

Document:-  
**A/CN.4/SR.2826**

**Summary record of the 2826th meeting**

Topic:  
**Adoption of the report**

Extract from the Yearbook of the International Law Commission:-  
**2004, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/>)*

*Paragraph (6) was adopted.*

Paragraph (7)

44. Mr. PELLET said that, since a corporation could quite conceivably have dual nationality, the categorical statement contained in the second sentence, to the effect that it was impossible for a corporation to have dual nationality, was unacceptable, since there had been no consensus on the matter.

45. Mr. KATEKA said that some corporations could indeed have dual nationality; for example, as a result of State succession. He therefore proposed the addition of a qualifying word such as “generally”.

46. Mr. DUGARD (Special Rapporteur) said that it was wise, where possible, for the commentaries to suggest that there had been consensus. He therefore favoured Mr. Kateka’s suggestion.

47. Mr. PELLET said that a crucial question of international commercial law was being dispatched with undue haste. He fundamentally disagreed with the Special Rapporteur; as the draft articles were being adopted on first reading, it was particularly important that attention should be drawn to instances where there was no consensus. Hence he was in favour of Mr. Kateka’s proposal, which implied that cases did exist in which corporations had dual nationality.

48. The CHAIRPERSON said that he was concerned that if paragraph (7) were amended too extensively, it would contradict the provisions of draft article 9, which had already been adopted. He asked whether the Commission could go along with the amendment proposed by Mr. Kateka: “This language is used to avoid any suggestion that a corporation might have dual nationality, which is not generally the case.”

49. Mr. ECONOMIDES said that the phrase which had just been suggested considerably weakened the text. In its place, he proposed “which certain members do not rule out”.

50. Mr. PELLET said that, while he would prefer the formulation proposed by Mr. Kateka, he could accept Mr. Economides’s suggestion, provided that it was recast to read “a possibility which some members do not rule out.”

51. Mr. DUGARD (Special Rapporteur) said that he too continued to prefer Mr. Kateka’s proposal.

52. Mr. PELLET said that, if national rules on the formation of a corporation were not identical, at the international level corporations could *de facto* meet the criteria laid down in draft article 9 in two different States. While draft article 9 did not include the possibility of dual or multiple nationality, neither did it preclude that possibility. The commentary should not create the false impression that the Commission had reached consensus that such a situation could never arise.

53. The CHAIRPERSON said that a distinction should clearly be drawn between the nationality of natural persons and that of legal persons. Draft article 9 referred to “the” State of nationality, a plain indication that, in the Commission’s view, a corporation could have only one

State of nationality. Draft article 4, on the other hand, spoke of “a” State of nationality of natural persons, thus reflecting the current *de facto* situation, in which some persons did have more than one nationality. Although the approach adopted in draft article 9 had not received unanimous support on first reading, if paragraph (7) of the commentary were altered too much, it might conflict with the text of the article itself.

54. Mr. AL-BAHARNA, subscribing to the Chairperson’s opinion that it was necessary to abide by draft article 9, wondered if the phrase “This language is generally used” might solve the problem posed in paragraph (7).

55. Mr. MANSFIELD supported Mr. Kateka’s suggestion: the paragraph merely explained why certain phrases had been used in the text of draft article 9. It was quite legitimate to explain that the reason for using particular language was to avoid the suggestion that a corporation might have dual nationality, which was not generally the case. That was an accurate explanation, and it also covered Mr. Pellet’s point.

56. Mr. MATHESON concurred with the Chairperson that the language had been deliberately changed in order to specify that a corporation had a single nationality. He suggested that the sentence in question be deleted so that the text of draft article 9 could speak for itself.

57. Mr. PELLET said that he was against deletion of the sentence at issue and that the phrasing proposed by Mr. Kateka was correct, legally speaking.

58. Mr. AL-MARRI said that the wording of the text was clear in all languages and that he saw no need for amendment.

59. Mr. DAOUDI said he agreed with Mr. Pellet that the text of paragraph (7) gave the impression that it was impossible for a corporation to have dual nationality, despite the fact that such cases actually existed. He therefore strongly supported Mr. Kateka’s proposal.

60. Mr. KABATSI said that he was in favour of Mr. Kateka’s proposal, but that if it were to be accepted by the Commission, the last sentence of paragraph (7) should perhaps be deleted.

61. The CHAIRPERSON suggested that further discussion of paragraph (7) should be postponed until the next plenary meeting.

*It was so decided.*

*The meeting rose at 11.45 a.m.*

---

## 2826th MEETING

*Tuesday, 3 August 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr.

Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

—————

**Draft report of the Commission on the work  
of its fifty-sixth session (*continued*)**

**Chapter IV. Diplomatic protection (*continued*) (A/CN.4/L.653 and Corr.1 and Add.1)**

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of chapter IV, section C, of the draft report on diplomatic protection (A/CN.4/L.653 and Corr.1 and Add.1).

**C. Text of the draft articles on diplomatic protection adopted by the Commission on first reading (*continued*) (A/CN.4/L.653 and Add.1)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

*Commentary to article 9* (State of nationality of a corporation) (*concluded*)

Paragraph (7) (*concluded*)

2. Mr. DUGARD (Special Rapporteur) proposed that the following sentence should be added at the end of paragraph (7) in order to reflect all of the opinions expressed: “Some members of the Commission did not agree with the idea that corporations could have only one nationality”.

*Paragraph (7), as amended, was adopted.*

*Commentary to article 10* (Continuous nationality of a corporation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

3. Mr. GAJA said that, since the problems to which paragraph (2) gave rise were exactly the same as the problems that the Commission had dealt with in respect of natural persons in paragraph (5) of the commentary to article 5, it would be more logical to use the same wording.

4. Mr. DUGARD (Special Rapporteur) proposed that he should redraft the paragraphs in question in cooperation with Mr. Gaja and Mr. Matheson and then submit them to the Commission again.

5. The CHAIRPERSON said he took it that the Commission agreed to that proposal.

*It was so decided.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

6. Mr. PELLET said that, in the fourth sentence, the words “or arbitral tribunals” should be added after the word “courts” and the word “certain” added before it.

7. Mr. GAJA said that, as it stood, the third sentence appeared to mean that, because of the shareholders’ nationality, the State would not be able to do anything, but, in fact, the idea was that the State would not be able to base itself on the shareholders’ nationality in order to bring a claim. The State of nationality of the corporation might well also be that of the shareholders. He therefore proposed that the words “the State of nationality of the shareholders will certainly not be able to bring such a claim” should be replaced by the words “a State may not base itself on the nationality of the shareholders in order to...”.

8. The CHAIRPERSON said he took it that the Commission was prepared to accept the proposals by Mr. Pellet and Mr. Gaja.

*It was so decided.*

*Paragraph (4), as amended, was adopted.*

*Commentary to article 11* (Protection of shareholders)

Paragraph (1)

9. Mr. PELLET proposed that, in the first sentence, the words “the State of nationality of the shareholders” should be replaced by the words “the State or States of nationality of the shareholders”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

10. Mr. GAJA said that, in the second sentence, the words “the risk that the corporation may ... decline” should be replaced by the words “the risk that the State of nationality of the corporation may ... decline”, because reference was being made to the State and not to the corporation.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

Paragraph (7)

11. Mr. MATHESON proposed that the word “highly” in the second sentence should be deleted.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were adopted.*

*Commentary to article 12* (Direct injury to shareholders)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*Commentary to article 13* (Other legal persons)

Paragraph (1)

12. Mr. PELLET proposed that, in the third sentence, the words “in general” should be added before the words “represented by shares”.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

13. Mr. KATEKA said that the last sentence should be deleted. If it was not, he had a reservation to propose.

14. Mr. DAOUDI said that he agreed with Mr. Kateka’s suggestion and would associate himself with any reservation that Mr. Kateka might propose.

15. Mr. PELLET said that the footnote to the fifth sentence in the paragraph should refer to article 5 of the draft articles on responsibility of States and the commentary thereto, which defined the concept of “State organ”.

16. Mr. DUGARD (Special Rapporteur) said that he would prefer to avoid any reference to article 5 of the draft articles on responsibility of States, but he was prepared to accept such a reference if it came at the end of the footnote.

17. The CHAIRPERSON said that he took it that the Commission agreed to the proposal by Mr. Pellet, together with that by the Special Rapporteur.

*It was so decided.*

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

18. Mr. ECONOMIDES said that, in the penultimate sentence, the words “that it would be wiser” should be deleted because there was nothing wise about the decision not to use a well-known Latin maxim.

*Paragraph (5), as amended, was adopted.*

*Commentary to article 14* (Exhaustion of local remedies)

Paragraph (1)

19. Mr. PELLET said that the footnote at the end of the paragraph should refer to the commentary to article 22 and not to article 22 itself.

*Paragraph (1) was adopted, subject to an amendment along those lines.*

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

Paragraph (5)

20. Mr. GAJA proposed that the reference to the Latin maxim *ubi jus ibi remedium* should be deleted because it had nothing to do with the content of paragraph (5).

21. Mr. MOMTAZ proposed that paragraph (5) should be split into two paragraphs, one relating to judicial remedies and the other to administrative remedies. Paragraph (5) would thus end after the seventh sentence and the new paragraph (6) would begin with the words “Administrative remedies”.

22. Mr. MATHESON said that the last two sentences were too categorical as far as requests for clemency and resort to an ombudsman were concerned. He proposed that they should be replaced by the following sentence: “Requests for clemency and resort to an ombudsman usually fall into this category”.

*Paragraph (5), as amended by Mr. Gaja, Mr. Momtaz and Mr. Matheson, was adopted.*

Paragraph (6)

23. Mr. GAJA said that, in order to reflect more accurately the ICJ judgment in the *ELSI* case, the words “all the arguments” in the first sentence should be replaced by the words “the main arguments”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

*Commentary to article 15* (Category of claims)

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*Commentary to article 16* (Exceptions to the local remedies rule)

Paragraph (1)

24. Mr. PELLET, referring to the text of article 16 (b), said that the words “*L’administration du recours*” did not mean much in French and that, on second reading, they should be replaced by wording along the following lines: “*L’exercice du recours*” or “*La procédure de recours*”.

*Paragraph (1) was adopted.*

Paragraphs (2) to (17)

*Paragraphs (2) to (17) were adopted.*

*Commentary to article 17* (Actions or procedures other than diplomatic protection)

Paragraph (1)

25. Mr. KATEKA, supported by Mr. RODRIGUEZ CEDEÑO, said that he reserved his position on the last sentence because it contained the words “such as non-governmental organizations”.

26. Mr. ECONOMIDES said that the French text, in particular the second sentence, should be looked at again very carefully.

27. Mr. GAJA said that the French text of the second sentence did not correspond to the English text because some words had been left out during the translation. It should refer to “*le droit des États, aussi bien celui de l’État de nationalité que celui des États autres que l’État de nationalité*”.

*Paragraph (1), as amended in French, was adopted.*

Paragraph (2)

28. Mr. PELLET said that some words were missing in the French text, after the first footnote in the fourth sentence, and should be put back.

29. Moreover, paragraph (2) related exclusively to human rights and might give the mistaken impression that that was the only area in question. Perhaps the following sentence might be added: “The same was true in other areas, particularly that of investments”.

30. Mr. DUGARD (Special Rapporteur) said that Mr. Pellet’s comment would have been entirely correct in the absence of article 18, which dealt specifically with investment conventions.

31. Mr. PELLET said that the separation of articles 17 and 18 was indefensible and illogical, but he accepted it, because it was the result of a decision by the Commission. However, if the purpose was to make a distinction between multilateral treaties and bilateral treaties, that should be stated in the commentary.

32. Mr. GAJA explained that article 17 was a “without prejudice” provision, whereas article 18 served a different purpose because it provided that the articles did not apply when other treaty provisions were applicable, particularly in respect of investments.

33. The CHAIRPERSON said he took it that the members of the Commission wished to hold informal consultations and submit a revised version of the commentary to article 17, paragraph (2), later.

*It was so decided.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

34. Mr. PELLET said that paragraph (4) called for the same comment as paragraph (2) and should be reviewed at the same time during the informal consultations.

35. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission accepted that proposal.

*It was so decided.*

Paragraph (5)

36. Mr. ECONOMIDES proposed that, with a view to a more faithful reflection of the discussion which had taken place on articles 17 and 18, the following new paragraph (6) should be added after paragraph (5): “One member of the Commission considered that remedies exercised under human rights conventions were part of a *lex specialis* that took priority over diplomatic protection. Several members also took the view that articles 17 and 18 should be merged.”

*Paragraph (5) and the new paragraph (6) were adopted.*

Commentary to article 18 (Special treaty provisions)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

37. Mr. MATHESON proposed that the words “customary law rules relating to” should be deleted because what resort to dispute settlement procedures ruled out in most cases was diplomatic protection, not customary law rules.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Commentary to article 19 (Ships’ crews)

Paragraph (1)

38. Mr. MATHESON, noting that his comment related to all paragraphs of the commentary to article 19, said that the text of article 19 referred to the right of the State of nationality of a ship to “seek redress” on behalf of the members of the ship’s crew. That wording should therefore be used in the commentary instead of the words “exercise its protection”.

39. Mr. GAJA said that Mr. Matheson’s point was well taken, but he wondered whether the transposition was possible in all cases. In reply to a question by Mr. Pellet, he drew attention to a mistake in the French text of article 19. In the phrase “*demander réparation au bénéfice de ses membres d’équipage*”, the word “*ses*” should be replaced by the word “*ces*”.

40. The CHAIRPERSON said that the secretariat would make the necessary changes in the text. With regard to Mr. Matheson’s proposal, he suggested that the Special Rapporteur should indicate the amendments to be made as each paragraph came up for consideration.

41. Mr. DUGARD (Special Rapporteur) proposed that, in the penultimate sentence, the words “exercise protection in respect of” should be replaced by the words “seek redress on behalf of”. He also proposed that the last sentence should be amended to read: “Although reference cannot be made to diplomatic protection because the bond of nationality between the flag State of a ship

and the members of a ship's crew is not present, there is nevertheless a close resemblance with diplomatic protection". Since the word "protection" was used in the broad sense in that sentence, there was no danger of confusion with diplomatic protection and the term could therefore be retained.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

42. Mr. MOMTAZ said that he had three comments to make on paragraph (2). Firstly, the words "as reflected in judicial decisions and in the writings of publicists" were inappropriate because they did not reflect the content of the report, and the practice described in paragraph (3) related nearly exclusively to the United States. Secondly, since paragraphs (3) to (8) did not contain any reference to the writings of publicists, that reference should either be deleted or explained. Thirdly, the word "sound" in the last sentence should be deleted because the examples given in paragraphs (3) and (4) did not justify its use.

43. Mr. PELLET proposed that any reference to the writings of publicists and to judicial decisions should be deleted because examples of judicial decisions were given only in paragraph (4).

44. Mr. DAOUDI said that he did not object to Mr. Pellet's proposal, but, if it was adopted, the beginning of paragraph (3) would have to be amended because the examples given related mainly to the United States and not to the practice of States in general.

45. Mr. BROWNLIE said that he supported the proposals by Mr. Momtaz and Mr. Pellet because they improved the text.

46. Mr. ECONOMIDES said that paragraph (2) introduced the other paragraphs. He therefore supported the proposal by Mr. Momtaz that reference should be made only to the practice of States and judicial decisions. He was also in favour of the deletion of the word "sound".

47. Mr. DUGARD (Special Rapporteur) said that he had no objection to the deletion of the word "sound" in the second sentence. He proposed that the first sentence should be amended to read: "The practice of States, judicial decisions and the writings of publicists confirm, to some extent, that the State of nationality of a ship (flag State) may seek redress on behalf of the members of the crew of that ship who do not have its nationality." He was, moreover, prepared to add the references to the writings of publicists in a footnote, although that seemed contrary to the Commission's practice.

48. The CHAIRPERSON said that it was true that the Commission had no tradition of referring to the writings of publicists in the commentaries.

49. Mr. PELLET said that he did not agree. In his opinion, the codification and progressive development of international law required the Commission to apply the teachings of publicists, which were an element of the determination of the rules of law, as indeed provided in

Article 38 (d) of the Statute of the International Court of Justice.

50. Mr. DUGARD (Special Rapporteur) said that, although he agreed with Mr. Pellet, he thought that reference should be made in moderation to the teachings of publicists.

51. The CHAIRPERSON said that he took it that the Commission accepted paragraph (2), as amended by the Special Rapporteur.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

52. Mr. PELLET proposed that, in the third sentence, the words "consistently reaffirmed" should be replaced by the words "traditionally reaffirmed".

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

53. Mr. PELLET said that the title of the case referred to in the last sentence should be cited correctly as "*Reparation for Injuries Suffered in the Service of the United Nations*". The word "approve" was not appropriate and the French translation of the words "went out of their way" by the words "*s'était donné beaucoup de mal*" was unsatisfactory.

54. Mr. DUGARD (Special Rapporteur) proposed that the last sentence should be amended to read: "In the *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion, two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members."

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

55. Mr. DUGARD (Special Rapporteur) proposed that, in the first sentence, the word "protect" should be replaced by the words "seek redress for".

56. Mr. PELLET said that, in the first footnote, reference should be made to the *ITLOS Reports of Judgments, Advisory Opinions and Orders* rather than to the *International Law Materials* publication.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

57. Mr. DUGARD (Special Rapporteur) proposed that, in the first and last sentences, the words "exercise protection" should be replaced by the words "seek redress for".

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

58. Mr. DUGARD (Special Rapporteur) proposed that the first sentence should be amended to read: “Support for the right of the flag State to seek redress for members of the ship’s crew is substantial and justified.” The fourth sentence might also be amended to read: “In the Commission’s view, diplomatic protection exercised by the State of nationality and the right of the flag State to seek redress for the crew should both be recognized, without priority being accorded to either”. He also proposed that the last sentence should be deleted.

*Paragraph (8), as amended, was adopted.*

**Chapter V. Responsibility of international organizations (A/CN.4/L.654 and Corr.1 and Add.1)**

59. The CHAIRPERSON invited the members of the Commission to consider chapter V, sections A and B, of the draft report of the Commission on the responsibility of international organizations.

**A. Introduction (A/CN.4/L.654 and Corr.1)**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

Paragraph 3

*Paragraph 3, as amended in document A/CN.4/L.654/Corr.1, was adopted.*

*Section A, as amended, was adopted.*

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

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

Paragraph 6

60. Mr. ECONOMIDES said that the French word “*remarquables*” in the fourth sentence was inappropriate and should be replaced by a more suitable term.

61. The CHAIRPERSON, pointing out that the word “noteworthy” was used in the English text, suggested that a better equivalent should be found in French.

*Paragraph 6 was adopted, subject to that amendment.*

Paragraphs 7 to 10

*Paragraphs 7 to 10 were adopted.*

*Section B, as amended, was adopted.*

62. The CHAIRPERSON invited the members to consider chapter V, section C.2, of the draft report of the Commission, which contained the text of the draft articles with commentaries thereto.

**C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (A/CN.4/L.654/Add.1)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

Attribution of conduct to an international organization

Paragraph (1)

63. Mr. ECONOMIDES said that it would be better to avoid referring to “first” and “second” conditions. In any event, the order of those two conditions should be reversed.

64. Mr. GAJA (Special Rapporteur) said that the order adopted in paragraph (1) corresponded to the order followed in the draft articles on responsibility of States for internationally wrongful acts,<sup>1</sup> which referred first to attribution and then to the objective element. Since the two conditions were necessary, he proposed that the words “the first condition” should be replaced by the words “one condition” and that the words “the second condition” should be replaced by the words “the other condition”.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (5)

*Paragraphs (2) to (5) were adopted.*

Paragraph (6)

65. Mr. PELLET said that the last sentence of the French text was awkward because the words *toutefois* and *néanmoins* could not be used in the same sentence. He also considered that reference should be made not to “the pertinent rule”, but to “the pertinent rules” applicable to States.

66. Mr. GAJA (Special Rapporteur) said that the use of the plural did not make the text any clearer, since there were two possible situations, namely insurrection and anarchy, which were not likely to take place at the same time. The words “such an issue” thus referred to one of those two situations, to which the rules stated in either article 9 or article 10 of the draft articles on responsibility of States for internationally wrongful acts was applied.

67. Mr. PELLET said that he was basically convinced by the Special Rapporteur’s argument, but he pointed out that the rules corresponding to article 9 and article 10 were quite far apart in the text and that it should therefore be recalled that the choice was between one or the other.

68. Mr. GAJA (Special Rapporteur) suggested that the following wording should be added at the end of the paragraph: “as stated in either article 9 or article 10 of the draft articles on responsibility of States”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

*The meeting rose at 1 p.m.*

<sup>1</sup> See 2792nd meeting, footnote 5.