question had arisen as to when international responsibility occurred for the purpose of deciding whether or not the court had jurisdiction. Third, it would not be possible for a State to waive the exhaustion of local remedies rule if the rule was a substantive one, as no international wrong would be committed in the absence of the exhaustion of local remedies.

156. The Special Rapporteur noted the difficulty that the sources were not clear as to which approach should be followed. He summarized various previous attempts

²⁵⁸ See *Yearbook ... 1996*, vol. II (Part Two), p. 58.

²⁵⁹ See J. E. S. Fawcett, “The exhaustion of local remedies: substance or procedure?” *BYBIL*, 1954, pp. 452–458.

²⁶⁰ *Judgment*, 1938, *PCIJ*, Series A/B, No. 74, p. 10.

at codification, as described in his report. He stated that, while the Commission at its twenty-ninth session, in 1977, had preferred the substantive view in its then article 22 of the draft articles on State responsibility,²⁶¹ in 2000 the Rapporteur of the Committee on Diplomatic Protection of Persons and Property had taken a purely procedural position in the International Law Association.²⁶²

157. The Special Rapporteur further observed that judicial decisions were also vague and open to different interpretations that lent support for either the procedural or the substantive position. For example, concerning the *Phosphates in Morocco* case, Special Rapporteur Ago had maintained that PCIJ had not ruled against the substantive position. However, the current Special Rapporteur's interpretation of a key passage in the decision was that the Court had supported the French argument that the rule on the exhaustion of local remedies was no more than a rule of procedure.

158. The Special Rapporteur also noted that State practice was of little value, because it usually took the form of arguments presented in international proceedings, and inevitably a State was bound to espouse the position that best served its own interests. Hence, no clear conclusion could be drawn from arguments put forward by States.

159. Furthermore, it was noted that academic opinion was also divided on the issue. He acknowledged that the third position, which he preferred, had received little attention. For example, a State which tortured an alien incurred international responsibility at the moment when the act was committed, but it might also find itself in violation of its own legislation. If a domestic remedy existed, it must be exhausted before an international claim could be raised; in such a case, the exhaustion of local remedies rule was procedural in nature. Draft articles 12 and 13 sought to give effect to that conclusion, and academic opinion offered some support for such a position.

160. The Commission was also faced with the decision to depart from the position it had adopted in former article 22 of the draft articles on State responsibility. However, in proposing that article, the then Special Rapporteur on State responsibility had assumed that the document in its final form would distinguish between obligations of conduct and result, a distinction which had not been retained on second reading. Hence, in the Special Rapporteur's view, the Commission was free to adopt the position he was proposing.

(b) *Summary of the debate*

161. In support of the substantive position, it was observed that where local remedies were required to be, and had not been, exhausted, diplomatic protection could not be exercised. Therefore, no claim in relation to an alleged breach could be put forward, and countermeasures could not be taken. It was not clear what the practical significance was of an alleged breach which had no consequences at the international level for either the State or

the individual concerned, and for which no remedy was available. Since the precondition applied to all procedures relating to such a case, it must be regarded as substantive.

162. Others expressed support for the procedural position. It was observed, in connection with the rendering of a declaratory judgement in the absence of the exhaustion of local remedies, that the exhaustion of local remedies was not always a practical possibility—for example, because of the prohibitive cost of the procedure. A declaratory judgement obtained in the absence of the exhaustion of local remedies could be a potentially significant satisfaction leading to practical changes. Such a possibility would, however, be precluded if the exhaustion of local remedies rule was characterized as substantive.

163. A preference was also expressed for the “third view” espoused by Fawcett, as described by the Special Rapporteur in his report. Conversely, the view was expressed that the various possibilities mentioned in Fawcett's study relating to the distinction between remedies available under domestic law and those available under international law might lead to a theoretical debate that would complicate the issue unnecessarily.

164. The prevailing view in the Commission was that draft articles 12 and 13 should be deleted since those articles added nothing to article 11. It was recognized that, while some implications might follow from the adoption of one or another of the theories, and while the question whether such remedies were substantive or procedural in nature was to some extent inescapable in special circumstances such as those of the *Phosphates in Morocco* case, they were not of primary importance and did not justify inclusion of the draft articles in question. Similarly, it was stated that the distinction was not very useful or relevant as a global approach to the problem of the exhaustion of local remedies. Nor was it of much practical purpose. Indeed, the concern was expressed that such a distinction could greatly complicate the Commission's task, since it would involve detailed consideration of the remedies to be exhausted. It was also stated that articles 12 and 13 either duplicated the statement of the principle contained in articles 10 and 11 or else merely pointed to notions, such as denial of justice, which they failed to articulate fully.

165. Furthermore, it was noted that, when viewed purely in the context of diplomatic protection, the distinction seemed to lose its relevance. The postulate was that an internationally wrongful act had been committed; thus the only question to be considered was on what conditions—and, perhaps, under what procedures—reparation could be required when an individual was injured; for in the absence of an internationally wrongful act, diplomatic protection would not arise. Seen from that perspective, the issue was straightforward: diplomatic protection was a procedure whereby the international responsibility of the State could be implemented; exhaustion of local remedies was a prerequisite for implementation of that procedure; and whether it was a substantive or a procedural rule made little difference.

166. It was recalled that the distinction had initially been made in the context of the determination of the precise moment when an unlawful act was committed during the consideration of the topic of State responsibility. The question was whether the responsibility of the State

²⁶¹ See footnote 257 above.

²⁶² “The exhaustion of local remedies”, interim report, International Law Association, *Report of the Sixty-ninth Conference* (London, 2000), p. 606, especially pp. 629–630.

came into play as soon as the internationally wrongful act was committed, independently of the exhaustion of local remedies. It was proposed, therefore, that, in the interests of harmonization, the Commission follow the approach taken in article 44 (Admissibility of claims) of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.²⁶³ Similarly, it was noted that article 12 of the draft articles on diplomatic protection was open to question: it was queried how a breach of local law could of itself constitute an internationally wrongful act. That seemed to contradict both the spirit and the letter of the articles on State responsibility, and in particular article 3 thereof.

167. In addition, some speakers took issue with the assertion that waivers were inconsistent with the substantive nature of the exhaustion of local remedies rule. States could waive a precondition for admissibility with regard to either a substantive or a procedural issue. Rules on the exhaustion of local remedies were not peremptory in nature but were open to agreement between States.

168. It was further noted that the question of the nature of the exhaustion of local remedies rule raised difficult theoretical questions and had political implications since the procedural theory was perceived as belittling the importance of a rule that many States considered fundamental. In view of those problems and the lack of consensus within the Commission, it was considered unwise to endorse any of the competing views.

169. The view was also expressed that the Commission might instead consider an empirical study of the exhaustion of local remedies rule on the basis of policy, practice and history. For example, it was stated that the principle of assumption of risk, the existence of a voluntary link between the alien and the host State and the common-sense application of the rule on the exhaustion of local remedies could be of greater relevance than issues of procedure or substance.

170. According to a further suggestion, the issue could be treated in the commentaries to articles 10, 11 and 14.

171. Others maintained that articles 12 and 13 were useful, but not in the form presented. The view was expressed that the exhaustion of local remedies rule, while being a procedural matter, could have substantive outcomes as well. It was thus proposed that exceptions be created to take account of situations where the application of the rule could be unfair, such as when there was a change of nationality or refusal to accept the jurisdiction of an international court. In such a case, it would be necessary to establish the time from which the right of the State to claim diplomatic protection ran, and that would probably be when the injury to the national of that State occurred. If worded in those terms, articles 12 and 13 would not duplicate article 10.

172. The suggestion was also made that only article 12 be referred to the Drafting Committee, and article 13 deleted as being outside the scope of the draft articles since it dealt with a situation where injury was the result of a violation of domestic law.

²⁶³ *Yearbook ... 2001*, vol. II (Part Two), chap. IV, para. 76; art. 44 is on p. 29.

(c) *Special Rapporteur's concluding remarks*

173. The Special Rapporteur confirmed that he did not have a strong preference for retaining the distinction between the procedural and substantive positions in the draft articles. He agreed with the assertion that it was not a general framework for the study of diplomatic protection. However, it could not be entirely ignored in a study on exhaustion of local remedies, as it had featured prominently in the first reading of the draft articles on State responsibility, specifically article 22, as well as in all the writings on the exhaustion of local remedies rule. It also had practical implications in determining the time when the injury occurred, which was an issue that arose in respect of nationality of claims, because the injured alien must be a national of the State in question at the time the injury occurred.

174. In response to the suggestion that it would have been more helpful to offer a rationale of the exhaustion of local remedies rule by considering the reasons for which international law had established it, he observed that his second report²⁶⁴ had included an introductory section on the rationale of the rule, but that it had not been particularly well received by the Commission. He would further remedy the omission in the commentary on article 10.

175. He observed that articles 12 and 13 had been subjected to considerable criticism and had not been met with general approval. They had been viewed as too conceptual, irrelevant, premised on the dualist position and overly influenced by the distinction between procedure and substance. He conceded that some criticisms of article 13 were well-founded. He cited as an example the fact that diplomatic protection came into play where an international rule had been violated, whereas article 13 dealt mainly with situations where no international wrong had yet occurred. He also noted that some members had pointed out that article 13 dealt mainly with the issue of when an internationally wrongful act was committed; thus, it clearly did not fall under the rule on the exhaustion of local remedies.

176. Therefore he proposed that articles 12 and 13 not be referred to the Drafting Committee, a solution which would have the advantage of avoiding the question whether the exhaustion of local remedies rule was procedural or substantive in nature and would leave members free to hold their own opinions on the matter.

3. ARTICLE 14

(a) *Futility (art. 14, subpara. (a))*²⁶⁵

(i) Introduction by the Special Rapporteur

177. In introducing article 14, the Special Rapporteur noted that he was proposing an omnibus provision which

²⁶⁴ See footnote 3 above.

²⁶⁵ Article 14, subparagraph (a), proposed by the Special Rapporteur in his third report reads as follows:

"Article 14

"Local remedies do not need to be exhausted where:

"(a) the local remedies:

"are obviously futile (option 1);

"offer no reasonable prospect of success (option 2);

"provide no reasonable possibility of an effective remedy (option 3);"

dealt with exceptions to the exhaustion of local remedies rule. It responded to the suggestion made both in the Commission and in the Sixth Committee that it was only all available adequate and effective local legal remedies that ought to be exhausted. He could accept the suggestion that the general provision on the exhaustion of local remedies required that local remedies be both available and effective, provided that a separate provision was devoted to the ineffectiveness or futility of local remedies. The main reason was that, as was stated in his proposed article 15, the burden of proof was on both the respondent State and the claimant State, the former having to show that local remedies were available, whereas the latter had to prove that local remedies were futile or ineffective.

178. He suggested that the term “ineffective” should be discarded as too vague. Instead, he submitted three tests, grounded in judicial decisions and the literature, for determining what an “ineffective” local remedy was. Local remedies were ineffective where they were obviously futile, offered no reasonable prospect of success or provided no reasonable possibility of an effective remedy.

179. It was noted that the first test, that of obvious futility, which required the futility of the local remedy to be immediately apparent, had been criticized by authors, as well as by ICJ in the *ELSI* case,²⁶⁶ as being too strict. Similarly, the second test, that the claimant should prove only that local remedies offered no reasonable prospect of success, had been deemed too weak. The third test, a combination of the first two, under which local remedies provided no reasonable possibility of an effective remedy, was, in his view, the one that should be preferred.

180. In support of his position, he cited circumstances in which local remedies had been held to be ineffective or futile: where the local court had no jurisdiction over the dispute (for example, in the *Panevezys-Saldutiskis Railway* case²⁶⁷); where the local courts were obliged to apply the domestic legislation at issue (for example, legislation to confiscate property); where the local courts were notoriously lacking in independence (for example, in the *Robert E. Brown* claim²⁶⁸); where there were consistent and well-established precedents that were adverse to aliens; and where the respondent State did not have an adequate system of judicial protection.

(ii) Summary of the debate

181. General support was expressed for the referral of subparagraph (a) to the Drafting Committee. In particular, support was expressed for option 3, whereby a remedy must be exhausted only if there was a reasonable possibility of an effective remedy.

182. It was noted that the futility of local remedies was a complex issue because it involved a subjective judgement and because of its relationship to the burden of proof; it raised the question of whether a State of nationality could

bring a claim before an international court on the sole assumption that local remedies were, for various reasons, futile. It was important to prevent extreme interpretations in favour of either the claimant State or the host State. It was suggested that option 3 was preferable as a basis for drafting a suitable provision, since it covered an adequate middle ground and offered a balanced view.

183. At the same time, it was observed that the test of ineffectiveness must be an objective one. Such was the case, for example, where local remedies were unduly and unreasonably prolonged or unlikely to bring effective relief, or where local courts were completely subservient to the executive branch.

184. The view was expressed, however, that, whatever option was adopted, the terms proposed left very considerable scope for subjective interpretation, whether of the term “futile” or of the term “reasonable”. The criterion of reasonableness was vague and related to the problem of the burden of proof, and was thus related to the Special Rapporteur’s proposal for article 15. However, it was noted that article 15 failed to provide a limitation to the apparent arbitrariness of the criterion adopted in article 14. Furthermore, it was pointed out that “effective remedy” and “undue delay” were relative concepts, in respect of which no universal standards were possible. As such, they must be judged in the light of the particular context and circumstances, and on the basis of other equally important principles: equality before the law, non-discrimination and transparency. It was also suggested that for an individual to be deemed to have exhausted local remedies, it was not enough for a case to have been brought before the competent domestic court; the claimant must also have put forward the relevant legal arguments.

185. Several drafting suggestions were made, including referring to “remedy” in the singular, in the chapeau of subparagraph (a), so as to avoid general statements about whether all remedies were available; deleting the reference to the term “reasonable”, which was superfluous and implied on the contrary that people would behave unreasonably unless specifically instructed to behave reasonably; that reference be made to all “adequate and effective” local remedies; and that the words “reasonable possibility” be scrutinized since they denoted a subjective assessment by the claimant State. It was also noted that subparagraph (a) of article 14 seemed to overlap with subparagraphs (c), (d), (e) and (f), which dealt with specific situations for which there might be no possibility of an effective remedy.

186. Support was also expressed for a combination of options 2 and 3. In terms of another view, the exhaustion of local remedies rule should be respected unless local remedies were obviously futile (option 1). However, it was stated that the test of obvious futility would be too stringent.

(iii) Special Rapporteur’s concluding remarks

187. The Special Rapporteur recalled that it had been suggested at the fifty-third session of the Commission, in 2001, and subsequently at the meeting of the Sixth Committee later that year that the concept of effectiveness should be dealt with only as an exception. He hoped that

²⁶⁶ *Elektronika Sicula S.p.A. (ELSI) Judgment*, ICJ Reports 1989, p. 15.

²⁶⁷ *Panevezys-Saldutiskis Railway, Judgment*, 1939, PCIJ, Series A/B, No. 76, p. 4.

²⁶⁸ *Robert E. Brown (United States) v. Great Britain*, award of 23 November 1923, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120.

the Commission's silence on that subject indicated support for that position.

188. He observed that there had been unanimous support for referring article 14, subparagraph (a), to the Drafting Committee; and that most members had favoured option 3, although there had been some support for a combination of options 2 and 3; with little support for option 1. He therefore suggested that subparagraph (a) should be referred to the Committee with a mandate to consider both options 2 and 3.

(b) *Waiver and estoppel (art. 14, subpara. (b))*²⁶⁹

(i) Introduction by the Special Rapporteur

189. In introducing subparagraph (b), which dealt with waiver and estoppel, the Special Rapporteur observed that since the exhaustion of local remedies rule was designed to benefit the respondent State, the latter could elect to waive it. Waiver might be express or implied, or it might arise as a result of the conduct of the respondent State, in which case it might be said that the respondent State was estopped from claiming that local remedies had not been exhausted. He noted that an express waiver might be included in an *ad hoc* arbitration agreement to resolve an already existing dispute; it might also arise in the case of a general treaty providing that future disputes were to be settled by arbitration. Such waivers were acceptable and were generally regarded as irrevocable.

190. Implied waivers presented greater difficulty, as could be seen in the *ELSI* case, where ICJ had been "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".²⁷⁰ Hence, there must be clear evidence of such an intention, and some jurists had suggested that there was a presumption, albeit not an irrebuttable one, against implying waiver. But when the intention to waive the local remedies rule was clear in the language of the agreement or in the circumstances of the case, it had to be implied.

191. He observed that it was difficult to lay down any general rule as to when such a waiver could be implied, but he referred to the four examples, cited in his third report, in which special considerations might apply: (a) the case of a general arbitration agreement dealing with future disputes—silence in such an agreement did not imply waiver; (b) the question whether the filing of a declaration under the Optional Clause implied waiver—the practice of States suggested that that could not be the case (in accordance with the *Panevezys-Saldutiskis Railway* decision); (c) the case of an *ad hoc* arbitration agreement entered into after the dispute and where the agreement was silent

on the exhaustion of local remedies rule—silence could be interpreted as waiver because the *ad hoc* agreement had been entered into after the dispute had arisen; and (d) the situation in which a contract between an alien and the host State impliedly waived the exhaustion of local remedies rule and the respondent State then refused to go to arbitration. If the State of nationality took up the claim in such circumstances, the implied waiver might also extend to international proceedings, although the authorities were divided on that point. It could thus be concluded that waiver could not be readily implied, but where there was clear evidence of an intention to waive on the part of a respondent State, it had to be so implied. For that reason, he suggested that reference to implied waiver should be retained in article 14, subparagraph (b).

192. Similar considerations applied in the case of estoppel. If the respondent State conducted itself in such a way as to suggest that it had abandoned its right to claim the exhaustion of local remedies, it could be estopped from claiming that the local remedies rule applied at a later stage. The possibility of estoppel in such a case had been accepted by a Chamber of ICJ in the *ELSI* case and was also supported by human rights jurisprudence.

193. In addition, the Special Rapporteur noted that waiver of the exhaustion of local remedies rule created some jurisprudential difficulties and the procedural/substantive distinction came into play. If the rule was procedural in nature, there was no reason why it could not be waived. It was simply a procedure that had to be followed, and the respondent State could therefore dispense with it. The international wrong was not affected, and the dispute could be decided by an international tribunal. If, on the other hand, the exhaustion of local remedies was one of substance, it could not be waived by the respondent State, because the wrong would only be completed after a denial of justice had occurred in the exhaustion of local remedies or if it was established that there were no adequate or effective remedies in the respondent State. Admittedly, some substantivists took the view that that could be reconciled with the substantive position.

(ii) Summary of the debate

194. Support was expressed for the referral of subparagraph (b) of article 14 to the Drafting Committee in the form proposed by the Special Rapporteur.

195. It was noted that waiver played different roles in the field of diplomatic protection. Article 45, subparagraph (a), of the draft articles on State responsibility for internationally wrongful acts²⁷¹ considered waiver by an injured State, whereas the proposed article 14, subparagraph (b), of the present draft referred to waiver by the respondent State. In practice, the respondent State's waiver usually related to the obligation to exhaust local remedies, but it could also concern other aspects of admissibility of claims, such as the nationality of claims. Therefore, it was proposed that a more general provision be formulated to provide for waiver in the field of diplomatic protection, either by the claimant State or by the respondent State, as well as for acquiescence or estoppel. In addition, it was

²⁶⁹ Article 14, subparagraph (b), proposed by the Special Rapporteur in his third report reads as follows:

"Article 14

"Local remedies do not need to be exhausted where:

...

"(b) the respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;"

²⁷⁰ *ELSI* (see footnote 266 above), para. 50.

²⁷¹ See footnote 263 above.

maintained that if the Commission nevertheless considered that a specific—rather than a general—provision on waiver was necessary, it would be better to separate that provision from those relating to the effectiveness of local remedies or the presence of a significant link between the individual and the respondent State, as the latter dealt with the scope and content of the rule, whereas waivers mostly concerned the exercise of diplomatic protection in a specific case.

196. It was also observed that waivers should not be confused with agreements between the claimant State and the respondent State to the effect that exhaustion of local remedies was not required. While such agreements had the same function, they were instances of *lex specialis* and should not be considered when codifying general international law.

197. The view was expressed that subparagraph (b) could be further improved by a closer study of the issues of implied waiver and estoppel. As for implied waivers, concern was expressed that, even when unequivocal, they might give rise to confusion. It was observed that waiver was a unilateral act which should be irrevocable and should not easily be assumed to have taken place. It was noted that there were few unambiguous cases of implied waiver. This was corroborated by the fact that one of the few treaties on general dispute settlement, the European Convention for the Peaceful Settlement of Disputes, had an express provision indicating that local remedies must be exhausted. It was, instead, suggested that the provision indicate that the respondent State must expressly and unequivocally waive the requirement that local remedies should be exhausted.

198. Conversely, the view was expressed that the possibility of implicit waiver should not be rejected out of hand. Emphasis had to be placed on the criteria of intention and clarity of intention, taking into account all pertinent elements.

199. Doubts were expressed concerning the advisability of including a reference to the concept of estoppel. It was stated that estoppel was a common-law notion and was viewed with some suspicion by practitioners of civil law, and that it was covered by the broader concept of implied waiver. It was further observed that the examples cited by the Special Rapporteur with regard to estoppel were, without exception, cases in which an award or a judgement had stated that, since the respondent State had been silent regarding the failure to exhaust local remedies, it could not invoke that failure at a later stage. Thus there was some overlap between subparagraphs (b) and (f) of article 14.

200. Others, while accepting the principle set out in subparagraph (b), had reservations about its formulation. It was suggested that it be stated that the waiver must be clear and unambiguous, even if it was implicit. Serious doubts were also expressed regarding the reference to the “respondent State”, which seemed to imply contentious proceedings, and which did not appear in the articles referred to the Drafting Committee or in articles 12 and 13. It was considered preferable to refer to the terminology used in the articles on State responsibility for internationally wrongful acts.

(iii) Special Rapporteur’s concluding remarks

201. The Special Rapporteur observed that, while strong support existed for the inclusion of express waiver as an exception to the exhaustion of local remedies rule, many speakers had been troubled by implied waivers and had expressed the view that a waiver should be clear and unambiguous. However, even those members had not denied that the Drafting Committee should consider the question. He therefore suggested that article 14, subparagraph (b), should be referred to the Committee with a recommendation that the latter exercise caution regarding implied waiver and consider treating estoppel as a form of implied waiver.

(c) *Voluntary link and territorial connection (art. 14, subparas. (c) and (d))*²⁷²

(i) Introduction by the Special Rapporteur

202. The Special Rapporteur, in introducing subparagraphs (c) and (d) of article 14, suggested that the Commission should consider the provisions together, as they were closely linked. He noted that, while there was support for those rules, it could also be adduced that the existing rule on the exclusion of local remedies might cover those two paragraphs. He also recalled that when the Commission, at its forty-eighth session, had considered the matter in respect of article 22 of the draft on State responsibility on first reading,²⁷³ it had been decided that it was unnecessary to include such provisions.

203. In his report, he had raised the question of whether the Commission needed one or more separate provisions dealing with the absence of a voluntary link or a territorial connection. The debate on the subject had largely grown out of the *Aerial Incident of 27 July 1955* case,²⁷⁴ where there had been no voluntary link between the injured parties and Bulgaria. In all the traditional cases dealing with the exhaustion of local remedies rule, there had been some link between the injured individual and the respondent State, taking the form of physical presence, residence, ownership of property or a contractual relationship with the respondent State. Furthermore, diplomatic protection had undergone major changes in recent years. In the past, diplomatic protection had been concerned with cases in which a national had gone abroad and was expected to exhaust local remedies before proceeding to the international level. However, more recently the problem of transboundary environmental harm had been raised—for example, in connection with the Chernobyl accident.

204. The Special Rapporteur observed further that those who supported the adoption of a voluntary link or territo-

²⁷² Subparas. (c) and (d) of article 14 proposed by the Special Rapporteur in his third report read as follows:

“Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(c) there is no voluntary link between the injured individual and the respondent State;

“(d) the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;”

²⁷³ See footnote 258 above.

²⁷⁴ *ICJ Pleadings, Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom v. Bulgaria)*.

rial connection exception to the local remedies rule emphasized that, in the traditional cases, there had been an assumption of risk on the part of aliens in the sense that they had subjected themselves to the jurisdiction of the respondent State and could therefore be expected to exhaust local remedies. However, there was no clear authority on the need to include a separate rule. The Special Rapporteur, in illustrating the point that the judicial decisions on this point were largely ambiguous, referred to several such decisions, including the *Interhandel*,²⁷⁵ *Salem*,²⁷⁶ *Norwegian Loans*²⁷⁷ and *Aerial Incident of 27 July 1955* cases. Similarly, cases involving transboundary harm tended to suggest that it was not necessary to exhaust local remedies. For example, in the *Trail Smelter* case,²⁷⁸ exhaustion of local remedies had not been insisted upon. But the decision in that case could also be explained by saying that it dealt with a direct injury by the respondent State (Canada) of the claimant State (the United States) and that thus there had been no need to exhaust local remedies in that situation. In his view, the proponents of the voluntary link/territorial connection requirement had made a strong case.

205. Supporters of the voluntary link requirement had never equated it with residence. If residence were the requirement, that would exclude the application of the rule on the exhaustion of local remedies in cases of the expropriation of foreign property and contractual transactions where the injured alien was not permanently resident in the respondent State. Where a State had been responsible for accidentally shooting down a foreign aircraft, in many cases it had not insisted that local remedies must first be exhausted. The same applied to transboundary environmental harm—for example, the Agreement concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims relating to Gut Dam,²⁷⁹ in which Canada had waived that requirement, and the Convention on International Liability for Damage Caused by Space Objects, neither of which required exhaustion of local remedies.

206. The Special Rapporteur remarked that early codification efforts had usually focused on State responsibility for damage done in the State's territory to the person or property of foreigners and on the traditional situation in which an alien had gone to another State to take up residence and do business. During the first reading of the draft articles on State responsibility, the Commission had refrained from including an exception to the local remedies rule relating to the existence of a voluntary link, because, as neither State practice nor judicial decisions had dealt with it, the Commission had felt that it was best to let it be addressed by existing rules and to allow State practice to develop.

207. In his view, there was good reason to give serious consideration to including the exceptional rules in subparagraphs (c) and (d) of article 14. It seemed impractical

and unfair to insist that an alien be required to exhaust local remedies in the following four situations: transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects; the shooting down of aircraft outside the territory of the respondent State or of aircraft that had accidentally entered its airspace; the killing of a national of State A by a soldier of State B stationed on the territory of State A; and the transboundary abduction of a foreign national from either the latter's home State or a third State by agents of the respondent State.

208. It was for the Commission to examine whether such examples required a special rule exempting them from the scope of the local remedies rule or were already covered by existing rules. In many such cases, the injury to the claimant State by the respondent State was direct. That was true, for example, of most cases of transboundary environmental harm, the accidental shooting down of aircraft and the transboundary abduction of a national. He left it to the Commission to decide whether it wished to follow the course previously taken in the context of State responsibility and to allow the matter to develop in State practice, or whether it felt there was a need to intervene *de lege ferenda*.

(ii) Summary of the debate

209. Support was expressed for the view that, in the absence of a voluntary link between the individual and the respondent State, or when the respondent State's conduct had taken place outside its territory, it might be unfair to impose on the individual the requirement that local remedies should be exhausted, and that it was justifiable to provide for such exceptions to the exhaustion of local remedies rule in the context of progressive development. It was further observed that the underlying principle seemed to be a matter of common sense and equity.

210. However, issue was taken with the tentative tone of the Special Rapporteur's report. It was maintained that, regardless of the paucity of clear authority for or against the voluntary link, the Commission was free to engage in the progressive development of international law if it so wished. It was thus suggested that the Commission could look more directly at questions of policy underlying the local remedies rule.

211. However, it was cautioned that the text of subparagraphs (c) and (d) of article 14 went too far in categorically stating that both the absence of a voluntary link and the fact that the respondent State's conduct had not been committed within its territorial jurisdiction were *per se* circumstances that totally excluded the requirement that local remedies should be exhausted. It was suggested that a single provision be formulated allowing for an exception to the exhaustion of local remedies rule in either of those two cases, where the circumstances justified it.

212. In terms of a further view, the issue was not one of an exception to the rule, but rather concerned the very rationale for the rule itself.

213. Others observed that the problem with the concept of voluntary link was that the "link" was a physical concept, a nineteenth-century view of the physical movement of people. However, in an era of economic globalization

²⁷⁵ *Interhandel*, Preliminary Objections, Judgment, ICJ Reports 1959, p. 6.

²⁷⁶ UNRIAA, vol. II (Sales No. 1949.V.1), p. 1161.

²⁷⁷ *Certain Norwegian Loans*, Judgment, ICJ Reports 1957, p. 9.

²⁷⁸ UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

²⁷⁹ Signed in Ottawa, 25 March 1965. United Nations, *Treaty Series*, vol. 607, no. 8802, p. 142; text reproduced in *ILM*, vol. 4, no. 3 (May 1965), p. 468.

individuals were increasingly able to influence entire economies extraterritorially. Therefore the local remedies rule could also be viewed as protecting the respondent State, whose interests had to be taken into consideration.

214. It was noted that the exhaustion of local remedies did not involve the assumption of risk but was a way in which issues between Governments were resolved before they became international problems. Hence, to focus on certain aspects of the rule that tended to distort it into an assumption of risk on the part of the individual would be misleading. While there was room for the notion of “voluntary link” as part of the concept of reasonableness or other concepts espousing distinctions based, *inter alia*, on the activity of the individual and the extent to which the burden of exhaustion was onerous, it was in that subsidiary capacity that the notion should be examined, rather than as a primary consideration. In some situations, for example, there might be a voluntary link in a technical sense, but for other reasons it might be unreasonable to require exhaustion of local remedies.

215. It was also emphasized that diplomatic protection should not be confused with general international claims. While the concept was useful for explaining why local remedies should be exhausted, it would be wrong to conclude that when there was no voluntary link, diplomatic protection should not be invoked.

216. Doubts were also expressed as to the aptness of the examples cited in the Special Rapporteur’s report in support of the voluntary link requirement. It was noted, for example, that in cases involving the shooting down of foreign aircraft, referred to in paragraph 79 of the report, generally speaking, the States responsible insisted that the act had been an accident, refusing to accept responsibility for a wrongful act, and offering *ex gratia* payments to compensate the victims. Disagreement was also expressed with the reference to the example of the International Convention on Liability for Damage Caused by Space Objects, since it concerned a special regime.

217. While some supported the Special Rapporteur’s view that it was unreasonable to require an injured alien to exhaust domestic remedies in such difficult cases as transboundary environmental harm, others observed that the concept of transboundary damage had its own characteristics, which did not necessarily match those of diplomatic protection.

218. Concerning the example of the Chernobyl incident, it was pointed out that plaintiffs in the United Kingdom, for example, would have been required to exhaust local remedies in Ukrainian courts. Requiring groups of people that were not well-funded to exhaust local remedies in such circumstances was considered oppressive.

219. Others expressed doubts about the appropriateness of describing cases such as *Trail Smelter*, Chernobyl and other incidents of transboundary harm and environmental pollution as falling under the rubric of diplomatic protection. Such cases were typically dealt with as examples of direct injury to the State. To do otherwise might be to expand the scope of diplomatic protection too far. Furthermore, it was not clear that the Chernobyl accident had amounted to an internationally wrongful act. While it might have been an issue of international liability, it

was not clearly one of international responsibility. It was also maintained that it would be artificial to consider the measures taken in response by the United Kingdom and other countries as constituting an exercise of diplomatic protection.

220. Conversely, it was observed that the Chernobyl incident did raise issues of international responsibility arising out of the failure to respect the duty of prevention. It was also pointed out that all that was novel in that case was the number of victims; the risk of nuclear accidents had been envisaged in several major European multilateral conventions which had the very purpose of addressing the issue of civil liability in the event of such an accident.

221. Still others recalled that the Commission had included a provision on equal access in its draft articles on prevention of transboundary harm from hazardous activities adopted at its fifty-third session (art. 15).²⁸⁰ Such provisions, which were found in most environmental treaties, encouraged the individuals who were affected and lived in other countries to make use of the remedies available in the country of origin of the pollution. However, the impact of article 14, subparagraph (c), was to discourage people from doing that unless their connection to the country of origin was voluntary. It was thus cautioned that, when the Commission did something in the field of general international law, it should keep in mind developments in more specific areas that might diverge from what it was doing.

222. The Commission considered various options as to the drafting of article 14, subparagraph (c), including not treating the voluntary link requirement as an exception to the exhaustion of local remedies rule but rather locating it as a provision on its own, or considering it together with article 14, subparagraph (a), or articles 10 and 11. Some members regarded the requirement of a voluntary link as a *sine qua non* for the exercise of diplomatic protection, rather than an exception. Still others preferred to view it as merely a factor to be taken into account.

223. With regard to article 14, subparagraph (d), some speakers professed confusion at the examination of the concept of voluntary link together with the concept of territorial connection. The view was expressed that there was no merit in subparagraph (d) because it seemed to be only a sub-concept of the concept dealt with in article 14, subparagraph (c). It was thus proposed that subparagraph (d) be deleted.

(iii) Special Rapporteur’s concluding remarks

224. The Special Rapporteur remarked that the conclusions to be drawn from the debate were not clear. There had been general agreement that, whatever became of article 14, subparagraph (c), article 14, subparagraph (d), was one of its components and did not warrant separate treatment. Many members had expressed the view that, while subparagraph (c) embodied an important principle, it was not so much an exception as a precondition for the exercise of diplomatic protection. Others had maintained that those issues could be dealt with in the context of reasonableness under article 14, subparagraph (a). Several members had argued that cases of transboundary harm

²⁸⁰ *Yearbook ... 2001*, vol. II (Part Two), chap. V, p. 146, para. 97.

involved liability in the absence of a wrongful act and should be excluded completely. His preliminary view was that it was unnecessary to include subparagraphs (c) and (d) because in most cases they would be covered by article 11 on direct injury or article 14, subparagraph (a), on effectiveness.

225. At the request of the Commission, the Special Rapporteur subsequently circulated an informal discussion paper summarizing his recommendation for action to be taken on article 14, subparagraph (c). He was persuaded that the voluntary link was essentially a rationale for the rule on the exhaustion of local remedies, and that as such it was not suitable for codification. In his view, if the Commission nonetheless wanted to codify the voluntary link, there were a number of ways of doing so, such as amending article 10 to read: "A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, who has a voluntary link with the responsible State, before the injured national has exhausted all available local legal remedies." Alternately, the voluntary link could be retained as an exception, along the lines suggested in draft article 14, subparagraph (c). If there were objections to the term "voluntary link", subparagraph (c) could be replaced by "(c) Any requirement to exhaust local remedies would cause great hardship to the injured alien [be grossly unreasonable]". In terms of a further suggestion, subparagraph (c) could be simply deleted as undesirable, particularly in the light of developments in the law relating to transboundary harm.

226. His preference was not to provide expressly for a voluntary link, but to include it in the commentary to article 10 as a traditional rationale for the exhaustion of local remedies rule, in the commentary to article 11 with a discussion of direct injury to a State where local remedies need not be exhausted, and in the commentary to article 14, subparagraph (a), in the discussion of whether local remedies offered a reasonable possibility of an effective remedy.

227. Referring to the hardship cases which had been discussed in paragraph 83 of his third report, and in which it was unreasonable to require an injured alien to exhaust local remedies, he pointed out that, in the first case, namely, transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects, if the injury resulted from an act which was not an internationally wrongful act, the context was not that of State responsibility, which included diplomatic protection, but that of liability. If the injury resulted from an internationally wrongful act, it was a direct injury. He was therefore of the opinion that there was no need for a separate provision requiring a voluntary link as a precondition for the application of the local remedies rule. In the second type of situation, namely the shooting down of an aircraft outside the territory of the responsible State or an aircraft that had accidentally entered that State's airspace, there really was a direct injury, and State practice showed that in most cases the responsible State would not insist on the need to exhaust local remedies. Regarding the third type of situation, involving the killing of a national of State A by a soldier from State B stationed in the territory of State A, in most circumstances there would be an international treaty provision for the possibility of a claim against State B. If there was no such agreement, however, there

was no reason why the individual's heirs should not be required to request compensation in the courts of State B, provided that there was a reasonable prospect of an effective remedy. That situation was already covered by draft article 14, subparagraph (a), and there was no need for a separate provision. With regard to the transboundary abduction of a foreign national from either the home State or a third State by agents of the responsible State, there were two possible options: either there had clearly been a violation of the territorial sovereignty of the State of nationality of the foreigner, which could give rise to a direct claim by the State against the responsible State, or the injured party might have the possibility to sue in the domestic courts of the responsible State and there was no reason why that remedy could not be resorted to. If that possibility was not available, the situation was that covered by subparagraph (a).

228. In his opinion, the Commission should not hamper the development of international law on the question, particularly as the practice of States continued to evolve, especially in the field of damage to the environment. He suggested that the Commission should say nothing about the voluntary link in the draft articles, but should simply refer to it in the commentary on several occasions and deal with it in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

(d) *Undue delay and denial of access (art. 14, subparas. (e) and (f))*²⁸¹

(i) Introduction by the Special Rapporteur

229. The Special Rapporteur observed that article 14, subparagraph (e), on undue delay, was supported in various codification efforts, human rights instruments and judicial decisions, such as the *El Oro Mining and Railway Co.*²⁸² and *Interhandel*²⁸³ cases. Nevertheless, such an exception to the exhaustion of local remedies rule was more difficult to apply in complicated cases, particularly those involving corporate entities. While it could be subsumed under the exception set out in article 14, subparagraph (a), it deserved to be retained as a separate provision as a way of serving notice on the respondent State that the latter must not unduly delay access to its courts.

230. He remarked further that article 14, subparagraph (f), dealing with prevention of access, was relevant in contemporary circumstances. It was not unusual for a respondent State to refuse an injured alien access to its

²⁸¹ Subparas. (e) and (f) of article 14 proposed by the Special Rapporteur in his third report read as follows:

"Article 14

"Local remedies do not need to be exhausted where:

...

"(e) the respondent State is responsible for undue delay in providing a local remedy;

"(f) the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies."

²⁸² *El Oro Mining and Railway Company (Limited) (Great Britain) v. United Mexican States*, British-Mexican Claims Commission, decision no. 55 of 18 June 1931, UNRIAA, vol. V (Sales No. 1952.V.3), p. 191.

²⁸³ See footnote 275 above.

courts on the grounds that the alien's safety could not be guaranteed, or by not granting an entry visa.

(ii) Summary of the debate

231. Satisfaction was expressed with subparagraphs (e) (undue delay) and (f) (denial of access) of article 14. Others maintained that the two provisions did not constitute specific categories, inasmuch as a proper reading of subparagraph (a), whether drafted in the form of option 1 or option 3, would encompass both exceptions. It was thus suggested that the two provisions could be recast in light of the amendment to subparagraph (a). It was also proposed that subparagraph (e) be combined with subparagraph (a), or at least be moved closer to that provision.

232. In terms of another view, article 14, subparagraph (e), was not rendered superfluous in the light of article 14, subparagraph (a). The cases covered by subparagraphs (a) and (e) were in a sense consecutive in time: an existing local remedy which might at first appear to be a "reasonable possibility" from the standpoint of subparagraph (a) might subsequently not need to be further pursued, in the light of undue delay in its application. The view was also expressed that the text should refer not to "delay in providing a local remedy" but to the court's delay in taking a decision with regard to a remedy which had been used.

233. While it was agreed that a decision had to be obtainable "without undue delay", it was suggested that the text specify what was abusive. It was also noted that what constituted undue delay would be a matter of fact to be judged in each case. It was proposed that the provision be reformulated to read "Local remedies do not need to be exhausted where the law of the State responsible for the internationally wrongful act offers the injured person no objective possibility of obtaining reparation within a reasonable period of time". It would then be explained that "the objective possibility of obtaining reparation within a reasonable period of time must be assessed in good faith [in the light of normal practice] or [in conformity with general principles of law]".

234. Conversely, doubts were expressed about the validity of the exception set out in article 14, subparagraph (e), since undue delay might simply be the result of an overburdened justice system, as was often the case in countries faced with serious shortages of resources, and in particular of qualified judges to deal with cases. Others disagreed and pointed out that a State should not benefit from the fact that a national judiciary had allowed a case to be unnecessarily delayed.

235. Regarding article 14, subparagraph (f), it was observed that if access to a remedy was prevented, it would be concluded that there was no remedy at all. Thus the proposed wording did not correspond to what was intended. Instead, the Special Rapporteur's proposal referred to a different situation, one in which an alien was refused entry to the territory of the allegedly responsible State or where there was a risk to the alien's safety if he or she entered the territory. Those elements would rarely be decisive in the context of civil remedies. Normally, the claimant's physical presence in the territory of the State in which he or she wished to claim a civil remedy was not required. It was noted that, in most legal systems, it

was entirely possible to exhaust local remedies through a lawyer or a representative.

236. It was proposed that the exception be limited to cases in which physical presence appeared to be a condition for the success of the remedy. It was also suggested that there should be some reference, even if in the commentaries, to the problem posed where the individual or lawyer was dissuaded, by means of intimidation, from taking up the case. Likewise, it was queried why the provision was limited to cases where it was the respondent State that denied the injured individual access to local remedies. Other non-State actors might similarly constitute obstacles to such access.

237. Others expressed doubts and were of the view that the provision might be regarded as covered by article 14, subparagraph (a). If the respondent State effectively prevented the injured alien from gaining access to the courts, then in practice there was no reasonable possibility of an effective remedy. It was thus proposed that the provision could be included in the commentary as part of the more general test of effectiveness as stated in subparagraph (a).

(iii) Special Rapporteur's concluding remarks

238. The Special Rapporteur noted that opinions differed on article 14, subparagraph (e), on undue delay. While some members had opposed it, others had suggested that it might be dealt with under article 14, subparagraph (a). The majority had preferred to deal with it as a separate provision. He therefore proposed that it should be referred to the Drafting Committee, bearing in mind the suggestion that it should be made clear that the delay was caused by the courts.

239. Regarding article 14, subparagraph (f), the Special Rapporteur pointed to the division between common- and civil-law systems. In the common-law system, the injured individual might have to give evidence in person before the court, and if he or she was not permitted to visit the respondent State, then no claim could be brought. There had been some support for referring subparagraph (f) to the Drafting Committee. However, the majority of members had taken the view that it would be better to deal with that issue under article 14, subparagraph (a). He therefore recommended that subparagraph (f) should not be sent to the Committee.

4. ARTICLE 15²⁸⁴

(a) *Introduction by the Special Rapporteur*

240. The Special Rapporteur observed that the burden of proof in the context of international litigation related to what must be proved and which party must prove it. The subject was difficult to codify, first, because there were no detailed rules in international law of the kind found

²⁸⁴ Article 15 proposed by the Special Rapporteur in his third report reads as follows:

"Article 15"

"1. The claimant and respondent State share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.

in most municipal law systems, and second, because circumstances varied from case to case and general rules that applied in all instances were difficult to lay down. Nevertheless, in his view, the subject was important to the exhaustion of local remedies rule and therefore warranted inclusion in the draft.

241. Furthermore, as a general principle, the burden of proof lay on the party that made an assertion. Article 15, paragraph 1, reflected that principle. However, in his view, the general principle was not enough, and therefore he suggested two additional principles which were incorporated in paragraph 2. They related to the burden of proof in respect of the availability and effectiveness of local remedies. He recalled that previous attempts to codify the exhaustion of local remedies rule had avoided developing provisions on those subjects.

242. It was observed that the subject had been considered at some length by human rights treaty-monitoring bodies, and that their jurisprudence supported two propositions: (a) that the respondent State must prove there was an available remedy that had not been exhausted by the claimant State, and (b) that, if there were available remedies, the claimant State must prove that they were ineffective or that some other exception to the local remedies rule was applicable. However, he conceded that such jurisprudence was guided strongly by the instruments that established the treaty-monitoring bodies, and that it was questionable whether the principles expounded by those bodies were directly relevant to general principles of diplomatic protection.

243. As to judicial and arbitral decisions, the Special Rapporteur remarked that some support for the principles he had outlined could be found in the *Panevezys-Saldutiskis Railway*,²⁸⁵ the *Finnish Ships Arbitration*,²⁸⁶ the *Ambatielos*²⁸⁷ claim, and the *ELSI*,²⁸⁸ *Aerial Incident of 27 July 1955*²⁸⁹ and *Norwegian Loans*²⁹⁰ cases. Two conclusions could be drawn from those cases: (a) the burden of proof was on the respondent State in that it had to show the availability of local remedies; and (b) the claimant State bore the burden of proof for showing that if remedies were available, they were ineffective, or that some other exception applied—for instance, that there had been a direct injury to the claimant State.

“2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:

“(a) the burden of proof is on the respondent State to prove that the international claim is one to which the exhaustion of local remedies rule applies and that the available local remedies have not been exhausted;

“(b) the burden of proof is on the claimant State to prove any of the exceptions referred to in Article 14 or to prove that the claim concerns direct injury to the State itself.”

²⁸⁵ See footnote 267 above.

²⁸⁶ Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels during the War, decision of 9 May 1934, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479.

²⁸⁷ Award of 6 March 1956, UNRIAA, vol. XII (Sales No. 63.V.3), p. 91.

²⁸⁸ See footnote 266 above.

²⁸⁹ *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment, ICJ Reports, 1959, p. 127.

²⁹⁰ See footnote 277 above.

244. At the same time, he conceded that it was difficult to lay down general rules, since the outcome was linked to the facts of each case. He recalled the *Norwegian Loans* case, which involved a specific fact pattern and in the context of which Judge Lauterpacht had laid down four principles which enjoyed considerable support in the literature: it was for the plaintiff State to prove that there were no effective remedies to which recourse could be had; no such proof was required if there was legislation which on the face of it deprived the private claimants of a remedy; in such a case, it was for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence could reasonably be assumed; and the degree of burden of proof ought not to be unduly stringent.

245. The Special Rapporteur confirmed that, in his view, the four principles adduced by Lauterpacht resulted from the unusual circumstances of the *Norwegian Loans* case. Therefore he did not undermine his own hypothesis that there were essentially two rules on the availability and effectiveness of local remedies, as set out in article 15, paragraphs 2 (a) and 2 (b).

(b) Summary of the debate

246. While some support for article 15 was expressed, strong opposition was voiced in the Commission to the inclusion of article 15 on the burden of proof. It was doubted that rules of evidence should be included within the scope of the topic. Furthermore, customary rules of evidence, if they did exist, were difficult to establish. Reference was made to the differences between common-law and civil-law systems regarding issues relating to the burden of proof. Similarly, it was noted that rules of evidence also varied greatly, depending on the type of international proceedings. It was further observed that, in view of the traditional requirements regarding the burden of proof, it seemed unlikely that any judicial or other body would feel constrained by what was an extremely complex additional provision.

247. It was observed that the respondent State was in a much better position than judges or the claimant to demonstrate the existence of remedies. Similarly, the State of nationality was best able to provide evidence on the nationality of the individual. There, the burden of proof was on the claimant State. Thus, the position of the State as a claimant or respondent seemed to be less important than the availability of evidence.

248. Furthermore, doubts were expressed as to the relevance of the human rights jurisprudence—developed on the basis of specific treaty provisions within the framework of a procedural system—to the task of delineating the burden of proof in general international law. Moreover, the same treaty body might have different rules of evidence at each stage of the proceedings. The example of the European Court of Human Rights was cited in that regard. While the rule proposed by the Special Rapporteur was appealing in its simplicity, the situation was bound to be much more complex in practice. It was also noted that it would be difficult to reach an agreement on the subject matter of article 15.

249. It was suggested that the burden of proof could best be left to the rules of procedure or *compromis* in the case of international judicial forums, and to the law of the State in cases of resort to domestic forums of adjudication. It was also proposed that the commentary could include a discussion of the question of the burden of proof.

250. Concerning paragraph 1, the view was expressed that it provided little guidance to state, as a general principle, that the party that made an assertion must prove it. What mattered was not the allegation but the interest which the party might have in establishing a certain fact that appeared to be relevant. Conversely, the view was expressed that paragraph 1 was useful and should be included.

251. Regarding paragraph 2, the view was expressed that the distinction between the availability of a remedy, which should be shown by the respondent State, and its lack of effectiveness, which should be demonstrated by the claimant State, was artificial. A remedy that offered no chance of success—in other words, was not effective—was not one which needed to be exhausted. Thus, the respondent State's interest went further than establishing that a remedy existed: it had to also show that it had a reasonable chance of success. At issue was the effectiveness of a remedy in the absence of pertinent judicial precedents at the time of the injury. In terms of a further view, the problem was simply one of drafting, which the Drafting Committee could look into.

(c) *Special Rapporteur's concluding remarks*

252. The Special Rapporteur observed that, while article 15 had been considered innocuous by some and too complex by others, a large majority had been opposed to its inclusion. Therefore he could not recommend that it should be referred to the Drafting Committee.

5. ARTICLE 16²⁹¹

(a) *Introduction by the Special Rapporteur*

253. The Special Rapporteur, in introducing article 16, said that the Calvo clause²⁹² was an integral part of the history and development of the exhaustion of local remedies rule and continued to be of relevance. He explained that the Calvo clause was a contractual undertaking whereby a person voluntarily linked with a State of which he was not a national agreed to waive the right to claim diplomatic protection by his State of nationality and to confine himself exclusively to local remedies relating to the performance of the contract.

254. From the outset, the Calvo clause had been controversial. Latin American States had seen it as a rule of general international law, and as a regional rule of international law, and many of them, notably Mexico, had incorporated it into their constitutions. On the other hand, other States had seen it as contrary to international law, on the ground that it offended the Vattelian fiction, according to which an injury to a national was an injury to the State,²⁹³ and that only the State could waive the right to diplomatic protection.

255. The leading case on the subject was the decision handed down by the Mexico–United States General Claims Commission in the *North American Dredging Company* case,²⁹⁴ in which it had been shown that the Calvo clause was compatible with international law in general and with the right to diplomatic protection in particular, although the decision in that case had been subjected to serious criticism by jurists.

256. However, there was still debate on the Calvo clause's purpose and scope, and he alluded to several considerations that had emerged from that debate. First, the Calvo clause was of limited validity in the sense that it did not constitute a complete bar to diplomatic intervention. It applied only to disputes relating to the contract between alien and host State containing the clause, and not to breaches of international law. Second, the Calvo clause confirmed the importance of the exhaustion of local remedies rule. Some writers had suggested that the clause was nothing more than a reaffirmation of that rule, but most writers saw it as going beyond such a reaffirmation. Third, international law placed no bar on the right of aliens to waive by contract their own power or right to request that their State of nationality exercise diplomatic protection on their behalf. Fourth, aliens could not by means of a Calvo clause waive rights that under international law belonged to their Government. Fifth, the waiver in a Calvo clause extended only to disputes arising out of the contract, or to breach of the contract, which did not, in any event, constitute a breach of international law; nor, in particular, did it extend to a denial of justice.

257. The Calvo clause had been born out of the fear on the part of Latin American States of intervention in their domestic affairs under the guise of diplomatic protection. Capital-exporting States, for their part, had feared that their nationals would not receive fair treatment in countries whose judicial standards they regarded as inadequate. Since then, the situation had changed. The Calvo clause nevertheless remained an important feature of the Latin

²⁹¹ Article 16 proposed by the Special Rapporteur in his third report reads as follows:

"Article 16

"1. A contractual stipulation between an alien and the State in which he carries on business to the effect that:

"(a) the alien will be satisfied with local remedies; or

"(b) no dispute arising out of the contract will be settled by means of an international claim; or

"(c) the alien will be treated as a national of the contracting State for the purposes of the contract,

shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection in respect of matters pertaining to the contract. Such a contractual stipulation shall not, however, affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien.

"2. A contractual stipulation referred to in paragraph 1 shall be construed as a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement."

²⁹² See footnote 249 above.

²⁹³ See E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (The law of nations, or the principles of natural law), English translation of the edition of 1758 in *The Classics of International Law*, vol. III (Washington, D.C., Carnegie Institution, 1916).

²⁹⁴ *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, decision of 31 March 1926, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 26.

American approach to international law, and the doctrine influenced the attitude of developing countries in Africa and Asia, which feared intervention by powerful States in their domestic affairs.

258. Furthermore, the Calvo doctrine, already reflected in General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources, appeared again in the Charter of Economic Rights and Duties of States, contained in Assembly resolution 3281 (XXIX) of 12 December 1974, which proclaimed in its article 2, paragraph 2 (c), that disputes over compensation arising from the expropriation of foreign property had to be settled under the domestic law of the nationalizing State. The influence of the Calvo doctrine was also to be seen in decision 24 of the Cartagena Agreement (Subregional integration agreement (Andean Pact)). On the other hand, the North American Free Trade Agreement (NAFTA),²⁹⁵ which permitted foreign investors to resort to international arbitration without first exhausting local remedies, was seen by some as representing a departure from the Calvo doctrine.

259. Two options were open to the Commission: to decline to draft any provision on the subject on the ground that to do so would be superfluous if one took the view that the Calvo clause simply reaffirmed the exhaustion of local remedies rule, or else to draft a provision limiting the validity of the Calvo clause to disputes arising out of the contract containing the clause, without precluding the right of the State of nationality of the alien to exercise its diplomatic protection on behalf of that individual where he or she had been injured as a result of an internationally wrongful act attributable to the contracting State. Paragraph 2 provided that such a clause constituted a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement, where there was a *compromis* providing for an exception to the exhaustion of local remedies rule.

(b) *Summary of the debate*

260. The Special Rapporteur was commended for his thorough review of the history of the Calvo doctrine and his treatment of the issues raised in international law by the Calvo clause. Different views were expressed regarding the inclusion of a provision on the Calvo clause in the draft articles.

261. Some were of the view that, subject to a few drafting improvements, article 16 should be retained as a complement to article 10. As a codified rule, it would clarify the limits of contractual relationships between a State and an alien, particularly by guaranteeing the rights of the State of nationality under international law. Some members also expressed the view that the proposed article did not deal with the Calvo clause in its classical sense, but with a mere obligation of exhaustion of local remedies in particular circumstances. It was suggested that the provision placed useful emphasis on the exhaustion of local remedies rule. Indeed, the view was expressed that

the codification of the exhaustion of local remedies rule would be incomplete without recognition of the Calvo clause.

262. The view was also expressed that the Calvo clause was not merely of historical and symbolic value but remained an important issue in the modern world, with international implications far exceeding those of contractual stipulations under domestic law. Moreover, though resort to the Calvo clause had been largely confined to Latin America, the problems it had sought to address had a global, not merely a regional, dimension. By including the provision, the Commission would be codifying a regional customary rule, which could legitimately be elevated to the rank of a universal rule.

263. The view was further expressed that the Calvo clause was not contrary to international law, on account of two important principles, namely, the sovereign equality of States, which entailed a duty of non-intervention, and the equal treatment of nationals and aliens. It was also noted that article 16 did not set out to codify the Calvo clause as such, but instead established limits to its application in international relations. It also clarified the relationship between the rights of the individual and of the State in that area, which was that a foreign individual or company had the right to seek, and a State the right to exercise, diplomatic protection.

264. Others spoke against the inclusion of the provision in the draft articles on diplomatic protection and preferred its deletion. The view was expressed that article 16 was beyond the scope of the Commission's statute, in particular article 15 thereof: it was not a rule of law and therefore did not lend itself to codification. The Calvo clause was said to be a mere contractual drafting device.

265. It was pointed out that the national of the State could not replace the State, since it was not the national's own rights that were involved, but those of the State. An alien could not waive a right that was not his. The legal significance of the waiver in paragraph 1 was uncertain since the alien's request was not a precondition for the exercise of diplomatic protection. The alien could, however, undertake, first, to rely only on the laws of the host country and, second, not to seek the diplomatic protection of his State of origin. What could not be done was to guarantee that the State of nationality would not intervene to ensure respect for its right to see international law respected in the person of its national. Hence, the question was not whether the Calvo clause was valid or not under international law. It was neither prohibited under international law nor regarded as lawful. There would be a breach of contract, but no breach of an obligation under international law, either by the alien or by the State of nationality, if the alien requested diplomatic protection from that State.

266. It was also noted by some that, while the Calvo clause was of historical importance, in practice it was used less and less. Furthermore, the international context differed from that in which the Calvo clause had been formulated a century before. The concerns underlying the Calvo doctrine had to a large extent been addressed by developments in the latter half of the twentieth century, including the adoption of several important interna-

²⁹⁵ See *The NAFTA*, vol. I. North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (Washington, D.C., U.S. Government Printing Office, 1993).

tional texts referred to in the Special Rapporteur's report. Likewise, the conduct of States in the modern-day world was strongly influenced, if not conditioned, by common standards imposed by international human rights law. Furthermore, the importance that Governments attached, and the recognition they accorded, to private entrepreneurship made it possible for foreign private investments to enjoy a secure legal environment. For example, it was more common for States to conclude investment agreements making provision for direct recourse to international arbitration in the event of a dispute.

267. Disagreement was also expressed with the inclusion of paragraph 2. It was thought to contradict the exhaustion of local remedies rule. The existence of a Calvo clause was not necessary to create a presumption in favour of the exhaustion of local remedies. That presumption existed independently of any contractual clause.

268. The Commission further considered a suggestion that a general provision be drafted concerning waivers, both on the part of the State of nationality and on that of the host State. However, the proposal was opposed on the grounds that it had not been fully discussed in plenary.

(c) *Special Rapporteur's concluding remarks*

269. The Special Rapporteur noted that opinions in the Commission were fairly evenly divided on whether to include article 16. It seemed to him that those who thought the Calvo clause was not within the Commission's remit were nonetheless convinced of its importance in the history and development of diplomatic protection. Hence, the inclusion of article 16, which reflected the Calvo clause, could be acceptable. He had been impressed by arguments from both sides of the debate, and noted the fact that representatives from all regional groups could be found on both sides.

270. He observed that there had been very little support for article 16, paragraph 2, except in that its contents should be dealt with in the commentary to article 14, subparagraph (b).

271. The question facing the Commission was, thus, whether to refer article 16, paragraph 1, to the Drafting Committee, with the important amendments suggested during the debate, or to omit it from the draft. If it was omitted, the subject would have to be dealt with extensively in the commentary, specifically to article 10 and article 14, subparagraph (b).

272. The Special Rapporteur further pointed out that it would not be appropriate to take up the suggested drafting of an omnibus waiver clause before a full consideration of such a provision was undertaken by the Plenary.

273. Given the almost even division in the Commission, he found it difficult to make a recommendation on how to proceed. However, on balance, he recommended that the Commission refer article 16, paragraph 1, to the Drafting Committee, subject to the drafting suggestions made during the debate. The Commission subsequently decided not to refer article 16 to the Committee.

6. DENIAL OF JUSTICE

(a) *Introduction by the Special Rapporteur*

274. The Special Rapporteur observed that the concept of denial of justice, which was inextricably linked with many features of the exhaustion of local remedies rule, including that of ineffectiveness, could as such be said to have a secondary character. He proposed to consider the place of denial of justice within the draft articles in an addendum to his third report and invited observations on the subject from the Commission.

(b) *Summary of the debate*

275. The view was expressed that the concept of denial of justice was merely one of the manifestations of the more general rule whereby local remedies must be regarded as exhausted if they had failed or were doomed to failure. As the concept was covered by article 14, subparagraphs (a), (e) and (f), it was not necessary to devote a specific provision to it, and the point could be stressed in the commentary. It was also cautioned that taking up the subject of denial of justice could be very difficult and that, strictly speaking, it fell outside the scope of diplomatic protection.

276. Others maintained that it would be difficult to disregard the question of denial of justice, which could be one of the situations giving rise to the exercise of diplomatic protection, and that it would be appropriate to include some consideration of denial of justice in the study.

(c) *Special Rapporteur's concluding remarks*

277. The Special Rapporteur noted that the debate had revealed that the majority of the members were hostile or, at best, neutral regarding the inclusion of the question of denial of justice in the study. Several members had stressed that it was a primary rule, while others pointed out that denial of justice did arise in a number of procedural contexts and was thus a form of secondary rule.

278. He observed that the content of the notion of denial of justice was uncertain. At the beginning of the twentieth century, it had involved a refusal of access to the courts; Latin American scholars had included judicial bias and delay of justice, while others took the view that denial of justice was not limited to judicial action or inaction, but included violations of international law by the executive and the legislature. The contemporary view was that denial of justice was limited to acts of the judiciary or judicial procedure in the form of inadequate procedure or unjust decisions. However, it featured less and less in the jurisprudence and had largely been replaced by the standards of justice set forth in international human rights instruments, particularly article 14 of the International Covenant on Civil and Political Rights.

279. Since the prevailing view in the Commission was that the concept did not belong to the study, he no longer intended to produce an addendum on it.

C. Articles 1 to 7 of the draft articles on diplomatic protection provisionally adopted by the Commission

1. TEXT OF THE DRAFT ARTICLES

280. The text of draft articles 1 to 7 adopted by the Commission at its fifty-fourth session is reproduced below.

DIPLOMATIC PROTECTION

PART ONE

General provisions

Article 1. Definition and scope

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.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].²⁹⁶

Article 2 [3].²⁹⁷ Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with these articles.

PART TWO

Natural persons

Article 3 [5].²⁹⁸ State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Article 4 [9]. Continuous nationality

1. A State is entitled to 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.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that per-

son was a national of the former State of nationality and not of the present State of nationality.

Article 5 [7]. Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 6. Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Article 7 [8]. Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

281. The text of draft articles 1 to 7 with commentaries thereto adopted by the Commission at its fifty-fourth session is reproduced below.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1. Definition and scope

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.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].²⁹⁹

²⁹⁶ This paragraph will be reconsidered if other exceptions are included in the draft articles.

²⁹⁷ The numbers in square brackets are the numbers of the articles as proposed by the Special Rapporteur.

²⁹⁸ This article will be reviewed in connection with the Commission's consideration of the diplomatic protection of legal persons.

²⁹⁹ See footnote 296 above.

Commentary

(1) Article 1 defines diplomatic protection by describing its main elements and at the same time indicates the scope of this mechanism for the protection of nationals injured abroad.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured person to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session,³⁰⁰ maintain the distinction between primary and secondary rules and deal only with the latter.

(3) Paragraph 1 makes it clear that the right of diplomatic protection belongs to the State. In exercising diplomatic protection the State adopts in its own right the cause of its national arising from the internationally wrongful act of another State. This formulation follows the language of ICJ in the *Interhandel* case, when the Court stated that the Applicant State had “adopted the cause of its national”³⁰¹ whose rights had been violated. The legal interest of the State in exercising diplomatic protection derives from the injury to a national resulting from the wrongful act of another State.

(4) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in article 3. The term “national” in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

(5) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between “diplomatic action” and “judicial proceedings” when describing the action that may be taken by a State when it resorts to diplomatic protection.³⁰² Article 1 retains this distinction but goes further by subsuming judicial proceedings under “other means of peaceful settlement”. “Diplomatic action” covers all the lawful procedures used by States to inform each other of their views and concerns, including protest, request for an enquiry and negotiations aimed at the settlement of disputes. “Other means of peaceful settlement” embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2,

paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection.

(6) Paragraph 1 makes it clear that the present articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded by an international organization to its officials, recognized by ICJ in its advisory opinion in the *Reparation for Injuries* case.³⁰³ Functional protection³⁰⁴ differs substantially from diplomatic protection in that it is premised on the function of the organization and the status of its agent.³⁰⁵

(7) Diplomatic protection covers the protection of nationals not engaged in official international business on behalf of the State. Diplomats and consuls are protected by other rules of international law and instruments, notably the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

(8) Paragraph 2 recognizes that there may be circumstances in which diplomatic protection may be exercised in respect of non-nationals. Article 7 provides for such protection in the case of stateless persons and refugees. The footnote to paragraph 2 indicates that the Commission may include other exceptions at a later stage in its work.

Article 2 [3]. Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with these articles.

Commentary

(1) Article 2 stresses that the right of diplomatic protection belongs to or vests in the State. It gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State.³⁰⁶ PCIJ formulated this view more carefully in the *Mavrommatis* case when it stated:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law.³⁰⁷

This view is frequently criticized as a fiction difficult to reconcile with the realities of diplomatic protection, which require continuous nationality for the assertion of a diplomatic claim,³⁰⁸ the exhaustion of local remedies by the injured national, and the assessment of damages suffered to accord with the loss suffered by the individual. Nevertheless the “Mavrommatis principle” or the “Vattelian fiction”, as the notion that an injury to a national is

³⁰⁰ See footnote 263 above.

³⁰¹ *Interhandel* (see footnote 275 above), p. 27.

³⁰² See the *Panevezys-Saldutiskis Railway* case (footnote 267 above), p. 16, and the *Nottebohm* case, *Second Phase, Judgment*, ICJ Reports 1955, p. 4, at p. 24.

³⁰³ See footnote 250 above.

³⁰⁴ *Ibid.*, p. 185.

³⁰⁵ *Ibid.*, pp. 180 and 186.

³⁰⁶ In *Le droit des gens* ... (see footnote 293 above), Emmerich de Vattel stated: “Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen” (chap. VI, p. 136).

³⁰⁷ *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCIJ Series A, No. 2*, p. 12.

³⁰⁸ See article 4.

an injury to the State has come to be known, remains the cornerstone of diplomatic protection.³⁰⁹

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige the State to extend diplomatic protection to a national,³¹⁰ but international law imposes no such obligation. The position was clearly stated by ICJ in the *Barcelona Traction* case:

... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress ... The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.³¹¹

A proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law.³¹²

(3) The right of a State to exercise diplomatic protection may only be carried out within the parameters of the present articles.

PART TWO

NATURAL PERSONS

Article 3 [5].³¹³ State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. For the purpose of diplomatic protection of natural persons, a State of nationality means a State whose nationality the person sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner not inconsistent with international law.

Commentary

(1) Whereas article 2 affirms the discretionary right of the State to exercise diplomatic protection, article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise

diplomatic protection on behalf of such a person. The emphasis in this article is on the bond of nationality between State and individual which entitles the State to exercise diplomatic protection. Paragraph 1 affirms this.

(2) Paragraph 2 defines the State of nationality for the purpose of diplomatic protection. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; second, that there are limits imposed by international law on the grant of nationality. Paragraph 2 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(3) The principle that it is for each State to decide who are its nationals is backed by both judicial decision and treaty. In 1923, PCIJ stated in the *Nationality Decrees Issued in Tunis and Morocco* case that “in the present state of international law, questions of nationality are ... in principle within the reserved domain”.³¹⁴ This principle was confirmed by article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter “1930 Hague Convention”): “It is for each State to determine under its own law who are its nationals.” More recently it was endorsed by the 1997 European Convention on Nationality (art. 3).

(4) The connecting factors for the conferment of nationality listed in paragraph 2 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (*jus soli*), descent (*jus sanguinis*) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage *per se* is insufficient for the grant of nationality: it requires in addition a short period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse, problems may arise in respect of the consistency of such an acquisition of nationality with international law.³¹⁵ Nationality may also be acquired as a result of the succession of States in accordance with the principles contained in the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading.³¹⁶

(5) The connecting factors listed in paragraph 2 are those most frequently used by developed States to establish nationality. In some developing countries, where there are no clear birth records, it will be difficult to prove nationality. In such cases residence could provide proof of nationality, although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(6) Paragraph 2 does not require a State to prove an effective or genuine link between itself and its national,

³⁰⁹ For a discussion of this notion, and of the criticisms directed at it, see the first report of the Special Rapporteur on diplomatic protection (footnote 243 above), paras. 61–74.

³¹⁰ For an examination of domestic laws on this subject, see *ibid.*, paras. 80–87.

³¹¹ *Barcelona Traction* (see footnote 6 above), p. 44.

³¹² See art. 4 of the first report of the Special Rapporteur on diplomatic protection (footnote 243 above). For the debate in the Commission, see *Yearbook ... 2000*, vol. II (Part Two), pp. 77–79, paras. 447–456.

³¹³ See footnote 298 above.

³¹⁴ *Advisory Opinion, 1923, PCIJ Reports, Series B, No. 4*, p. 6, at p. 24.

³¹⁵ See, for example, art. 9, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, which prohibits the acquisition of nationality in such circumstances. See also para. (7) of the commentary to this draft article, below.

³¹⁶ See *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 20, para. 47.

along the lines suggested in the *Nottebohm* case,³¹⁷ as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that limited *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous”³¹⁸ compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led ICJ to repeatedly assert that Liechtenstein was “not entitled to extend its protection to Nottebohm *vis-à-vis* Guatemala”.³¹⁹ This suggests that the Court did not intend to expound a general rule³²⁰ applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. Nottebohm in order to be permitted to claim on his behalf against Guatemala, with whom he had extremely close ties. Moreover, the Commission was mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection, as in today’s world of economic globalization and migration there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire, or who have acquired nationality by birth or descent from States with which they have a tenuous connection.³²¹

(7) The final phrase in paragraph 2 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who its nationals are, this right is not absolute. Article 1 of the 1930 Hague Convention confirmed this by qualifying the provision that “it is for each State to determine under its own law who are its nationals” with the proviso “[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality”.³²² Today, conventions, particularly in the field of human rights, require States to comply with

international standards in the granting of nationality.³²³ For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.³²⁴

(8) Paragraph 2 therefore recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Paragraph 2 requires that nationality should be acquired in a manner “not inconsistent with international law”. The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality³²⁵ and that there is a presumption in favour of the validity of a State’s conferment of nationality.³²⁶

Article 4 [9]. Continuous nationality

1. A State is entitled to 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.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of

³¹⁷ In this case ICJ stated: “According to the practice of states, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual’s connection which has made him its national” (see footnote 302 above, p. 23).

³¹⁸ *Ibid.*, p. 25.

³¹⁹ *Ibid.*, p. 26.

³²⁰ This interpretation was placed on the *Nottebohm* case by the Italian–United States Conciliation Commission in the *Flegenheimer* case (1958), decision no. 182 of 20 September 1958, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 327, at p. 376, or *ILR*, vol. 25, p. 91, at p. 148.

³²¹ For a more comprehensive argument in favour of limiting the scope of the *Nottebohm* case, see the first report of the Special Rapporteur on diplomatic protection (footnote 243 above), paras. 106–120.

³²² See also art. 3, para. 2, of the European Convention on Nationality.

³²³ This was stressed by the Inter-American Court of Human Rights in its advisory opinion on the *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica* case, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State “with the further principle that international law imposes certain limits on the State’s power, which limits are linked to the demands imposed by the international system for the protection of human rights” (*ILR*, vol. 79, p. 283, at p. 296).

³²⁴ See also art. 20 of the American Convention on Human Rights: “Pact of San José, Costa Rica” and art. 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination.

³²⁵ See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* case (footnote 323 above), para. 62.

³²⁶ See *Oppenheim’s International Law* (footnote 112 above), p. 856.

the former State of nationality and not of the present State of nationality.

Commentary

(1) Although the continuous nationality rule is well established,³²⁷ it has been subjected to considerable criticism³²⁸ on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to “nationality shopping” for the purpose of diplomatic protection.³²⁹ The Commission is of the view that the continuous nationality rule should be retained but that exceptions should be allowed to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.³³⁰ In these circumstances the Commission decided to leave open the question whether nationality has to be retained between injury and presentation of the claim.³³¹

(3) The first requirement is that the injured national be a national of the claimant State at the time of the injury. Normally the date of the injury giving rise to the responsibility of the State for an internationally wrongful act will coincide with the date on which the injurious act occurred.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim³³²

is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have used different language to identify the date of the claim.³³³ The phrase “presentation of the claim” is that most frequently used in treaties, judicial decisions and doctrine. The Commission has added the word “official” to this formulation to indicate that the date of the presentation of the claim is that on which the State exercising diplomatic protection makes the first official or formal demand, in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The word “claim” in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the draft articles on State responsibility and the commentary thereto.³³⁴

(6) While the Commission decided that it was necessary to retain the continuous nationality rule, it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury, provided that three conditions are met: first, the person seeking diplomatic protection has lost his or her former nationality; second, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and third, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(7) Loss of nationality may occur voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(8) As was discussed above,³³⁵ fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on the person's behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired the new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States.

³²⁷ See, for instance, the decision of the United States International Claims Commission 1951–1954 in the *Kren* claim, *ILR*, vol. 20, p. 233, especially p. 234.

³²⁸ See the separate opinion of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case (footnote 6 above), pp. 101–102; see also E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international* (Paris, Presses Universitaires de France, 1990).

³²⁹ See the statement of Umpire Parker in *Administrative Decision No. V*: “Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency on behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.” United States–Germany Mixed Claims Commission, decision of 31 October 1924, *UNRIAA*, vol. VII (Sales No. 1956.V.5), p. 119, at p. 141.

³³⁰ See H. W. Briggs, “La protection diplomatique des individus en droit international: la nationalité des réclamations”, *Annuaire de l'Institut de droit international*, vol. 51 (1965), tome I, p. 5, especially pp. 72–73.

³³¹ The Institute of International Law adopted the same position at its Warsaw session, in September 1965: see *Annuaire de l'Institut de droit international*, vol. 51 (1965), tome II, pp. 260–262.

³³² According to a view, the concept of “nationality of the claim” gave rise to confusion since it was a common law concept that was not known to other legal systems.

³³³ See the dictum of Umpire Parker in *Administrative Decision No. V* (footnote 329 above), p. 143.

³³⁴ See footnote 263 above.

³³⁵ See para. (1) of this commentary.

(9) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with article 3, paragraph 2.

(10) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

Article 5 [7]. Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Commentary

(1) Although some domestic legal systems prohibit their nationals from acquiring dual or multiple nationality, it must be accepted that dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization, which does not result in the renunciation of a prior nationality. International law does not prohibit dual or multiple nationality: indeed, such nationality was given approval by article 3 of the 1930 Hague Convention, which provides: "... a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses." It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Article 5 is limited to the exercise of diplomatic protection by one of the States of which the injured person is a national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in article 6.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like article 3, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the in-

jured person is not a national, in both arbitral decisions³³⁶ and codification endeavours³³⁷ the weight of authority does not require such a condition. In the *Salem* case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that "the rule of international law [is] that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power".³³⁸ This rule has been followed in other cases³³⁹ and has more recently been upheld by the Iran–United States Claims Tribunal.³⁴⁰ The Commission's decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or before different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction with respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

³³⁶ See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in *de Born*, case no. 205, A. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases 1925 and 1926* (London, Longmans, 1929), pp. 277–278.

³³⁷ See art. 5 of the 1930 Hague Convention; article 4, subpara. (b), of the resolution on the national character of an international claim presented by a State for injury suffered by an individual adopted by the Institute of International Law at its Warsaw session in 1965, *Tableau des résolutions adoptées (1957–1991)* (Paris, Pedone, 1992), p. 57, at p. 59 (reproduced in *Yearbook ... 1969*, vol. II, p. 142); art. 23, para. 3, of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", *AJIL*, vol. 55, no. 3 (July 1961), p. 548; and art. 21, para. 3, of the draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, included in the third report on international responsibility by Special Rapporteur García Amador, *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 61.

³³⁸ *Salem* (see footnote 276), p. 1188.

³³⁹ See the decisions of the Italian–United States Conciliation Commission in the *Mergé* claim, 10 June 1955, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 236, or *ILR* (1955), vol. 22 (1958), p. 443, at p. 456; the *Vereano* claim, 17 May 1957, UNRIAA, vol. XIV, p. 321, or *ILR* (1957), vol. 24 (1961), pp. 464–465; and the *Stankovic* claim, 29 July 1963, *ILR*, vol. 40 (1970), p. 153, at p. 155.

³⁴⁰ See *Dallal v. Iran* (1983), *Iran–United States Claims Tribunal Reports*, vol. 3 (Cambridge, Grotius, 1984), p. 23.

Article 6. Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Commentary

(1) Article 6 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas article 5, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, article 6 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

(2) In the past there was strong support for the rule of non-responsibility, according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention declares in article 4: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."³⁴¹ Later codification proposals adopted a similar approach,³⁴² and there was also support for this position in arbitral awards.³⁴³ In 1949, in its advisory opinion in the *Reparation for Injuries* case, ICJ described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".³⁴⁴

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State

of nationality.³⁴⁵ This jurisprudence was relied on by ICJ in another context in the *Nottebohm* case³⁴⁶ and was given explicit approval by the Italian–United States Conciliation Commission in the *Mergé* claim in 1955. Here the Conciliation Commission stated:

The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.³⁴⁷

In its opinion the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.³⁴⁸ Relying on these cases, the Iran–United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases.³⁴⁹ Another institution which gives support to the dominant nationality principle is the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of

³⁴⁵ *Drummond* case, 2 Knapp, Privy Council I, p. 295, *The English Reports*, vol. 12 (Edinburgh/London, William Green and Sons/Stevens and Sons, 1901), p. 492; the *Mathison, Stevenson* (British-Venezuelan Mixed Claims Commission), *Brignone and Miliani* (Italian-Venezuelan Mixed Claims Commission) cases, UNRIAA, vol. IX (Sales No. 59.V.5), pp. 485 and 494, and vol. X (Sales No. 60.V.4), pp. 542 and 584 respectively, or J. H. Ralston, ed., *Venezuelan Arbitrations of 1903* (Washington, D.C., U.S. Government Printing Office, 1904), pp. 429–438, 710, 754–761, 438–455, 710–720 and 754–762 respectively; the *Canevaro* case (Italy v. Peru) (Permanent Court of Arbitration), decision of 3 May 1912, UNRIAA, vol. XI (Sales No. 61.V.4), p. 397, or J. B. Scott, ed., *The Hague Court Reports* (New York, Oxford University Press, 1916), p. 284; the *Hein* case, case no. 148 (1922) (Anglo-German Mixed Arbitral Tribunal), J. F. Williams and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases 1919 to 1922* (London, Longman, 1932), p. 216; the *Blumenthal* case (1923) (French-German Mixed Arbitral Tribunal), *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, tome 3 (Paris, Sirey, 1924), p. 616; the *de Montfort* case, case no. 206 (1926) (French-German Mixed Arbitral Tribunal), *Annual Digest of Public International Law Cases 1925 to 1926* (footnote 336 above), p. 279; the *Pinson* cases, cases no. 194 and 195 (1928) (French-Mexican Mixed Claims Commission), *ibid.*, pp. 297–301, or UNRIAA, vol. V (Sales No. 1952.V.3), p. 327; and the *Tellech* case (1928) (United States–Austria–Hungary Tripartite Claims Commission), UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 248–250.

³⁴⁶ See footnote 302 above, pp. 22–23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein in judicial decisions such as those referred to in footnote 345 above.

³⁴⁷ *Mergé*, UNRIAA (see footnote 339 above) p. 247.

³⁴⁸ See, for example, the *Spaulding* case (1956), UNRIAA, vol. XIV (Sales No. 65.V.4), p. 292, or *ILR* (1957), vol. 24 (1961), p. 452; the *Zangrilli* case (1956), UNRIAA, vol. XIV, p. 294, or *ILR*, vol. 24, p. 454; the *Cestra* case (1957), UNRIAA, vol. XIV, p. 307, or *ILR*, vol. 24, p. 454; the *Salvoni* case (1957), UNRIAA, vol. XIV, p. 311, or *ILR*, vol. 24, p. 455; the *Ruspoli-Droutzkoy* case (1957), UNRIAA, vol. XIV, p. 314, or *ILR*, vol. 24, p. 457; the *Puccini* case (1957), UNRIAA, vol. XIV, p. 323, or *ILR*, vol. 24, p. 454; the *Turri* case (1960), *ILR*, vol. 30 (1966), p. 371; the *Graniero* case (1959), UNRIAA, vol. XIV, p. 393, or *ILR*, vol. 30, p. 351; the *Ganapini* case (1959), UNRIAA, vol. XIV, p. 400, or *ILR*, vol. 30, p. 366; and the *Di Cicio* case (1962), *ILR*, vol. 40 (1970), p. 148.

³⁴⁹ See, in particular, *Esfahanian v. Bank Tejarat* (1983), *Iran–United States Claims Tribunal Reports*, vol. 2 (Cambridge, Grotius, 1984), p. 157, at p. 166; and case no. A/18 (1984), *ibid.*, 1985, vol. 5, p. 251.

³⁴¹ See also art. 16, subpara. (a), of the 1929 Harvard Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, *AJIL*, vol. 23, special supplement (vol. 2) (April 1929), p. 133, at p. 200 (reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 9, p. 229, at p. 230).

³⁴² See art. 23, para. 5, of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens (footnote 337 above); and art. 4, subpara. (a), of the resolution on the national character of an international claim presented by a State for injury suffered by an individual adopted by the Institute of International Law at its Warsaw session in 1965 (*ibid.*).

³⁴³ See the *Executors of R.S.C.A. Alexander v. United States* case (1898) (United States–British Claims Commission), J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. III (Washington, D.C., U.S. Government Printing Office, 1898), p. 2529; the *Oldenbourg* case, decision no. 11 of 19 December 1929, UNRIAA, vol. V (Sales No. 1952.V.3), pp. 74 and 204, or *Decisions and Opinions of the Commissioners*, 5 October 1929 to 15 February 1930 (London, HM Stationery Office, 1931), p. 97; the *Honey* case (British-Mexican Claims Commission), decision no. 23 of 26 March 1931, UNRIAA, vol. V, p. 133, or *Further Decisions and Opinions of the Commissioners*, subsequent to 15 February 1930 (London, HM Stationery Office, 1933), p. 13; and the *Adams and Blackmore* case (British-Mexican Claims Commission), decision no. 69 of 3 July 1931, UNRIAA, vol. V, p. 216.

³⁴⁴ *Reparation for Injuries* (see footnote 250 above), p. 186.

Kuwait.³⁵⁰ The condition applied by the Compensation Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.³⁵¹ Recent codification proposals have given approval to this approach. In his third report on international responsibility to the Commission, Special Rapporteur García Amador proposed: “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 or other ties.”³⁵² Orrego Vicuña advanced a similar view in his report to the sixty-ninth conference of the International Law Association.³⁵³

(4) The Commission is of the opinion that the principle which allows a State of dominant or effective nationality to bring a claim against another State of nationality reflects the present position in customary international law. Moreover, it is consistent with developments in international human rights law, which accords legal protection to individuals, even against a State of which they are nationals. This conclusion is given effect to in article 6.

(5) The authorities use the term “effective” or “dominant” to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. The Commission decided not to use either of these words to describe the required link but instead to use the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities, and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than by either “effective” or “dominant”. It is, moreover, the term used by the Italian–United States Conciliation Commission in the *Mergé* claim, which may be seen as the starting point for the development of the present customary rule.³⁵⁴

(6) The Commission makes no attempt to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence; the amount of time spent in each country of nationality; the date of naturalization (the length of the period spent as a national of the protecting State before the claim arose); the place, curricula and language of education; employment and financial interests; the place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank accounts and social security insurance; visits to the other State of nationality; possession and use of the passport of the other State; and military service. None of these factors is decisive, and the weight attributed to

each factor will vary according to the circumstances of each case.

(7) Article 6 is framed in negative language: “A State of nationality may *not* exercise diplomatic protection ... *unless*” its nationality is predominant. This is intended to show that the circumstances envisaged by article 6 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(8) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the time of the injury and at the date of the official presentation of the claim. This requirement echoes the principle affirmed in article 4, paragraph 1, on the subject of continuous nationality. The phrases “at the time of the injury” and “at the date of the official presentation of the claim” are explained in the commentary on this article. The exception to the continuous nationality rule contained in article 4, paragraph 2, is not applicable here as the injured person contemplated in article 6 will not have lost his or her other nationality.

Article 7 [8]. Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Commentary

(1) The general rule was that a State could only exercise diplomatic protection on behalf of its own nationals. In 1931 the Mexico–United States General Claims Commission held, in the *Dickson Car Wheel Company* case, that a stateless person could not be the beneficiary of diplomatic protection when it stated: “A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.”³⁵⁵ This dictum no longer reflects the accurate position of international law for stateless persons and refugees. Contemporary interna-

³⁵⁰ Security Council resolution 692 (1991) of 20 May 1991.

³⁵¹ Decision 7 of the Governing Council of the Compensation Commission, of 16 March 1992, “Criteria for additional categories of claims” (S/AC.26/1991/7/Rev.1), para. 11.

³⁵² Art. 21, para. 3, of the draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens (see footnote 337 above).

³⁵³ “The changing law of nationality of claims”, interim report, International Law Association, *Report of the Sixty-ninth Conference* (see footnote 262 above), p. 646, para. 11.

³⁵⁴ See footnote 339 above.

³⁵⁵ *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, decision of July 1931, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678.

tional law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961 and the Convention relating to the Status of Refugees of 1951.

(2) Article 7, an exercise in progressive development of the law, departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although the Commission has acted within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition appears, however, in article 1 of the Convention relating to the Status of Stateless Persons, which defines a stateless person “as a person who is not considered as a national by any State under the operation of its law”. This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that the person was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.³⁵⁶ Whereas some members of the Commission believed that this threshold is too high and could lead to a situation of lack of effective protection for the individuals involved, the majority took the view that the combination of lawful residence and habitual residence approximates to the requirement of effectiveness invoked in respect of nationality and is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim contained in article 4 are repeated in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim. This ensures that non-nationals are subject to the same rules as nationals in respect of the temporal requirements for the bringing of a claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of

Nationality]”³⁵⁷ and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain the decision of the Commission to allocate a separate paragraph to each category.

(7) The Commission decided to insist on lawful residence and habitual residence as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention relating to the Status of Refugees sets the lower threshold of “lawfully staying”³⁵⁸ for Contracting States in the issuing of travel documents to refugees. The Commission was influenced by two factors in reaching this decision: the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection,³⁵⁹ and the need to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*. Some members of the Commission argued that the threshold of lawful and habitual residence as preconditions for the exercise of diplomatic protection was too high in the case of both stateless persons and refugees.³⁶⁰

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in article 6, paragraph 4 (g), of the European Convention on Nationality, which would have extended the concept to include refugees recognized by regional instruments, such as the OAU Convention governing the Specific Aspects of Refugee Problems in Africa,³⁶¹ widely seen as the model for the international protection of refugees,³⁶² and the Cartagena Declaration on Refugees.³⁶³ However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it considered and treated as a refugee. This would be of particular importance for refugees in States not parties to the existing international or regional instruments.

³⁵⁷ Art. 1.A.2 of the Convention relating to the Status of Refugees.

³⁵⁸ The *travaux préparatoires* of the Convention make it clear that “stay” means less than durable residence.

³⁵⁹ See para. 16 of the Schedule to the Convention.

³⁶⁰ See para. (4) of this commentary.

³⁶¹ This convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

³⁶² See the Note on International Protection submitted by the United Nations High Commissioner for Refugees (A/AC.96/830), p. 17, para. 35.

³⁶³ Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in OEA/Ser.L/V/II.66 doc. 10, rev. 1. OAS General Assembly, fifteenth regular session (1985), resolution approved by the General Commission held at its fifth session on 7 December 1985.

³⁵⁶ The use of the terms “lawful” and “habitual” with regard to residence is based on the European Convention on Nationality, art. 6, para. 4 (g), where they are used in connection with the acquisition of nationality. See also art. 21, para. 3 (c), of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (footnote 337 above), which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State”.

(9) The temporal requirements for the bringing of a claim contained in article 4 are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hands of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge “*may* exercise diplomatic protection”. This em-

phasizes the discretionary nature of the right. Under international law, a State has discretion regarding whether to exercise diplomatic protection in respect of a national.³⁶⁴ *A fortiori* it has discretion regarding whether to extend such protection to a stateless person or refugee.

(12) The Commission stresses that article 7 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Article 28 of the Convention relating to the Status of Refugees, read with paragraph 15 of its schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. *A fortiori* the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

³⁶⁴ See art. 2 and the commentary thereto.

Chapter VI

UNILATERAL ACTS OF STATES

A. Introduction

282. In the report of the Commission to the General Assembly on the work of its forty-eighth session, in 1996, the Commission proposed to the Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.³⁶⁵

283. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic “Unilateral acts of States” and to indicate its scope and content.

284. At its forty-ninth session, in 1997, the Commission established a working group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.³⁶⁶

285. Also at its forty-ninth session, the Commission appointed Mr. Víctor Rodríguez Cedeño Special Rapporteur for the topic.³⁶⁷

286. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission’s decision to include the topic in its agenda.

287. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur’s first report on the topic.³⁶⁸ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

288. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of a unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.³⁶⁹

289. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur’s sec-

ond report on the topic.³⁷⁰ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

290. The Working Group reported to the Commission on issues related to (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group established guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission’s study of the topic.

291. At its fifty-second session, in 2000, the Commission considered the third report of the Special Rapporteur on the topic,³⁷¹ along with the text of the replies received from States³⁷² to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

292. At its fifty-third session, in 2001, the Commission considered the fourth report of the Special Rapporteur³⁷³ and established an open-ended working group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.³⁷⁴

B. Consideration of the topic at the present session

293. At the present session the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/525 and Add.1 and 2) and the text of replies received from

³⁶⁵ *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248 and annex II.

³⁶⁶ *Yearbook ... 1997*, vol. II (Part Two), pp. 64–65, paras. 194, 196 and 210.

³⁶⁷ *Ibid.*, pp. 66–71, paras. 212 and 234.

³⁶⁸ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486.

³⁶⁹ *Ibid.*, vol. II (Part Two), pp. 58–59, paras. 192–201.

³⁷⁰ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1.

³⁷¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505.

³⁷² *Ibid.*, document A/CN.4/511.

³⁷³ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519.

³⁷⁴ *Ibid.*, vol. II (Part Two), pp. 19 and 205, paras. 29 and 254. The text of the questionnaire is available at <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.