

Chapter V

DIPLOMATIC PROTECTION

A. Introduction

55. 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.⁵⁷ In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission to examine the topic further 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 General Assembly resolution, established at its 2477th meeting a working group on the topic.⁵⁸ The Working Group submitted a report at the same session which was endorsed by the Commission.⁵⁹ 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.⁶⁰

56. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna as Special Rapporteur for the topic.⁶¹

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

58. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.⁶² At the same session, the Commission established an open-ended working group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.⁶³

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

Special Rapporteur for the topic,⁶⁴ after Mr. Bennouna was elected a judge to the International Tribunal for the Former Yugoslavia.

60. At its fifty-second session, in 2000, the Commission had before it the first report of the Special Rapporteur.⁶⁵ 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 open-ended informal consultations, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.⁶⁶ The Commission subsequently decided to refer draft articles 1, 3 and 5–8 to the Drafting Committee together with the report of the informal consultations.

61. At its fifty-third session, in 2001, the Commission had before it the remainder of the first report of the Special Rapporteur, as well as his second report.⁶⁷ Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of the report, concerning draft articles 12 and 13, to the next session. At the same session, the Commission decided to refer draft articles 9–11 to the Drafting Committee.

62. Also at the same session, the Commission established open-ended informal consultations on article 9, chaired by the Special Rapporteur.

63. At its fifty-fourth session, in 2002, the Commission had before it the remainder of the second report of the Special Rapporteur,⁶⁸ concerning draft articles 12 and 13, as well as his third report,⁶⁹ covering draft articles 14 to 16. At the same session, the Commission decided to refer draft article 14 (a), (b), (d) (to be considered in connection with subparagraph (a)), and (e) to the Drafting Committee. It further decided to refer draft article 14 (c) to the Drafting Committee to be considered in connection with subparagraph (a).

64. The Commission also considered the report of the Drafting Committee on draft articles 1 to 7 [8], at the same session. It adopted articles 1 to 3 [5], 4 [9], 5 [7],

⁵⁷ *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, para. 248, and annex II, addendum 1, p. 137.

⁵⁸ *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

⁵⁹ *Ibid.*, para. 171.

⁶⁰ *Ibid.*, pp. 62–63, paras. 189–190.

⁶¹ *Ibid.*, p. 63, para. 190.

⁶² *Yearbook ... 1998*, vol. II (Part One), p. 309, document A/CN.4/484.

⁶³ The conclusions of the Working Group are contained in *Yearbook ... 1998*, vol. II (Part Two), p. 49, para. 108.

⁶⁴ *Yearbook ... 1999*, vol. II (Part Two), p. 17, para. 19.

⁶⁵ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

⁶⁶ The report of the informal consultations is contained in *Yearbook ... 2000*, vol. II (Part Two), pp. 85–86, para. 495.

⁶⁷ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

⁶⁸ *Ibid.*

⁶⁹ *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1.

6 and 7 [8]. The Commission also adopted the commentaries to the aforementioned draft articles.⁷⁰

65. The Commission established open-ended informal consultations, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

B. Consideration of the topic at the present session

66. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/530 and Add.1). The Commission considered the first part of the report, concerning draft articles 17 to 20, at its 2757th to 2762nd, 2764th and 2768th meetings, held from 14 May to 23 May, 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, held on 15, 16 and 18 July 2003.

67. At its 2762nd meeting, the Commission decided to establish an open-ended working group, chaired by the Special Rapporteur, on article 17, paragraph 2. The Commission considered the report of the Working Group at its 2764th meeting.

68. At its 2764th meeting, the Commission decided to refer to the Drafting Committee article 17, as proposed by the Working Group, and articles 18 to 20. At its 2777th meeting, the Commission decided to refer articles 21 and 22 to the Drafting Committee.

69. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] (A/CN.4/L.631) at its 2768th meeting. It provisionally adopted those draft articles at the same meeting (see section C, paragraphs 152–153, below).

1. ARTICLE 17⁷¹

(a) Introduction by the Special Rapporteur

70. In introducing article 17, the Special Rapporteur observed that the subject of the diplomatic protection of legal persons was dominated by the 1970 ICJ judgment in the *Barcelona Traction* case.⁷² In that case, the Court had expounded the rule that the right of diplomatic protection in respect of an injury to a corporation belonged to the State under whose laws the corporation was incorporated and in whose territory it had its registered office, and not to the State of nationality of the shareholders. The Court had acknowledged further that there was some practice relating to bilateral or multilateral investment treaties

that tended to confer direct protection on shareholders, but that did not provide evidence that a rule of customary international law existed in favour of the right of the State of nationality of shareholders to exercise diplomatic protection on their behalf. It had dismissed such practice as constituting *lex specialis*.

71. In reaching its decision, ICJ had ruled on three policy considerations: (a) where shareholders invested in a corporation doing business abroad, they undertook risks, including the risk that the State of nationality of the corporation might in the exercise of its discretion decline to exercise diplomatic protection on their behalf; (b) permitting the State of nationality of shareholders to exercise diplomatic protection might result in a multiplicity of claims since shareholders could be nationals of many countries and shareholders might even be corporations; and (c) the Court declined to apply, by way of analogy, rules relating to dual nationality of natural persons to corporations and shareholders, which would allow the States of nationality of both to exercise diplomatic protection.

72. The Special Rapporteur recalled further that there had been widespread disagreement among judges over the ICJ reasoning, as was evidenced by the fact that eight of the 16 judges had given separate opinions, of which five had supported the right of the State of nationality of shareholders to exercise diplomatic protection. The decision of the Court had also been subjected to a wide range of criticisms, *inter alia*, that it had not paid sufficient attention to State practice; and that the Court had established an unworkable standard since, in practice, States would not protect companies with which they had no genuine link. Indeed, in the view of some writers, the traditional law of diplomatic protection had been to a large extent replaced by dispute settlement procedures provided for in bilateral or multilateral investment treaties.

73. The Special Rapporteur observed that it was for the Commission to decide whether or not to follow the ICJ judgment, given that decisions of the Court were not necessarily binding on the Commission and bearing in mind the different responsibilities of the two bodies. He observed further that, in the *ELSI* case,⁷³ although the Chamber of the Court was there dealing with the interpretation of a treaty and not customary international law, it had overlooked *Barcelona Traction* when it had allowed the United States of America to exercise diplomatic protection on behalf of two American companies which had held all the shares in an Italian company. At the same time, he acknowledged that *Barcelona Traction* was still viewed as a true reflection of customary international law on the subject and that the practice of States in the diplomatic protection of corporations was guided by it.

74. The Special Rapporteur identified seven options concerning which State would be entitled to exercise diplomatic protection: (a) the State of incorporation, as per the *Barcelona Traction* rule; (b) the State of incorporation and the State of genuine link; (c) the State of the registered office or *domicile*; (d) the State of economic control; (e) the State of incorporation and the State of economic

⁷⁰ The text of the draft articles with commentaries are contained in *Yearbook ... 2002*, vol. II (Part Two), paras. 280–281.

⁷¹ Article 17 proposed by the Special Rapporteur in his fourth report reads:

“Article 17

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

“2. For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office].”

⁷² *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 3.

⁷³ *Elettronica Sicula S.p.A. (ELSI), Judgment*, I.C.J. Reports 1989, p. 15.

control; (f) the State of incorporation, failing which the State of economic control; and (g) the States of nationality of all shareholders.

75. After considering all those options, he proposed that the Commission consider codifying the *Barcelona Traction* rule, subject to the exception recognized in the judgment. Article 17, paragraph 1, recognized the fact that, since the State was entitled to exercise diplomatic protection, it would be for the State to decide whether or not to do so. It was conceded that the discretionary nature of the right meant that companies that did not have a genuine link with the State of incorporation could go unprotected. However, that was a shortcoming which ICJ itself had recognized, and which was why investors preferred the security of bilateral investment treaties. Paragraph 2 sought to define the State of nationality for purposes of the draft articles. It was proposed that the State of nationality of a corporation was the State in which the corporation was incorporated. A possible additional reference could be made to “and in whose territory it has registered its office” which had also been considered in the *Barcelona Traction* decision. However, the two conditions were not strictly necessary.

(b) *Summary of the debate*

76. Members commended the Special Rapporteur on the quality of his report, and expressed their gratitude for the even-handed manner in which the options open to the Commission were presented.

77. The view was expressed that, regardless of their level of development, all States were dependent on foreign investment. International law must thus offer investors the necessary guarantees, and the Commission should seek to ensure that the law coincided with the facts while maintaining a balance between the interests of States and those of investors. It was against that background that the Commission was being asked to recognize the right of the State to exercise diplomatic protection on behalf of a corporation that had its nationality.

78. General support was expressed in the Commission for article 17, paragraph 1, based as it was on the *Barcelona Traction* judgment. This was held not to be contradicted in the *ELSI* case. It was noted that the choice of the State of nationality criterion was in accordance with article 3, provisionally adopted by the Commission at its fifty-fourth session in 2002,⁷⁴ designating the State of nationality as the State entitled to exercise diplomatic protection in the context of natural persons. Such a unified approach would make it possible to apply other rules to be formulated by the Commission to both natural and legal persons in respect of diplomatic protection. Indeed, it was proposed that article 17, paragraph 1, be further aligned with article 3, paragraph 1, adopted in 2002, as follows: “The State entitled to exercise diplomatic protection in respect of an injury to a corporation is the State of nationality of that corporation.”

79. As regards article 17, paragraph 2, most members supported the Special Rapporteur’s proposal to base the

discussion on the rule in the *Barcelona Traction* case. It was observed that, despite its shortcomings, the judgment in that case was an accurate statement of the contemporary state of the law with regard to the diplomatic protection of corporations and a true reflection of customary international law.

80. Some members supported the wording of paragraph 2, but favoured deleting the second criterion in brackets. It was noted that ICJ had made reference to both requirements since civil law countries tended to give relevance to the place of the registered office, whereas common-law countries preferred the criterion of the place of incorporation. Yet, the Commission could accept the latter criterion in view of its growing dominance in other areas of law. It was also suggested that the commentary could explain that the other criterion was superfluous because a corporation’s registered office was almost always located in the same State.

81. Other members preferred to retain both criteria. It was pointed out that the determination of the nationality of corporations was essentially a matter within States’ domestic jurisdiction, although it was for international law to settle any conflict. Just as the nationality of individuals was determined by two main alternative criteria, *jus soli* and *jus sanguinis*, so too the nationality of corporations depended on two alternative systems, namely, place of incorporation and place of registered office, though many States borrowed varying extents from one or the other system. However, caution was advised since some States did not apply either approach, or did not recognize the notion of nationality of corporations.

82. It was further suggested that, if the additional criterion in brackets was retained in the text, the conjunction “and” should be replaced by “or”. Others preferred that the two conditions be cumulative. Still others expressed the concern that if the phrase was retained with the conjunction “and”, the corporation whose registered office was located in a State other than the State of incorporation was in danger of losing the right to diplomatic protection on the grounds that it failed to meet both conditions. Alternatively, if the conjunction “and” was replaced by “or”, that could lead to dual nationality and competition between several States wishing to exercise diplomatic protection—which would depart from the position taken by ICJ in the *Barcelona Traction* case.

83. Other members suggested further consideration of the criterion of the *domicile* or registered office, which was the practice in international private law.

84. Some support was, however, expressed for the inclusion of a reference to the existence of an effective or genuine link between the corporation and the State of nationality. Indeed, it was pointed out that not including a reference to the genuine link criterion could have the effect of encouraging the phenomenon of tax havens, even indirectly.

85. It was subsequently pointed out that ICJ in the *Barcelona Traction* case had not been required to rule on the issue of nationality, which had not been contested by the

⁷⁴ See footnote 70 above.

parties. The Court had referred to the principles of incorporation and registered office, but also to the company's other connections with the State of nationality. Hence, a sufficiently broad criterion of international law was needed to cover the various possibilities. It was suggested that article 17 should instead refer to the State where the company was incorporated and/or in whose territory it had its registered office and/or with which it had other appropriate links. Other suggestions included stating that diplomatic protection was exercised by the national State, such State to be determined by internal law in each case, provided that there was a genuine link or connection between the national State and the company concerned; and redrafting article 17 as follows: "A State according to whose law a corporation was formed and in which it has its registered office is entitled to exercise diplomatic protection as the State of nationality in respect of an injury to the corporation." Other suggestions included reformulating paragraph 2 to read: "For the purposes of diplomatic protection, the national State of a corporation is the State in which the corporation is incorporated or in which it has its registered office or its domicile, or in which it has its basic economic activity or any other element recognized by international law as reflecting the existence of a genuine link between the corporation and the State in question"; and reformulating the latter part of paragraph 2 to read: "or which, in another way, recognizes the acquisition of its nationality by that corporation."

86. At the same time, caution was expressed about the introduction of the "genuine link" criterion—which was not accepted in the *Barcelona Traction* case—thereby introducing a test that would, in effect, be based on economic control as measured by majority shareholding. It was pointed out that a "genuine link" requirement would require the lifting of the "corporate veil", which would create difficulties not merely for courts but also for States of investment, which would have to decide whether to receive diplomatic representations or claims from States which believed that a company with which they had a genuine link had been injured. In addition, the complexity of determining the existence of an "appropriate" link when dealing with multinational corporations with a presence in numerous States, was referred to.

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

87. The Special Rapporteur noted that most members had endorsed paragraph 1.

88. Regarding paragraph 2, he observed that the Commission had initially expressed general support for his approach, subject to differing views being expressed as to the inclusion of only one criterion as opposed to two for the determination of nationality of a corporation for purposes of diplomatic protection. However, the debate subsequently took a new turn with many members, while supportive of the underlying idea in draft article 17, preferring formulations which emphasized formal links between the corporation and the State exercising diplomatic protection. While some of the proposals were cautious so as to avoid including a reference to the State of nationality of the shareholders, others went further and implied lifting the corporate veil in order to identify the State with which the corporation was most closely connected and which

thus established the locus of the economic control of the corporation. He noted that while the latter approach would be difficult to reconcile with *Barcelona Traction*, it would be in line with the *Nottebohm* case,⁷⁵ which emphasized the principle of the link with the State. However, as the Commission had not followed the *Nottebohm* test in draft article 3 with regard to natural persons, it might be illogical to do so for legal persons.

89. Furthermore, the problem of dual protection had been raised during the debate, i.e. where both the State of incorporation and the State of the registered office exercised diplomatic protection for the same corporation, a notion which had been supported by several judges in the *Barcelona Traction* case. In its judgment in *Barcelona Traction*, however, ICJ had clearly been hostile to the notion of dual protection or of a secondary right to protection in respect of the corporation and shareholders.

(d) *Establishment of a working group*

90. The Commission subsequently decided to establish an open-ended working group, chaired by the Special Rapporteur to consider article 17, before proceeding to take a decision on its referral to the Drafting Committee.

91. The Special Rapporteur subsequently reported on the outcome of the Working Group's consideration of the provision. He noted that the Working Group had reached a consensus on the need, first of all, to cater for situations where a municipal system did not know the practice of incorporation, but applied some other system of creating a corporation and, secondly to establish some connection between the company and the State along the lines of the links enunciated by ICJ in the *Barcelona Traction* decision. At the same time, however, the Working Group had been careful not to adopt a formula which might suggest that the tribunal considering the matter should take into account the nationality of the shareholders that controlled the corporation.

92. The Working Group had agreed on the following formulation for article 17, which the Special Rapporteur proposed to the Commission for referral to the Drafting Committee:

"For the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent] [administrative]/[formal] connection."

⁷⁵ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 4.*

2. ARTICLE 18⁷⁶(a) *Introduction by the Special Rapporteur*

93. The Special Rapporteur explained that draft article 18 dealt with exceptions to the general rule contained in article 17. The first exception, contained in subparagraph (a) concerned the situation where the corporation had ceased to exist in the place of its incorporation. He noted that the phrase “ceased to exist”, which had been used in the *Barcelona Traction* case, had not appealed to all writers, many preferring the lower threshold of intervention on behalf of the shareholders when the company was “practically defunct”. His own view was that the first solution was probably preferable.

94. The second exception, in subparagraph (b), provided for the State of nationality of the shareholders to intervene when a corporation had the nationality of the State responsible for causing the injury. It was not unusual for a State to insist that foreigners in its territory should do business there through a company incorporated under that State’s law. If the State confiscated the assets of the company or injured it in some other way, the only relief available to that company at the international level was through the intervention of the State of nationality of its shareholders. However, as described in his report, the rule was not free from controversy.

95. The Special Rapporteur explained further that before the *Barcelona Traction* case, the existence of the second exception had been supported in State practice, arbitral awards and doctrine. In *Barcelona Traction*, ICJ had raised the possibility of the exception and then had found that it was unnecessary for it to pronounce on the matter since it had not been a case in which the State of incorporation (Canada) had injured the company. Some support for the principle could be found in the post-*Barcelona Traction* era, mainly in the context of the interpretation of investment treaties. In the *ELSI* case, a Chamber of the Court had allowed the United States to protect American shareholders in an Italian company which had been incorporated and registered in Italy and had been injured by the Italian Government. The Chamber had not dealt with the issue in that case, but it had clearly been present in the minds of some of the judges. However, writers remained divided on the issue. He proposed that the Commission should accept the exception.

(b) *Summary of the debate*

96. General support was expressed for subparagraph (a), although it was suggested that a time limit should be included, perhaps from the date on which the company announced bankruptcy. Other suggestions included

deleting the phrase “in the place of its incorporation” and replacing the word “place” with “State”.

97. Some members were of the view that the requirement that a corporation had “ceased to exist” might be too high a threshold, and that the test could be that of “practically defunct” or “deprived of the possibility of a remedy available through the company”. In that way, the corporation would not have actually ceased to exist, but simply become non-functional, leaving no possibility of a remedy. Similarly, it was suggested that the words “*de jure* or *de facto*” could be inserted between “exist” and “in the place of”. It was further suggested that the commentary make it clear that the phrase “ceased to exist” should be interpreted as involving situations where a company continued to exist even if it was in receivership. In terms of a further suggestion, the provision would say that diplomatic protection could be exercised on behalf of shareholders when “the possibility of a remedy available through the company” was ruled out; or when the company was no longer in fact in a position to act to defend its rights and interests.

98. Differing views were expressed as to the inclusion of the exception proposed in subparagraph (b). Under one set of views, the exception was highly controversial, and potentially destabilizing, and therefore should not be included. The view was expressed that the authority for the exception was weak. It ignored the traditional rule that a State was not guilty of a breach of international law for injuring one of its own nationals. Concern was likewise expressed that granting the State of nationality of shareholders the right of action could result in long and complex proceedings and could lead to difficulties with the rule of continuity of nationality, given that shares changed hands quickly. Furthermore, in most cases, the State in which the corporation was incorporated provided a legal system, and hence a domestic remedy in situations of abuse. It was only in the extreme case where those remedies had been exhausted and no justice obtained that subparagraph (b) would apply. Indeed, it was always open to an investor not to invest in a particular country. In addition, the view was expressed that the exception might jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State, thereby contravening the international rules governing treatment of foreigners. Similarly, it was pointed out that recent investment protection agreements provided effective legal remedies for investors in the case of any denial of justice or wrongdoing by the State of incorporation resulting in injury to the corporation.

99. Others referred to the policy rationale for inclusion of the exception raised by the Special Rapporteur, namely that it was not unusual for capital-importing States to require a foreign consortium wishing to do business in its territory to do so through the instrument of a company incorporated under its law. Reference was made to the concern expressed by the Government of the United Kingdom in the *Mexican Eagle* case⁷⁷ that a requirement of incorporation under local law could lead to abuse in cases where the national State used such incorporation as a justification for rejecting an attempt at diplomatic

⁷⁶ Article 18, as proposed by the Special Rapporteur in his fourth report, reads:

“Article 18

“The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

“(a) The corporation has ceased to exist in the place of its incorporation; or

“(b) The corporation has the nationality of the State responsible for causing injury to the corporation.”

⁷⁷ M. M. Whiteman, *Digest of International Law* (Washington, D.C., 1967), vol. 8, pp. 1272–1274.

protection by another State. It would amount to limiting the “undoubted right [of foreign Governments] under international law to protect the commercial interests of their nationals abroad”.⁷⁸ The exception in subparagraph (b) was thus designed to afford a measure of protection to such companies. It was recalled that the basic principle was reflected in many investment treaties concluded by many States of the international community, regardless of their level of development or ideological orientation. The view was also expressed that, even if it was still not fully ripe for codification, the exception should be considered favourably in the context of progressive development of international law.

100. It was suggested that if the exception were accepted, then a reference could be included to the economic control of the company, as expressed by majority shareholding. Others were of the view that such a requirement would be complicated and possibly discriminatory. In terms of a further suggestion its scope of application could be limited to a situation in which the legislation of the host country required the creation of a corporation.

101. In terms of a further suggestion, a requirement of a “reasonable time limit” for exercising diplomatic protection should be included. Others questioned the necessity of such a requirement.

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

102. The Special Rapporteur observed that the first exception, contained in subparagraph (a), had posed no particular problem, the majority of the Commission being in favour of it. However, several suggestions had been made for improving the provision, including imposing a time limit for bringing a claim. Since there had been no objection to article 18 (a), he recommended that it should be referred to the Drafting Committee.

103. Subparagraph (b) had given rise to a much more vigorous debate and had divided the Commission. On balance, a majority of the Commission had favoured including article 18 (b). He believed that the exception was part of a cluster of rules and principles which together made up the ICJ decision in the *Barcelona Traction* case. For that reason, he thought it should be included. As to whether the exception was part of customary international law or not, the Commission had likewise been divided. His own view was that a customary rule was developing and that the Commission should be encouraged to engage in progressive development of the law in that area, if necessary. However, it should do so with great caution.

104. The Special Rapporteur noted further that several members of the Commission had argued that article 18 (b) was unnecessary because the shareholders had other remedies such as domestic courts, ICSID or the international tribunals provided for in some bilateral or multi-lateral agreements. However, that was not always true, either because there was no domestic remedy or because the State of nationality or the host State had not become a party to ICSID or to a bilateral investment treaty. Several

members had also stressed that the exception contained in article 18 (b) should be used only as a final resort. He thought that that went without saying: it was not a remedy that should be used lightly and it should be resorted to only when there was no other solution. He accordingly recommended that article 18 (b) should be referred to the Drafting Committee.

3. ARTICLE 19⁷⁹

(a) *Introduction by the Special Rapporteur*

105. The Special Rapporteur explained that article 19 was a savings clause designed to protect shareholders whose own rights, as opposed to those of the company, had been injured. As had been recognized by ICJ in *Barcelona Traction*, the shareholders had an independent right of action in such cases and qualified for diplomatic protection in their own right. The Chamber of the Court had also considered the issue in the *ELSI* case, but had not pronounced on rules of customary international law on that subject. The proposed article left two questions unanswered: first, the content of the right, or when such a direct injury occurred, and secondly, the legal order required to make that determination.

106. In *Barcelona Traction* ICJ had mentioned the most obvious rights of shareholders, but the list was not exhaustive. That meant that it was left to courts to determine, on the facts of individual cases, the limits of such rights. Care would have to be taken to draw clear lines between shareholders’ rights and corporate rights, however. He did not think it was possible to draft a rule on the subject, as it was for the courts to decide in individual cases.

107. As to the second question, it was clear that the determination of the law applicable to the question whether the direct rights of a shareholder had been violated had to be made by the legal system of the State in which the company was incorporated, although that legal order could be supplemented with reference to the general principles of international law. He had not wished to draft a new rule, but simply to restate the one recognized by ICJ in the *Barcelona Traction* decision, namely, that in situations in which shareholders’ rights had been directly injured, their State of nationality could exercise diplomatic protection on their behalf.

(b) *Summary of the debate*

108. Article 19 met with general approval in the Commission. The view was expressed that it presented no difficulties since it codified the most common situation, namely that of an individual shareholder whose subjective right had been harmed, and which corresponded to the general rules set forth in the part of the draft articles devoted to the diplomatic protection of natural persons.

⁷⁹ Article 19, as proposed by the Special Rapporteur in his fourth report, reads:

“Article 19

“Articles 17 and 18 are without prejudice to the right of the State of nationality of shareholders in a corporation to protect such shareholders when they have been directly injured by the internationally wrongful act of another State.”

⁷⁸ *Ibid.*, p.1274.

109. It was suggested that the commentary consider the shareholders' own rights as distinct from the rights of the corporation. Such rights could, for example, include the right to control and manage the company. Indeed, it was suggested that the provision's scope should be defined and a clear-cut distinction be drawn between the infringement of the rights of shareholders owing to injury suffered by the corporation and the direct infringement of the rights conferred on shareholders by statutory rules and company law, of which examples were given in the *Barcelona Traction* judgment.

110. It was queried whether, in a situation where a company ceased to exist because it had been nationalized and consequently it could not undertake any action on behalf of its shareholders before the local courts, the rights of the shareholders would be considered direct rights. Would the situation be governed by article 18 (b) or article 19?

111. It was suggested that article 19 could be viewed as yet another exception to the rule in article 17—one which related to direct injury suffered by shareholders. Indeed, it was proposed that the provision could be incorporated into article 18. Others were of the view that since the question of diplomatic protection of the corporation did not arise, article 19 could not be considered to be an exception to article 17.

112. As to the legal order which would be called on to decide on the rights of shareholders, the view was expressed that it was for the laws of the State in which the corporation was incorporated to determine the content of those rights. Agreement was expressed with the proposal that attention be given to the possibility of invoking general principles of law in certain cases as some national systems might not define clearly what constituted a violation of those direct rights.

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

113. The Special Rapporteur noted that article 19 had presented few problems. While some members had taken the view that it was an exception that would be better placed in article 18, he was persuaded that, with a view to conformity with the *Barcelona Traction* decision, the two articles should be kept separate.

4. ARTICLE 20⁸⁰

(a) *Introduction by the Special Rapporteur*

114. In introducing article 20 on continuous nationality of corporations, the Special Rapporteur noted that State practice on the subject was mainly concerned with natural persons. He recalled that the Commission had adopted

draft article 4 [9] on that subject at its fifty-fourth session in 2002.⁸¹ The principle was important in respect of natural persons in that they changed nationality more frequently and more easily than corporations. A corporation could change its nationality only by reincorporation in another State, in which case it changed its nationality completely, thus creating a break in the continuity of its nationality. It therefore seemed reasonable to require that a State should be entitled to exercise diplomatic protection in respect of a corporation only when it had been incorporated under its laws both at the time of injury and at the date of the official presentation of the claim.

115. If the corporation ceased to exist in the place of its incorporation as a result of an injury caused by an internationally wrongful act of another State, however, the question that arose was whether a claim had to be brought by the State of nationality of the shareholders, in accordance with article 18 (a), or by the State of nationality of the defunct corporation, or by both? He agreed with the view, expressed by some of the judges in *Barcelona Traction*, that both States should be entitled to exercise diplomatic protection, as it would be difficult to identify the precise moment of corporate death, and there would be a "grey area in time" during which a corporation was practically defunct, but might not have ceased to exist formally. In such a situation, both the State of incorporation of the company and the State of nationality of the shareholders should be able to intervene. He was aware that, in the *Barcelona Traction* case, ICJ had not been in favour of such dual protection, but it seemed that that solution might be appropriate.

116. Finally, he did not think it was necessary to draft a separate rule on continuous nationality of shareholders; since they were natural persons, the provisions of article 4 [9] would apply to them.

(b) *Summary of the debate*

117. Support was expressed for draft article 20. The view was expressed that the draft articles should not, in principle, accord more favourable treatment in the matter of continuous nationality to legal persons than to natural persons.

118. In terms of another view, the difficulties with the rule of continuous nationality for natural persons also existed in the case of legal persons: by virtue of the very principle of the legal fiction on which diplomatic protection was based, only the nationality of the protected person at the time of the internationally wrongful act was relevant. However, since the Commission had adopted a different position in article 4 [9], it would be inconsistent to adopt a different line of reasoning with respect to legal persons.

119. It was suggested that the exception provided in article 4, paragraph 2, in the context of natural persons should be equally extended to legal persons.

120. Support was expressed for retaining the bracketed portion of article 20 as it was a solution compatible with article 18 (a). However, it was observed that neither in

⁸⁰ Article 20, as proposed by the Special Rapporteur in his fourth report, reads:

"Article 20

"A State is entitled to exercise diplomatic protection in respect of a corporation which was incorporated under its laws both at the time of the injury and at the date of the official presentation of the claim [; provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation]".

⁸¹ See footnote 70 above.

article 18 (a), nor in article 20, was the corporation's having ceased to exist in law the important element. What mattered more was that it should be actually and practically incapable of defending its rights and interests. Others were of the view that the provision in square brackets seemed to contradict article 18 (a) according to which the State of nationality of the corporation was no longer entitled to exercise diplomatic protection when the corporation had ceased to exist. Yet, under the proviso in article 20, the State of nationality was still eligible to exercise diplomatic protection on behalf of the defunct corporation. It was suggested, therefore, that the proviso be deleted. In terms of a further suggestion, article 20 could be divided into two paragraphs, the second consisting of the bracketed part of the text, from which the words "provided that" would be deleted, and the phrase "with the exception provided in article 20, paragraph 2" could be added at the end of draft article 18 (a), after the word "incorporation".

121. Support was further expressed for the Special Rapporteur's position that it was unnecessary to draft a separate continuity rule for shareholders. However, it was not so clear that the continuity rule in respect of natural persons always covered shareholders. That was true only in some cases. In other, much more numerous cases, the shareholders of a corporation were corporate persons.

122. It was suggested that the phrase "which was incorporated under its laws" could be replaced by "which had its nationality", and "the State of incorporation of the defunct company" by "the State of nationality of the defunct company".

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

123. The Special Rapporteur observed that there had been no serious objections to article 20. There had, however, been a division of opinion over the proviso. It had also been proposed that the text of the article should be harmonized with that of article 4 [9]. He consequently recommended that the article should be referred to the Drafting Committee.

5. ARTICLE 21⁸²

(a) *Introduction by the Special Rapporteur*

124. In introducing article 21, the Special Rapporteur recalled that the fourth report on diplomatic protection had drawn attention to the fact that foreign investment was increasingly protected by some 2,000 bilateral investment treaties. Such agreements provided two routes for the settlement of disputes as alternatives to domestic remedies in the host State: (a) direct settlement of the investment dispute between the investor and the host State; and (b) settlement of an investment dispute by means of arbitration

between the State of nationality of the investor, be it a corporation or an individual, and the host State, over the interpretation or application of the bilateral investment agreement. The latter procedure was typically available in all cases, thereby reinforcing the investor-State dispute resolution procedure. Some States were also parties to the Convention on the settlement of investment disputes between States and nationals of other States, providing for tribunals established under the auspices of ICSID.

125. The Special Rapporteur explained that where the dispute settlement procedures provided for in a bilateral investment treaty or by ICSID are invoked, customary law rules relating to diplomatic protection are excluded. It was clear that the dispute settlement procedures in those two avenues offered greater advantages to the foreign investor than that offered under customary international law. For example, in the case of customary international law there was always the inherent political uncertainty in the discretionary nature of diplomatic protection. In the case of bilateral investment treaties and ICSID, the foreign investor had direct access to international arbitration. The existence of special agreements of this kind was acknowledged by ICJ in the *Barcelona Traction* case, which tended to see such arrangements as *lex specialis*.

126. The purpose of article 21 was to make it clear that the draft articles did not apply to the special regime provided for in bilateral and multilateral investment treaties. The provision was modelled on article 55 of the draft articles on responsibility of States for internationally wrongful acts, adopted by the Commission at its fifty-third session in 2001.⁸³ It was observed that in paragraph (4) of the commentary to article 55 it was noted that for the principle to apply "it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".⁸⁴

127. It was the view of the Special Rapporteur that there was a clear inconsistency between the rules of customary international law on diplomatic protection of corporate investment, which envisaged protection only at the discretion of the national State, and only in respect of the corporation itself; and the special regime on foreign investment established by special treaties which conferred rights on the foreign investor directly, either as corporation or shareholder, which may be decided by an international tribunal. It was thus necessary to include such a provision in the draft articles.

(b) *Summary of the debate*

128. Different views were expressed in the Commission regarding the necessity of including a provision on *lex specialis* in the draft articles. Three possibilities were discussed: (a) limiting the draft article to bilateral and multilateral treaties concerning the protection of

⁸² Article 21, as proposed by the Special Rapporteur in his fourth report, reads:

"Article 21. *Lex specialis*

"These articles do not apply where the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States, is governed by special rules of international law."

⁸³ Article 55 reads:

"These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law." (*Yearbook ... 2001*, vol. II (Part Two), p. 30, para. 76)

⁸⁴ *Ibid.*, p. 140, para. 77.

investments; (b) reformulating it as a more general provision applicable to the entire draft articles; or (c) deleting it.

129. In terms of one set of views, there was merit in including such a provision, as it would clarify how the principle related to the draft articles, and would recognize the existence of the important regime of *lex specialis* that applied in the area of protection of investments. It was observed that many special rules existed in the field of diplomatic protection. Some excluded or deferred such protection by providing a method for settlement of disputes that gave the investor a direct role. Other provisions modified the requirement of nationality of claims or derogated from the local remedies rule. In terms of a similar view, even though the inclusion of a *lex specialis* provision was not strictly necessary since it would apply as a general principle of law regardless of its inclusion in the draft articles, such inclusion would cause no harm and could be done *ex abundanti cautela*.

130. However, it was suggested that while most such special regimes might affect diplomatic protection of corporations or their shareholders, a provision on *lex specialis* should not be limited to the protection of corporations or their shareholders. Instead, it should have a wider scope and be placed among the final provisions of the draft articles. Indeed, the view was expressed that there was no reason not to give priority, for example, to human rights treaties in the context of the protection of natural persons.

131. Others expressed concern about giving the provision a broader application in relation to the draft articles as a whole. Indeed, it was pointed out that it could preclude the resort to diplomatic protection of natural persons where there existed “special” regimes for the protection of human rights, which were normally based on multilateral conventions, and did not usually expressly preclude the exercise of diplomatic protection. Extending the provision on *lex specialis* to cover natural persons could, therefore, create the impression that the possibility of diplomatic protection was necessarily excluded by the existence of a regime on the protection of human rights. Instead, the two regimes were designed to complement each other. It was thus suggested that the provision stipulate that the *lex specialis* would only apply in its entirety and exclusively when it expressly stated as much, otherwise the general rules of international law would also apply.

132. In terms of a further suggestion, the requirement of actual inconsistency between two provisions dealing with the same subject matter, and that of a discernible intention that one provision excluded the other could be included in the text of draft article 21 itself. Reference was made to a difference between article 21 and article 55 of the draft articles on responsibility of States for internationally wrongful acts, namely that the general rule should not apply not only where, but also “to the extent”, that the question of diplomatic protection was governed by special rules of international law. Others pointed out that the provision was different from article 55, which dealt with cases of contradiction between the general rule and the special rule. Instead, article 21 established a principle of preference: for corporations the preference would be

given to the special procedure which would have precedence over the general rules. It was thus suggested that the provision be recast as a rule of priority, so that diplomatic protection would not be entirely ruled out. A view was also expressed that a regime of priority could not be presumed, and that a “special regime” could not always be seen as the remedy that needed to be exhausted before diplomatic protection could apply.

133. In terms of a further suggestion, the basic approach to be followed was to recognize, either in the draft articles or in the commentary, that there existed important special regimes for the protection of investment, including but not limited to bilateral investment treaties, and that the purpose of the draft articles was not to supersede or modify those regimes. Such an approach would leave open the possibility that rules of international customary law could still be used in those contexts to the extent that they were not inconsistent with those regimes.

134. Additional suggestions for reformulating the provision included recasting it as a conditional exclusion, specifying its content and scope of application, more closely aligning it to the terminology used in investment treaties, and deleting the words “*lex specialis*” in the title.

135. Conversely, others expressed doubts about the necessity of including a provision on *lex specialis* at all. It was pointed out that the provision might not be necessary if the *lex specialis* was based only on treaty provisions. The view was also expressed that such a provision tended to give the false impression of an “either or” world, where the rules of diplomatic protection either applied completely or not at all. For example, where there was a relevant regime, such as a human rights regime, then all of diplomatic protection would be excluded immediately (which would be incorrect). In addition, inserting such a provision in texts produced by the Commission also risked creating the incorrect *a contrario* impression that a convention which made no mention of the *lex specialis* rule was intended to have a special “non-derogable” status. A preference was thus expressed for deleting the article entirely and dealing with the issue in the commentary.

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

136. The Special Rapporteur recalled that he had proposed article 21 for two reasons: (a) to follow the example of the draft articles on responsibility of States for internationally wrongful acts; and (b) out of a need to take into account the fact that bilateral investment treaties expressly aimed to avoid the regime of diplomatic protection because of its discretionary nature, and also so as to confer rights on the State of nationality of the shareholders. However, following the debate, he was no longer certain on both counts. He agreed that there was no need to follow the draft articles on responsibility of States for internationally wrongful acts blindly, and was persuaded by the argument that bilateral investment treaties did not intend to exclude customary international law completely. Indeed, it was often the intention of parties that recourse should be had to customary international law in order to fill in the gaps of the regime, to guide tribunals when it came to the interpretation of those treaties. Insofar as article 21 suggested that the bilateral investment treaty

regime excluded customary rules, it was both inaccurate and possibly dangerous. If it was to be retained it would have to be amended to drop the title “*lex specialis*”, and reformulated along the lines suggested during the debate.

137. The Special Rapporteur further recalled that the other criticism directed against article 21 was that there was no reason to limit it to bilateral investment treaties. Other special regimes existed, for example, in treaties which excluded the exhaustion of local remedies rule, regimes which covered human rights standards, and which might complement or replace diplomatic protection. He noted, in that regard, the suggestion that the article be recast as a general provision to be included at the end of the draft articles. However, he cautioned against such an approach which could support the view that diplomatic protection might be excluded by a human rights treaty, when in fact, diplomatic protection might offer a more effective remedy. In his view, if the individual's rights were to receive the maximum protection, the individual should be able to invoke all regimes.

138. On reflection and in the light of the concerns raised during the debate, he proposed that the Commission consider deleting article 21, leaving the issue to the commentary.

139. However, the Commission decided to refer the provision to the Drafting Committee with a view to having it reformulated and located at the end of the draft articles, for example, as a “without prejudice” clause.

6. ARTICLE 22⁸⁵

(a) *Introduction by the Special Rapporteur*

140. The Special Rapporteur explained that the purpose of article 22 was to apply the rules expounded in respect of corporations to other legal persons, allowing for the changes that must be made as a result of the different structures, aims and nature of those other legal persons. The Special Rapporteur observed that such other legal persons might also require diplomatic protection. Several PCIJ decisions had stressed the fact that other institutions might have legal personality which might result in diplomatic protection. There was no reason why a State should not protect, for example, a university if it was injured abroad, provided it was entirely a private university. In the case of injury to a publicly funded or State-controlled university, the injury would be a direct injury to the State. He referred further to the example of foundations and non-governmental organizations which were increasingly involved in philanthropic work abroad in the fields of health, welfare, human rights, women's rights, etc. In his view, such foundations and non-governmental organizations (despite some academic views to the contrary) should be protected abroad.

⁸⁵ Article 22, as proposed by the Special Rapporteur in his fourth report, reads:

“Article 22. *Legal persons*

“The principles contained in articles 17 to 21 in respect of corporations shall be applied *mutatis mutandis* to other legal persons.”

141. He noted that it was not possible to draft articles dealing with the diplomatic protection of every kind of legal person other than the corporation. The difficulty was that there was no consistency or uniformity among legal systems for the creation of a person by law, resulting in a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit associations, non-governmental organizations, and even, in some countries, partnerships. The impossibility of finding common or uniform features in all of those legal persons provided one explanation for the fact that writers on both public and private international law tended to focus their attention on the corporation. The other reason was that it was the corporation that engaged in international trade and foreign investment, resulting in the fact that most of the jurisprudence on the subject related to investment disputes concerning the corporation rather than other legal persons. The complexity of the issue was illustrated by the partnership: in most legal systems, particularly common-law systems, partnerships were not legal persons. In some, however, partnerships were conferred with legal personality. Therefore, a partnership could be considered a legal person in one State but not in another.

142. In such circumstances, the only way forward was to focus attention on the corporation, and then to insert a general clause as in article 22, which applied the principle expounded in regard to corporations *mutatis mutandis* to other legal persons. He noted further that most cases involving the diplomatic protection of legal persons other than corporations would be covered by draft articles 17 and 20, and that articles 18 and 19, dealing with the case of the protection of shareholders, would not apply to legal persons other than corporations.

(b) *Summary of the debate*

143. Support was expressed for the view that it would not be possible to draft further articles dealing with the diplomatic protection of each kind of legal person. The main difficulty of such approach was the infinite variety of forms legal persons might take, each depending on the internal legislation of States. The view was also expressed that there was some practical value in retaining the provision, by way of a marker that such cases, however rare, did exist, as shown by the *Peter Pázmány University* case.⁸⁶

144. While support was expressed for the inclusion of the expression *mutatis mutandis*, as it had become accepted legal usage, the view was also expressed that it would not entirely resolve the problem. It was pointed out that the difficulty was that it conveyed little about the circumstances that would entail the application of a different rule, and also about the contents of that different rule, i.e. what would prompt the change and what that change would be. Hence, a preference was expressed for a positive rule dealing with legal persons other than corporations, which would be based on an analysis of State practice. The following formulation was proposed: “The State entitled to exercise diplomatic protection of a legal

⁸⁶ *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61, p. 208.*

person other than a corporation is the State under whose law the legal personality has been granted, provided that the place of management is located or registration takes place in the territory of the same State.”

145. In terms of another proposal, a requirement of mutual recognition of the legal personality of a given entity by the States concerned would be included in the text. Others maintained that only the recognition by the State presenting the claim for diplomatic protection should be required, because, if mutual recognition were necessary, a State which did not recognize certain entities, like non-governmental organizations, would then be free to do whatever it wanted to them. Indeed, it was recalled that such mutual recognition requirement was not included in the context of corporations. In terms of a further view, the common aspect of any legal person was an attribute of being the bearer of rights and obligations. If in internal law an entity had been designated as a legal person, that would suffice for the international legal order which would have to take that into account for purposes of diplomatic protection. Others suggested that it might be left to the State to determine whether it wished to exercise diplomatic protection regarding the legal person or not.

146. Some members expressed concern about the resort to diplomatic protection by States for the benefit of legal persons other than corporations, such as non-governmental organizations the establishment and functioning of which were generally governed by the domestic law of those States. It was recalled that the act of exercising diplomatic protection was essentially a political decision, and it was maintained that it was possible that a State could be inclined to support a legal person, which was established in its territory, against another State with whom it did not maintain cordial relations. A preference was thus expressed for clear language in article 22 indicating whether non-governmental organizations could enjoy such protection or not. Indeed, support was expressed for the view that, in most cases, non-governmental organizations did not enjoy sufficient links with the State of registration to allow for such State to exercise diplomatic protection. Some other members expressed the view that diplomatic protection extended to all other legal persons, including non-governmental organizations, and that in any case States had the discretionary right to protect their own nationals.

147. Others expressed doubts about including the provision at all, since there was insufficient legal material, including evidence of State practice, to elaborate draft rules of diplomatic protection of legal persons other than corporations. Concern was also expressed that article 22 involved issues far more complex than were apparent at first glance, and that the assimilation of such other legal persons to corporations and shareholders was very difficult. It was proposed that the matter could instead be the subject of a separate study.

148. In terms of other suggestions, it was noted that the reference to articles 17 to 21 was inaccurate, since articles 18 and 19 did not apply. Instead, the provision should simply state “in articles 17 and 20”. Furthermore, the title could read “other legal persons”. Others queried the necessity of referring to “principles”.

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

149. The Special Rapporteur observed that there was little State practice on the circumstances in which a State would protect legal persons other than a corporation. Corporations were the legal person which most frequently engaged in international commerce, and for that reason they featured most prominently in international litigation. The question was what to do with the situation where there was little or no State practice, while at the same time addressing the real need to deal with legal persons other than corporations in the draft articles. He recalled that, during the debate on the protection of corporations, some members of the Commission had raised the question of the protection of other legal persons. Similar questions would be asked in the Sixth Committee and in the international legal community if no provision was included in the draft articles. In his view, it was not appropriate to avoid the subject simply because there was not enough State practice. A provision had to be included on the subject, either because it dealt with a general principle of the kind contained in the *Barcelona Traction* case,⁸⁷ or because it might be used by way of an analogy, or by way of progressive development.

150. The Special Rapporteur noted that several members had expressed difficulties in respect of non-governmental organizations. He clarified that it was not his intention to deal with the status of such entities in the draft articles. Instead, the approach was merely to recognize that if the problem arose, one should look to the principles of the diplomatic protection of corporations and apply them *mutatis mutandis*. He noted that, subject to several drafting suggestions, the majority of the Commission seemed to support that approach, as well as the inclusion of the expression *mutatis mutandis*.

151. It was thus proposed that the Commission refer the draft article to the Drafting Committee with a view to drafting a flexible provision which would be open to developments in practice on the application of diplomatic protection to other legal persons.

C. Text of the draft articles on diplomatic protection provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT ARTICLES

152. The text of the draft articles provisionally adopted so far by the Commission 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.

⁸⁷ See footnote 72 above.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].⁸⁸

Article 2 [3].⁸⁹ 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].⁹⁰ 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].⁹¹ 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 the former State of nationality and not of the present State of nationality.

Article 5 [7].⁹² 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 6.⁹³ 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.

⁸⁸ This paragraph will be reconsidered if other exceptions are included in the draft articles. For the commentary, see *Yearbook ... 2002*, vol. II (Part Two), pp. 67–68, para. 281.

⁸⁹ The numbers in square brackets are the numbers of the articles as proposed by the Special Rapporteur. For the commentary, see *Yearbook ... 2002* (footnote 88 above).

⁹⁰ Article 3 [5] will be reviewed in connection with the Commission's consideration of the diplomatic protection of legal persons. For the commentary, see *Yearbook ... 2002* (footnote 88 above).

⁹¹ For the commentary, see *Yearbook ... 2002* (footnote 88 above).

⁹² *Ibid.*

⁹³ *Ibid.*

Article 7 [8].⁹⁴ 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.

Article 8 [10].⁹⁵ Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8]⁹⁶ before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Article 9 [11].⁹⁷ Category of claims

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].⁹⁸

Article 10 [14].⁹⁹ Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.¹⁰⁰

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED AT THE FIFTY-FIFTH SESSION OF THE COMMISSION

153. The text of draft articles 8 [10], 9 [11] and 10 [14] with commentaries thereto adopted by the Commission at its fifty-fifth session, is reproduced below.

⁹⁴ *Ibid.*

⁹⁵ Articles 8 [10], 9 [11] and 10 [14] are to be included in a future part four to be entitled "Local remedies", and will be renumbered. For the commentary, see paragraph 153 below.

⁹⁶ The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles. For the commentary, see paragraph 153 below.

⁹⁷ See footnote 95 above.

⁹⁸ See footnote 96 above.

⁹⁹ See footnote 95 above.

¹⁰⁰ Subparagraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver". For the commentary, see paragraph 153 below.

DIPLOMATIC PROTECTION

Article 8 [10].¹⁰¹ Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8]¹⁰² before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. “Local remedies” means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Commentary

(1) Article 8 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. This rule was recognized by ICJ in the *Interhandel* case as “a well-established rule of customary international law”¹⁰³ and by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.¹⁰⁴ The exhaustion of local remedies rule ensures that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system”.¹⁰⁵ The Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a “principle of general international law” supported by judicial decisions, State practice, treaties and the writings of jurists.¹⁰⁶

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in article 7 [8], are also required to exhaust local remedies.

(3) Paragraph 1 refers to the bringing of a claim rather than the presentation of the claim as the word “bring” more accurately reflects the process involved than the word “present” which suggests a formal act to which consequences are attached and is best used to identify the moment in time at which the claim is formally made.

(4) The phrase “all local remedies” must be read subject to article 10 [14] which describes the exceptional circumstances in which local remedies need not be exhausted. Suggestions that reference be made in this provision to the need to exhaust only “adequate and effective” local remedies were not followed for two reasons. First, because such a qualification of the requirement that local remedies be exhausted needs special attention in a separate provision. Secondly, the fact that the burden of proof is generally on the respondent State to show that local remedies are available, while the burden of proof is generally on the applicant State to show that there are no effective remedies open to the injured person,¹⁰⁷ requires that these two aspects of the local remedies rule be treated separately.

(5) The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of remedies that must be exhausted.¹⁰⁸ In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.¹⁰⁹ Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which lie as of right and may result in a binding decision, in accordance with the maxim *ubi jus ibi remedium*. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies as of grace¹¹⁰ or those whose “purpose is to obtain a favour and not to vindicate a right”.¹¹¹

¹⁰⁷ The question of burden of proof was considered by the Special Rapporteur in his third report on diplomatic protection (see footnote 69 above), paras. 102–118. The Commission decided not to include a draft article on this subject (*Yearbook ... 2002*, vol. II (Part Two), pp. 62–64, paras. 240–252). See also the *ELSI* case (footnote 73 above), pp. 46–48, paras. 59–63.

¹⁰⁸ In the *Ambatielos Claim* the arbitral tribunal declared that “[i]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test” (award of 6 March 1956, UNRIAA, vol. XII (Sales No. 63.V.3), p. 120). See further on this subject, C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990).

¹⁰⁹ *B. Schouw Nielsen v. Denmark*, application No. 343/57, decision of 2 September 1959, *Yearbook of the European Convention on Human Rights*, 1958–1959, p. 438 (referring to the consideration of the Institute of International Law in its resolution of 1954 (*Annuaire de l'Institut de droit international* (1956), vol. 46, p. 364)). See also the Lawless case, application No. 332/57, decision of 30 August 1958, *Yearbook of the European Convention on Human Rights*, 1958–1959, p. 308 at pp. 318–322.

¹¹⁰ 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.

¹¹¹ *De Becker v. Belgium*, application No. 214/56, decision of 9 June 1958, *Yearbook of the European Convention on Human Rights*, 1958–1959, p. 238.

¹⁰¹ See footnote 95 above.

¹⁰² See footnote 96 above.

¹⁰³ *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.

¹⁰⁴ *I.C.J. Reports 1989* (see footnote 73 above), p. 42, para. 50.

¹⁰⁵ See footnote 103 above.

¹⁰⁶ See article 22 of the draft articles on State responsibility, provisionally adopted by the Commission on first reading, *Yearbook ... 1996*, vol. II (Part Two), p. 60 (draft article 22 was adopted by the Commission at its twenty-ninth session and the corresponding text and commentaries are reproduced in *Yearbook ... 1977*, vol. II (Part Two), pp. 30–50); see also article 44 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001* (footnote 6 above), pp. 120–121.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise all the arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the ICJ Chamber stated that:

for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.¹¹²

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal Courts.¹¹³

(7) The foreign litigant must therefore produce the evidence available to him to support the essence of his claim in the process of exhausting local remedies.¹¹⁴ He cannot use the international remedy afforded by diplomatic protection to overcome faulty preparation or presentation of his claim at the municipal level.¹¹⁵

Article 9 [11].¹¹⁶ *Category of claims*

Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].¹¹⁷

Commentary

(1) The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national.¹¹⁸ It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.

(2) In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before international courts have presented the phenomenon of the mixed claim. In the *United States Diplomatic and Consular Staff in Tehran* case,¹¹⁹ there was a direct violation

on the part of the Islamic Republic of Iran of the duty it owed to the United States to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,¹²⁰ there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *United States Diplomatic and Consular Staff in Tehran* case ICJ treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies.

(3) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case an ICJ Chamber rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

[T]he Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations].¹²¹

Closely related to the preponderance test is the *sine qua non* or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances the Commission preferred to adopt one test only—that of preponderance.

(4) Other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a diplomatic official¹²² or State property¹²³ the claim will normally be direct, and where the State seeks monetary relief on behalf of its national the claim will be indirect.

(5) Article 9 [11] makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgement brought preponderantly on the basis of an injury to a national. Although there is support for the

¹¹² *I.C.J. Reports 1989* (see footnote 73 above), p. 46, para. 59.

¹¹³ UNRIAA (see footnote 110 above), p. 1502.

¹¹⁴ *Ambatielos Claim* (see footnote 108 above).

¹¹⁵ D. P. O’Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. 2, p. 1059.

¹¹⁶ See footnote 95 above.

¹¹⁷ See footnote 96 above.

¹¹⁸ This accords with the principle expounded by PCIJ in the *Mavrommatis* case that “[b]y 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” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12).

¹¹⁹ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3.

¹²⁰ See footnote 103 above.

¹²¹ *I.C.J. Reports 1989* (see footnote 73 above), p. 43, para. 52. See also the *Interhandel* case (footnote 103 above), p. 28.

¹²² *United States Diplomatic and Consular Staff in Tehran* case (see footnote 119 above).

¹²³ *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4.

view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,¹²⁴ there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgement relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.¹²⁵ Article 9 [11] makes it clear that a request for a declaratory judgement *per se* is not exempt from the exhaustion of local remedies rule. Where the request for declaratory judgement is incidental to or related to a claim involving injury to a national—*whether linked to a claim for compensation or restitution on behalf of the injured national or not*—it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgement is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgement in order to avoid compliance with the local remedies rule.

Article 10 [14].¹²⁶ Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(d) The State alleged to be responsible has waived the requirement that local remedies be exhausted.¹²⁷

Commentary

(1) Article 10 [14] deals with the exceptions to the exhaustion of local remedies rule. Subparagraphs (a) to (c), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Subparagraph (d) deals with a different situation—that which arises where the respondent State has waived compliance with the local remedies rule. As this exception is not of the same character as those contained in subparagraphs (a) to (c) it may be necessary,

¹²⁴ Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 12 at p. 29, para. 41.

¹²⁵ See *Interhandel* (footnote 103 above), pp. 28–29; and *ELSI* (footnote 73 above), p. 43.

¹²⁶ See footnote 95 above.

¹²⁷ See footnote 100 above.

at a later stage, to provide for this situation in a separate provision.¹²⁸

Subparagraph (a)

(2) Subparagraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the “futility” or “ineffectiveness” exception. The Commission considered three options for the formulation of a rule describing the circumstances in which local remedies need not be exhausted:

(a) The local remedies are obviously futile;

(b) The local remedies offer no reasonable prospect of success;

(c) The local remedies provide no reasonable possibility of an effective redress.

All three of these options enjoy some support among the authorities.

(3) The Commission considered the “obvious futility” test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*,¹²⁹ but decided that it set too high a threshold. On the other hand, the Commission took the view that the test of “no reasonable prospect of success”, accepted by the European Commission of Human Rights in several decisions,¹³⁰ was too generous to the claimant. It therefore preferred the third option which avoids the stringent language of “obvious futility” but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case¹³¹ and is supported by the writings of jurists.¹³² Moreover, it accords with judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question,¹³³ the national legislation

¹²⁸ *Ibid.*

¹²⁹ UNRIAA (see footnote 110 above), p. 1504.

¹³⁰ *Retimag S.A. v. Federal Republic of Germany*, application No. 712/60, decision of 16 December 1961, *Yearbook of the European Convention on Human Rights*, 1961, p. 385 at p. 400; *X, Y and Z v. the United Kingdom*, application Nos. 8022/77 and 8027/77, decision of 8 December 1979, European Commission of Human Rights, *Decisions and Reports*, vol. 18, p. 66 at p. 74. See, too, the commentary to article 22 of the draft articles on State responsibility adopted by the Commission at its twenty-ninth session, *Yearbook ... 1977* (footnote 106 above), p. 47, para. (48).

¹³¹ *Certain Norwegian Loans, Judgment*, I.C.J. Reports 1957, p. 9 at p. 39.

¹³² See the third report on diplomatic protection (footnote 69 above), para. 35.

¹³³ *Panevezys-Saldutiskis Railway, Judgment*, 1939, P.C.I.J., Series A/B, No. 76, p. 4 at p. 18; *Arbitration under Article 181 of the Treaty of Neuilly*, AJIL, vol. 28 (1934), p. 760 at p. 789; claims of Rosa Gelbtrunk, award of 2 May 1902, and the “Salvador Commercial Company” (“El Triunfo Company”), award of 8 May 1902, UNRIAA, vol. XV (Sales No. 1966.V.3), p. 455 at pp. 467–479; *The Lottie May Incident*, arbitration between Honduras and the United Kingdom, arbitral award of 18 April 1899, *ibid.*, p. 29 at p. 31; Judge Lauterpacht’s separate opinion in the *Certain Norwegian Loans* case (see footnote 131 above), pp. 39–40; and *Finnish Ships Arbitration* (see footnote 110 above), p. 1535.

justifying the acts of which the alien complains will not be reviewed by local courts;¹³⁴ the local courts are notoriously lacking in independence;¹³⁵ there is a consistent and well-established line of precedents adverse to the alien;¹³⁶ the local courts do not have the competence to grant an appropriate and adequate remedy to the alien;¹³⁷ or the respondent State does not have an adequate system of judicial protection.¹³⁸

(4) The question whether local remedies do or do not offer the reasonable possibility of an effective redress must be determined with regard to the local law and circumstances at the time at which they are to be used. This is a question to be decided by the competent international tribunal charged with the task of examining the exhaustion of local remedies. The decision on this matter must be made on the assumption that the claim is meritorious.¹³⁹

Subparagraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts,¹⁴⁰ human rights instruments and

practice,¹⁴¹ judicial decisions¹⁴² and scholarly opinion. The Commission was aware of the difficulty attached to giving an objective content or meaning to “undue delay”, or to attempting to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British-Mexican Claims Commission stated in the *El Oro Mining* case:

The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.¹⁴³

(6) Subparagraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase “remedial process” is preferred to that of “local remedies” as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Subparagraph (c)

(7) The exception to the exhaustion of local remedies rule contained in article 10 [14] (a), to the effect that local remedies do not need to be exhausted where “the local remedies provide no reasonable possibility of effective redress”, does not cover situations where the local remedies might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down by a State whose airspace has been accidentally violated; or where serious obstacles are placed in the way of his using local remedies by the respondent State or some other body. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State or because of the existence of a special hardship exception.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies

¹³⁴ *Arbitration under Article 181 of the Treaty of Neuilly* (see footnote 133 above). See also *Affaire des Forêts du Rhodope Central (fond)*, decision of 29 March 1933, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405; the *Ambatielos Claim* (footnote 108 above), p. 119; and the *Interhandel* case (footnote 103 above), p. 28.

¹³⁵ *Robert E. Brown (United States) v. Great Britain*, arbitral award of 23 November 1923, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120; and the *Velásquez Rodríguez v. Honduras* Case, Inter-American Court of Human Rights, Judgement of 29 July 1988, Series C No. 4 (see also ILM, vol. 28 (1989), p. 291 at pp. 304–309).

¹³⁶ *Panevezys-Saldutiskis Railway* case (footnote 133 above); *S.S. “Lisman”*, award of 5 October 1937, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1767 at p. 1773; *“S.S. Segurancá”*, award of 27 September 1939, *ibid.*, p. 1861 at p. 1868; *Finnish Ships Arbitration* (see footnote 110 above), p. 1495; *X v. Federal Republic of Germany*, application No. 27/55, decision of 31 May 1956, European Commission of Human Rights, *Documents and Decisions, 1955–1956–1957*, p. 138; *X v. Federal Republic of Germany*, application No. 352/58, decision of 4 September 1958, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 342 at p. 344; *X v. Austria*, application No. 514/59, decision of 5 January 1960, *ibid.*, 1960, p. 196 at p. 202.

¹³⁷ *Finnish Ships Arbitration* (see footnote 110 above), pp. 1496–1497; *Velásquez Rodríguez* (see footnote 135 above); *Yağci and Sargin v. Turkey*, judgment of 8 June 1995, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 319, p. 3 at p. 17, para. 42; *Hornsby v. Greece*, judgment of 19 March 1997, *ibid.*, *Reports of Judgments and Decisions, 1997–II*, No. 33, p. 495 at p. 509, para. 37.

¹³⁸ *Mushikiwabo and Others v. Barayagwiza*, decision of 9 April 1996, ILR, vol. 107 (1997), p. 457 at p. 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies (see resolution No. 01a/88 of 12 September 1988, case 9755: Chile, *Annual Report of the Inter-American Commission on Human Rights, 1987–1988*, pp. 132–139).

¹³⁹ *Finnish Ships Arbitration* (see footnote 110 above), p. 1504; and the *Ambatielos Claim* (see footnote 108 above), pp. 119–120.

¹⁴⁰ See the discussion of early codification attempts by F. V. García-Amador, Special Rapporteur, in his first report on State responsibility, *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, pp. 223–226; and article 19, paragraph 2, of the draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School, reproduced in AJIL, vol. 55 (1961), p. 545 at p. 577.

¹⁴¹ International Covenant on Civil and Political Rights (art. 41, para. 1 (c)); American Convention on Human Rights: “Pact of San José, Costa Rica” (art. 46, para. 2 (c)); *Weinberger v. Uruguay*, Communication No. 28/1978, Human Rights Committee, *Selected Decisions under the Optional Protocol* (second to sixteenth sessions) (United Nations publication, Sales No. E.84.XIV.2), p. 57, at p. 59; *Las Palmeras*, Preliminary Objections, Judgment of 4 February 2000, Inter-American Court of Human Rights, *Series C: Decisions and Judgments*, No. 67, p. 64, para. 38; and *Erdoğan v. Turkey*, application No. 19807/92, decision of 16 January 1996, European Commission of Human Rights, *Decisions and Reports*, vol. 84–A, p. 5 at p. 15.

¹⁴² *El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States*, decision No. 55 of 18 June 1931, UNRIAA, vol. V (Sales No. 1952.V.3), p. 191 at p. 198. See also the case concerning the *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B*, No. 52, p. 11 at p. 16.

¹⁴³ See footnote 142 above.

has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.¹⁴⁴ Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in Ukraine, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident of 27 July 1955*¹⁴⁵ in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in support of the existence of such an exception in the *Interhandel*¹⁴⁶ and *Salem*¹⁴⁷ cases, in other cases¹⁴⁸ tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Certain Norwegian Loans* case¹⁴⁹ and the *Aerial Incident of 27 July 1955* case¹⁵⁰ arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did ICJ make a decision on this matter. In the *Trail Smelter* case,¹⁵¹ involving transboundary pollution in which there was no voluntary link or territorial

connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others¹⁵² in which local remedies were dispensed with where there was no voluntary link, have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) While the Commission took the view that it was necessary to provide expressly for that exception to the local remedies rule, it preferred not to use the term "voluntary link" to describe that exception as that emphasized the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. Moreover, it would be difficult to prove such a subjective criterion in practice. Hence the decision of the Commission to require the existence of a "relevant connection" between the injured alien and the host State. That connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal would be required to examine not only the question whether the injured individual was present, resided or did business in the territory of the host State, but whether, in the circumstances, the individual by his conduct had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word "relevant", it was decided, would best allow a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien.

(11) The second part of subparagraph (c) is designed to give a tribunal the power to dispense with the need for the exhaustion of local remedies where, in all the circumstances of the case, it would be unreasonable to expect compliance with this rule. Each case will obviously have to be considered on its own merits in making such a determination and it would be unwise to attempt to provide a comprehensive list of factors that might qualify for this exception. It is, however, suggested that the exception might be exercised where a State prevents an injured alien from gaining factual access to its tribunals by, for instance, denying him entry to its territory or by exposing him to dangers that make it unsafe for him to seek entry to its territory; or where criminal conspiracies in the host State obstruct the bringing of proceedings before local courts; or where the cost of exhausting local remedies is prohibitive.

Subparagraph (d)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused

¹⁴⁴ See Amerasinghe, *op. cit.* (footnote 108 above), p. 138; and T. Meron, "The incidence of the rule of exhaustion of local remedies", BYBIL, 1959, vol. 35, p. 83 at p. 94.

¹⁴⁵ I.C.J. Pleadings, *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), p. 127.

¹⁴⁶ Here ICJ stated: "[I]t has been considered necessary that the State where the violation occurred* should have an opportunity to redress it by its own means" (see footnote 103 above).

¹⁴⁷ In this case an arbitral tribunal declared that: "As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence." (*Salem* case, award of 8 June 1932, UNRIAA, vol. II (Sales No. 1949.V.1), p. 1202.)

¹⁴⁸ *Finnish Ships Arbitration* (see footnote 110 above); and the *Ambatielos Claim* (see footnote 108 above).

¹⁴⁹ I.C.J. Pleadings, *Certain Norwegian Loans*, Vol. I (France v. Norway), argument of France, p. 408.

¹⁵⁰ I.C.J. Pleadings (see footnote 145 above), argument of Mr. Rosenne (Israel), pp. 531-532.

¹⁵¹ UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

¹⁵² Case of the *Virginus*, 1873, reported in J. B. Moore, *A Digest of International Law* (Washington, D.C., Government Printing Office, 1906), vol. II, p. 895 at p. 903; and of the *Jessie*, reported in AJIL, vol. 16 (1922), pp. 114-116.

of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly.¹⁵³

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an *ad hoc* arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the settlement of investment disputes between States and nationals of other States, which provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.¹⁵⁴

(15) Waiver of local remedies must not be readily implied. In the *ELSI* case an ICJ Chamber stated in this connection that it was:

¹⁵³ *Viviana Gallardo et al. case*, Inter-American Court of Human Rights, decision of 13 November 1981, No. G 101/81, *Series A: Judgments and Opinions*, p. 88; and ILR, vol. 67 (1984), p. 587, para. 26. See also the *ELSI* case (footnote 73 above), p. 42, para. 50; and the *De Wilde, Ooms and Versyp* cases ("Vagrancy Cases"), European Court of Human Rights, judgment of 18 June 1971, *Series A: Judgments and Decisions*, p. 12 (and ILR, vol. 56 (1980), p. 337 at p. 370, para. 55).

¹⁵⁴ See the *Viviana Gallardo et al.* and *De Wilde, Ooms and Versyp* cases (footnote 153 above).

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.¹⁵⁵

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions¹⁵⁶ and the writings of jurists support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the contracting States espouses the claim of its national".¹⁵⁷ That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the ICJ Chamber in the *ELSI* case.¹⁵⁸ A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,¹⁵⁹ the Commission preferred not to refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. The Commission took the view that it was wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

¹⁵⁵ *I.C.J. Reports 1989* (see footnote 73 above), p. 42, para. 50.

¹⁵⁶ See, for example, *Steiner and Gross v. Polish State*, case No. 322 (30 March 1928), A. D. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases: Years 1927 and 1928* (London, Longmans, Green and Co., 1931), p. 472; and *American International Group, Inc. v. The Islamic Republic of Iran*, award No. 93-2-3 of 19 December 1983, Iran-U.S. C.T.R. (Cambridge, Grotius, 1985), vol. 4, p. 96.

¹⁵⁷ F. A. Mann, "State contracts and international arbitration", *BYBIL*, 1967, vol. 42, p. 32.

¹⁵⁸ See footnote 73 above. In the *Panevezys-Saldutiskis Railway* case, PCIJ held that acceptance of the optional clause under Article 36, paragraph 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule (see footnote 133 above).

¹⁵⁹ See the *ELSI* case (footnote 73 above), p. 44, para. 54; *United States—United Kingdom Arbitration concerning Heathrow Airport User Charges*, award of 30 November 1992, ILR, vol. 102 (1996), p. 216, at p. 285, para. 6.33; and the *Foti and Others* case (1982), *ibid.*, vol. 71 (1986), p. 366 at p. 380, para. 46.

Chapter VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

154. The Commission, at its thirtieth session, in 1978, included the topic “International liability for injurious consequences arising out of acts not prohibited by international law” in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur.¹⁶⁰

155. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.¹⁶¹ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur’s third report to the thirty-fourth session of the Commission (1982). The five draft articles were proposed in the Special Rapporteur’s fifth report to the thirty-sixth session of the Commission. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

156. The Commission, at the same thirty-sixth session, also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline¹⁶² and a survey prepared by the Secretariat on State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law.¹⁶³

¹⁶⁰ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150–152.

¹⁶¹ The five reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

¹⁶² *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

¹⁶³ *Yearbook ... 1985*, vol. II (Part One) (Addendum), p. 1, document A/CN.4/384. See also the survey prepared by the Secretariat of liability regimes relevant to the topic “International liability for injurious

157. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh to its forty-eighth session in 1996.¹⁶⁴

158. At its forty-fourth session, in 1992, the Commission established a working group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.¹⁶⁵ On the basis of the recommendation of the Working Group, the Commission decided to continue the work on this topic in stages. It would first complete work on prevention of transboundary harm and subsequently proceed with remedial measures. The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic dealt with “activities” and to defer any formal change of the title.¹⁶⁶

159. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations

consequences arising out of acts not prohibited by international law”, *Yearbook ... 1995*, vol. II (Part One), p. 61, document A/CN.4/471.

¹⁶⁴ The 12 reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394;

Second report: *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

Third report: *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

Fourth report: *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413;

Fifth report: *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423;

Sixth report: *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

Seventh report: *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437;

Eighth report: *Yearbook ... 1992*, vol. II (Part One), p. 59, document A/CN.4/443;

Ninth report: *Yearbook ... 1993*, vol. II (Part One), p. 187, document A/CN.4/450;

Tenth report: *Yearbook ... 1994*, vol. II (Part One), p. 129, document A/CN.4/459;

Eleventh report: *Yearbook ... 1995*, vol. II (Part One), p. 51, document A/CN.4/468;

Twelfth report: *Yearbook ... 1996*, vol. II (Part One), p. 29, document A/CN.4/475 and Add.1.

¹⁶⁵ *Yearbook ... 1992*, vol. II (Part Two), p. 51, paras. 341–343.

¹⁶⁶ *Ibid.*, paras. 344–349, for a detailed recommendation of the Commission.