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Summary record of the 2867th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-EIGHTH SESSION

Held at Geneva from 1 May to 9 June 2006

2867th MEETING

Monday, 1 May 2006, at 3.15 p.m.

Outgoing Chairperson: Mr. Djamchid MOMTAZ

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the fifty-eighth session of the International Law Commission, the last session of the current quinquennium, and extended a warm welcome to members.

2. The Commission's report on the work of its fifty-seventh session¹ had been considered by the Sixth Committee of the General Assembly at its 11th to 20th and 22nd meetings, between 24 October and 16 November 2005. A topical summary of the discussion, prepared by the Secretariat, was contained in document A/CN.4/560. Member States had expressed interest in the new topics on the Commission's agenda, namely, "Expulsion of aliens" and "Effects of armed conflicts on treaties", and had welcomed the inclusion of an item on "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

3. In accordance with the practice established in 2004, the first week of the Commission's consideration of the report had been designated "International Law Week".² During that week, legal advisers of Member States had exchanged views with the Special Rapporteurs on the topics of responsibility of international organizations and effects of armed conflicts on treaties, and fruitful informal contacts

¹ Reproduced in *Yearbook ... 2005*, vol. II (Part Two).

² General Assembly resolution 58/77 of 9 December 2003.

had taken place between delegations and other members of the Commission. He himself had also represented the Commission at the forty-fourth and forty-fifth sessions of the Asian-African Legal Consultative Organization (AALCO), the latter session coinciding with the fiftieth anniversary of that organization's establishment.

Election of officers

Mr. Pambou-Tchivounda was elected Chairperson by acclamation.

Mr. Pambou-Tchivounda took the Chair.

4. The CHAIRPERSON thanked members for the confidence they had placed in him in according him the privilege of chairing the Commission. He would spare no effort to show himself worthy of that confidence, and would do his utmost to ensure that the session was successful and productive.

Mr. Gaja was elected first Vice-Chairperson by acclamation.

Mr. Rodríguez Cedeño was elected second Vice-Chairperson by acclamation.

Mr. Kolodkin was elected Chairperson of the Drafting Committee by acclamation.

Ms. Xue was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/559)

5. The CHAIRPERSON invited the Commission to adopt the provisional agenda.

The agenda was adopted.

Organization of work of the session

[Agenda item 1]

6. The CHAIRPERSON suggested that the meeting should be suspended to enable the Enlarged Bureau to consider the programme of work of the session.

The meeting was suspended at 3.35 p.m. and resumed at 4.40 p.m.

7. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the Commission's session, which had been drawn up during the consultations. If he heard no objection, he would take it that the Commission decided to adopt the proposed programme.

It was so decided.

Filling of casual vacancies (article 11 of the Statute) (A/CN.4/563 and Add.1³)

8. The CHAIRPERSON announced that the Commission was required to fill a casual vacancy created by the election of Mr. Bernardo Sepúlveda to the International Court of Justice and his subsequent resignation from the Commission. He would suspend the meeting to enable the members of the Commission to hold informal consultations.

The meeting was suspended at 4.50 p.m. and resumed at 4.55 p.m.

9. The CHAIRPERSON announced that the Commission had elected Mr. Eduardo Valencia-Ospina to fill the casual vacancy. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.

Diplomatic protection (A/CN.4/560, sect. D, A/CN.4/561 and Add.1–2,⁴ A/CN.4/567,⁵ A/CN.4/575,⁶ A/CN.4/L.684 and Corr.1–2)

[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

10. Mr. DUGARD (Special Rapporteur), introducing his seventh report (A/CN.4/567), said that it was an examination of the draft articles on diplomatic protection adopted on first reading,⁷ taking account of recent developments, including the comments by 11 States contained in document A/CN.4/561, the comments by Belgium and the United Kingdom to be found in document A/CN.4/561/Add.1, and a comment by Italy circulated in document A/CN.4/561/Add.2. The report also responded to observations by States in the Sixth Committee (A/CN.4/560, paras. 112–127) and to scholarly comments referred to in the bibliography annexed to the report. In March 2006, the European University Institute in Florence, Italy had held a seminar on diplomatic protection based on his draft report, and the comments made during that event had also been taken into account. While it was disappointing that so few States, whether developed or developing, had reacted in writing to the

draft articles adopted on first reading, the comments received had nevertheless been very helpful. Interestingly enough, several States had chided the Commission for its unduly cautious approach and had enjoined it to move more rapidly and to engage in more radical progressive development.

11. The report made no proposals for provisions on dispute settlement or the question of signature and ratification, the reason being that it was not yet clear what form the draft articles would take. His own view was that they were closely linked to the draft articles on responsibility of States for internationally wrongful acts⁸ and that their future would largely be determined by the fate of those draft articles.

12. The seventh report contained proposals for changes to certain draft articles. Proposals regarding issues of principle would need to be discussed in plenary session; those of a technical or linguistic nature, and those relating to changes to the commentary, were of interest only to the Drafting Committee. The Commission also had before it one entirely new proposal: a new draft article 20 would propose that States be obliged to transfer any compensation received on behalf of an individual to that individual—a proposal made by Mr. Pellet at the previous session⁹ and one which he himself had initially opposed but which, on reflection, he was now inclined to endorse. A proposal to that effect was to be found in paragraph 103 of the report.

13. The comments on draft article 1 fell into three categories: those calling for clarity in language or changes to the text; those suggesting additions to the commentary; and those calling for a clear distinction to be made between diplomatic protection and consular assistance. The third category was certainly the most important and would be fully considered. Other comments and suggestions could be more easily disposed of.

14. Two important issues needed to be considered in respect of draft article 1: the proposal by Italy, to be found in document A/CN.4/561/Add.2, and his own proposal relating to a provision on consular assistance. The Government of Italy was of the view that draft article 1, in giving a definition of the concept of diplomatic protection, adopted a wording which was too traditional, especially when it referred to a State "adopting in its own right the cause of its national". According to the Government of Italy, that wording implied not only that the right of diplomatic protection belonged only to the State exercising such protection, but also that the right that had been violated by the internationally wrongful act belonged only to the same State. That approach, it argued, no longer accurately reflected current international law in the light of the decisions of the ICJ in the *LaGrand* (para. 77 of the judgment) and *Avena* (para. 40 of the judgment) cases and Advisory Opinion OC-16/99 (*The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*) of the

³ A/CN.4/563 reproduced in *Yearbook ... 2006*, vol. II (Part One). A/CN.4/563/Add.1 mimeographed.

⁴ Reproduced in *Yearbook ... 2006*, vol. II (Part One).

⁵ *Idem*.

⁶ *Idem*.

⁷ *Yearbook ... 2004*, vol. II (Part Two), p. 18, para. 59.

⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

⁹ See *Yearbook ... 2005*, vol. I, 2846th meeting, pp. 113–114, paras. 27–30.

Inter-American Court of Human Rights (paras. 80–84 of the decision), all of which, in the view of the Government of Italy, had established that the breach of international norms on treatment of aliens might produce both the violation of a right of the national State and the violation of a right of the individual. Italy therefore suggested that draft article 1 should be amended to read: “Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation of its own rights and the rights of its national in respect of an injury to that national arising from an internationally wrongful act of another State”. In his personal view, the Italian proposal was worthy of serious attention. The issue was one of principle and could not be left entirely to the Drafting Committee.

15. The second issue arising out of draft article 1 concerned the difference between diplomatic protection and consular assistance. International law recognized two kinds of protection that States might exercise on behalf of their nationals: consular assistance and diplomatic protection. The fundamental differences between them frequently gave rise to misunderstanding, particularly in respect of the definition of the term “action” in relation to diplomatic protection. Diplomatic action was sometimes mistakenly classified as consular assistance. The problem was that diplomatic protection was often considered to involve judicial proceedings only; in other words, interventions outside the judicial process on behalf of nationals were sometimes not regarded as constituting diplomatic protection, but instead as falling under consular assistance. That, in his view, was too narrow a view of diplomatic protection. Any intervention, including negotiation at the inter-State level, on behalf of a national *vis-à-vis* a foreign State should be classified as diplomatic protection and not as consular assistance, provided that the general requirements of diplomatic protection had been met, namely, that there had been a violation of international law for which the respondent State could be held responsible; that local remedies had been exhausted; and that the individual concerned had the nationality of the claimant State. Draft article 1 and the commentary thereto, adopted on first reading by the Commission at its fifty-sixth session, gave clear support to such a broad interpretation of diplomatic action. Draft article 1 provided that diplomatic protection consisted of “resort to diplomatic action or other means of peaceful settlement”, and paragraph (5) of the commentary stated that “‘Diplomatic action’ covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest and request for an inquiry or for negotiations aimed at the settlement of disputes. ‘Other means of peaceful settlement’ embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement”.¹⁰ It was difficult to draft a more comprehensive provision and commentary on the meaning of diplomatic “action” in the context of diplomatic protection. It was therefore suggested that the present draft article should not be rephrased. The provision did not, however, expressly exclude consular assistance, and that was a matter requiring the Commission’s attention.

16. Unfortunately neither government officials nor legal scholars distinguished clearly between diplomatic protection and consular assistance. There were, however, three structural differences: first, the limited nature of consular functions provided for in the 1963 Vienna Convention on Consular Relations compared with the less limited function of diplomats contained in the 1961 Vienna Convention on Diplomatic Relations; second, the difference in level of representation between consular assistance and diplomatic protection; and third, the preventive nature of consular assistance as opposed to the remedial nature of diplomatic protection. Consuls were seriously limited in respect of the action they might take to protect their nationals. Their main function was to assist nationals who had got into trouble, for example by finding lawyers to assist them, visiting prisons and contacting local authorities, but they were unable to intervene in the judicial process or internal affairs of the receiving State. That meant that consuls were permitted to represent the interests of the national, but not the interests of the State in the protection of the national. That was a matter for the diplomatic branch. There was another important distinction between the two: consular assistance had a largely preventive nature and took place before local remedies had been exhausted or before a violation of international law had occurred. It was primarily concerned with the protection of the rights of the individual and required the consent of the individual concerned. A diplomatic *démarche*, on the other hand, was designed to bring the matter to the international, or inter-State, level and might ultimately result in international litigation. Moreover, the individual concerned could not prevent his national State from taking up the claim or from continuing procedures in the exercise of diplomatic protection.

17. The relationship between diplomatic protection and consular assistance had been an issue in both the *LaGrand* and *Avena* cases. The merits of the cases concerned the exercise of consular assistance, but the mechanism used to bring the claim before the ICJ had been that of diplomatic protection. While Mr. Dugard had some sympathy with the United States’ argument that the parties in those cases had confused consular assistance and diplomatic protection, the Court had nonetheless found that the two could and should be distinguished and that the individual right to consular assistance could be claimed through the vehicle of diplomatic protection. There was no need for the Commission to attempt to unravel the Court’s judgments: suffice it to say that the two judgments confirmed the importance of distinguishing between consular assistance and diplomatic protection.

18. Another source of confusion was the provision in the Treaty establishing a Constitution for Europe, article I-10, paragraph 2 (c) of which provided that “Citizens of the Union ... shall have ... the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State”. That provision suggested that any member State of the European Union could exercise diplomatic protection on behalf of any national of any member State of the European Union. There were many objections to

¹⁰ *Yearbook ... 2004*, vol. II (Part Two), p. 20, para. 60.

that provision, the main one being that it offended the principle of *pacta tertiis nec nocent nec prosunt*, because any provision contained in a European Union treaty was not binding on States that were not members of the European Union. Third States were under no obligation to respect any of the provisions contained in European Union treaties and were not obliged to—and indeed were unlikely to—accept diplomatic protection by States that were not the State of nationality of an individual European Union citizen.

19. A “citizen” of the European Union was not a national of all member States of the European Union, which meant that European Union citizenship did not fulfil the requirement of nationality of claims for the purpose of diplomatic protection. The European Union treaty provisions purporting to confer the right to diplomatic protection on all European Union citizens by all member States of the European Union was therefore seriously flawed—unless it was interpreted as applicable to consular assistance only. It was submitted that that was indeed its intention. Although consular assistance was usually exercised only on behalf of a national, international law did not prohibit the rendering of consular assistance to nationals of another State. Since consular assistance was not an exercise in the protection of the rights of a State nor an espousal of a claim, the nationality criterion need not be applied as strictly as in the case of diplomatic protection. Thus, it was not necessary to establish the bond of nationality in such a case.

20. In theory, the distinction between diplomatic protection and consular assistance was clear. The former was an inter-State intervention conducted by diplomatic officials or government representatives attached to the foreign ministry, which occurred when a national was injured by an internationally wrongful act committed by another State and the national had exhausted local remedies. It was an intervention designed to remedy an international wrong, whereas consular assistance involved assistance to nationals who found themselves in difficulties in a foreign State, and was rendered by career consuls or honorary consuls not engaged in political representation. Such assistance was preventive in the sense that it aimed to prevent the commission of an international wrong. The national was provided with consular advice and legal assistance to ensure that he received a fair trial if charged with a criminal offence, or to protect his personal or proprietary interests in the host State. Despite the clear theoretical distinction between the two institutions, there were overlaps (as illustrated by the *LaGrand* and *Avena* cases) and failures to distinguish between the two (as shown by the European Union treaties). It might be wise to make it clear that the Commission was aware of the distinction and wished it to be maintained, and it was therefore suggested (paragraph 21 of the report) that a new paragraph should be included in draft article 1, to read: “(2) Diplomatic protection shall not be interpreted to include the exercise of consular assistance in accordance with international law”. While the matter could perhaps be dealt with in the commentary, he thought it sufficiently important to warrant an additional provision. Paragraph 21 of the report also contained a proposal for an amendment to draft article 1, paragraph 1, to give effect to the proposal by the Government of Italy.

21. Draft article 2 presented two problems. First there was the question, raised by the Government of Italy, whether a duty should be imposed on States to exercise diplomatic protection in the case of serious human rights violations; secondly, there was the general comment by the Government of Austria in document A/CN.4/561, to the effect that the respondent State should be under an obligation to accept the claim of diplomatic protection.

22. In 2000, the Commission had debated whether or not, by way of progressive development, States should be required to exercise diplomatic protection where the national had been subjected to a human rights violation amounting to a violation of a *jus cogens* norm; that proposal had, however, met with little enthusiasm in the Commission, and he had accordingly withdrawn his suggestion.¹¹ Since then, there had been a number of interesting national developments on the subject. Increasingly, litigants had sought to compel their States to exercise diplomatic protection on their behalf, the two best-known cases being *Abbasi and Juma v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* and *Kaunda and Others v. President of the Republic of South Africa and Others*. In the former, Mr. Abbasi and others had attempted to compel the United Kingdom Government to exercise diplomatic protection on their behalf against the United States of America arising out of their detention in Guantánamo Bay. The United Kingdom court had held that they had no right to diplomatic protection. Interestingly, it had considered at some length the debate in the Commission on the subject (paras. 36 and 88 of the decision). It had approached the matter largely from the perspective of domestic law and had held that in the particular circumstances of the case, the United Kingdom Government could not be compelled to exercise diplomatic protection, because it was endeavouring to assist the claimants. Mr. Abbasi and others had in fact been released several months after they had failed in their litigation. In the *Kaunda* case, which had involved the alleged participation of a group of South African mercenaries in an attempted coup to overthrow the Government of Equatorial Guinea, the South African Constitutional Court had likewise addressed the question whether there was an obligation under international law to afford diplomatic protection and had considered at some length, and been guided by, the debates in the Commission. The Court had held that, in the circumstances, the Government of South Africa had done something to help its nationals and that there was therefore no call for an order from the Court on the subject.

23. Thus, following those domestic developments, the Government of Italy was suggesting that the Commission should reconsider the matter. It proposed that a legal duty should be imposed on States to exercise diplomatic protection where the individual had been subjected to a serious human rights violation, and that States should be obliged to make provision in their municipal law for the enforcement of such a right. That was a radical suggestion, but it was not new, and the Government of Italy made it clear that the proposal was made by way

¹¹ See *Yearbook ... 2000*, vol. II (Part Two), pp. 77–79, paras. 447–456.

of *de lege ferenda*, not with a view to codification. It therefore required the Commission's close attention.

24. The Austrian proposal was perhaps less far-reaching. The Government of Austria argued that "the Commission concentrated only on one aspect of diplomatic protection, namely as a right of a State to make certain claims in the interest of its nationals. This right is, however, balanced by the corresponding obligation of the other States to accept such claims by a State. The legal regime on diplomatic protection also stipulates under which conditions a State has to accept such interventions by another State."¹² Draft article 2 could therefore be amended by adding a second paragraph, to read: "A State is under an obligation to accept a claim of diplomatic protection made in accordance with the present draft articles".

25. On draft article 3, he said that the Netherlands' proposal to formulate the article more elegantly was a matter for the Drafting Committee. The same applied to Austria's comment with regard to the formulation of draft article 4 (paragraph 29 of the report).

26. Draft article 5 had elicited the most comments, in particular from the United States. The comments on the subject of continuous nationality could best be left to the Drafting Committee or dealt with in the commentary. Then there were the questions of whether to retain draft article 5, paragraph 2; whether to provide that the time between the *dies a quo* and the *dies ad quem* should be covered by the provision; and whether the final date should be the date of presentation of the claim or the date of the award—the problem of the *dies ad quem*.

27. He was not certain what course of action should be followed with regard to draft article 5, paragraph 2. The United States had suggested that it should be deleted, arguing that its main purpose was to protect a person whose nationality had changed as a result of succession; laws did not necessarily mandate a change of nationality in the case of marriage and adoption. The United States believed that the right of diplomatic protection passed in State succession; the right to diplomatically protect in such a situation should not be viewed as an exception to the general requirement. It accordingly suggested that the issue should be addressed through the addition of a reference to the "predecessor State" in draft article 5, paragraph 1. It should, however, be borne in mind that paragraph 2 had been intended to introduce an element of flexibility to the continuous nationality rule. As paragraph 177 of the report of the Commission on the work of its fifty-third session stated,

there was agreement that the rule needed to be made more flexible so as to avoid inequitable results ... most members preferred a middle course whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State.¹³

At Mr. Candiotti's suggestion, a rider had been added, stating that such exceptions "should relate to involuntary changes of nationality of the protected person, arising

from succession of States, marriage and adoption". On mature reflection, he believed that to have been the right approach and he recommended that paragraph 2 should be retained. That position had the support of the United Kingdom, which stated that its own claims rules allowed it to exercise diplomatic protection on behalf of a national who ceased to be or became a national after the date of the injury. In practice, however, such an approach was adopted only in concert with the State of former or subsequent nationality. The United Kingdom was opposed to forum shopping but seemed to believe that no problem arose, thanks to the inclusion of the words "for reasons unrelated to the claim". The Commission would need to decide whether or not to delete the paragraph.

28. As for continuity of nationality, there was virtually no State practice to support a requirement that nationality should be retained continuously from the time of injury to the date of presentation or resolution of the claim. Yet, as the United States pointed out, it was incongruous to draft a rule on continuous nationality that failed to take account of the period between the *dies a quo* and the *dies ad quem*. It was suggested that draft article 5, paragraph 1 should be adjusted accordingly. The United States acknowledged that the provision might be an exercise in progressive development, but such an exercise seemed to be justified. Belgium and the United Kingdom, on the other hand, were opposed to the provision.

29. The most controversial aspect of the continuous nationality rule concerned the *dies ad quem*—the final date or stage of the proceedings at which the injured individual must still be a national of the claimant State. The Commission had chosen, on the basis of its reading of State practice, the date of the official presentation of the claim. That position was supported by several States in their written comments and in statements to the Sixth Committee. On the other hand, it was strongly opposed by the United States, which argued that the date of the resolution of the claim—the date on which the award was made—should be the criterion.

30. The United States relied heavily on the decision of an arbitral tribunal of the International Centre for Settlement of Investment Disputes (ICSID) in *The Loewen Group Inc, Inc. and Raymond L. Loewen v. United States of America*, which had held that "[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*" (para. 225 of the decision). That decision, it argued, was supported by a number of other arbitral decisions and claims presented through diplomatic channels in which the person on whose behalf the claim was presented had changed his/her nationality after the claim was officially presented but before the final resolution of the claim. According to the United States, in each of those cases the international claim had been dismissed or withdrawn when it became known that the claim was being asserted on behalf of a national of a State other than the claimant State. The United States argued that such cases reflected a consistent State practice amounting to a customary rule, and that, as a policy matter, that rule was preferable, as

¹² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/561.

¹³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 198, para. 177.

it avoided a situation where the respondent State owed the claimant State for an injury to a person who was no longer the legal concern of that State.

31. Academic opinion was not very helpful on the subject. Most writers acknowledged that the *dies ad quem* was uncertain. State practice was equally unclear, as treaties differed in their formulation of the *dies ad quem*. The United States cited the 1930 League of Nations Conference for the Codification of International Law in support of the date of the award, but it was important to recall that that “support” was based on a survey of only 20 States, eight of which had rejected continuous nationality as a rule, while three had abstained and nine had voted in favour.¹⁴ Those nine had included four dominions of the United Kingdom, which had probably been blindly following the United Kingdom’s lead.¹⁵

32. Judicial decisions on the subject were too uncertain to provide evidence of a rule of customary international law. In large part, the divergences of judicial opinion could be ascribed to the divergences in treaties regulating such claims. In such circumstances, it was not surprising that some decisions favoured the date of presentation, some favoured the date of the award, and others were inconclusive. It was, however, important to stress that many of the decisions in favour of the date of the resolution of the claim—on which the United States relied—involved instances in which the national changed his/her nationality after the presentation of the claim and before the award, to that of the respondent State. In such a case it could hardly be expected that the claim would succeed, as the respondent State would in effect then be paying compensation to another State in respect of an injury to its own national. That had been the case in many of the instances on which the United States relied.

33. The United States relied heavily on the decision in the *Loewen* case, but, while most of that decision was carefully reasoned and researched, it was seriously flawed in respect of the *dies ad quem*. The tribunal had simply asserted that there was a continuous nationality requirement, without any examination whatsoever of authority. The tribunal had referred critically to his own first report, which in its paragraphs 200 to 204¹⁶ had noted that the continuous nationality rule was not an accepted rule of customary international law (paras. 235–236 of the award), but it had failed to refer to the report’s examination of the *dies ad quem* dispute. Moreover, had it, before giving its award on 26 June 2003, inquired about the work of the Commission on the subject, the tribunal would have learned that in 2002 the Commission had adopted a draft article on continuous nationality which

gave approval to the date of the official presentation of the claim as the *dies ad quem*.¹⁷ However, it had made no attempt to do so. Had it taken the slightest trouble to find out what the Commission had decided, the tribunal would in all likelihood have adopted a different rule, or at least a different approach. While his comments might seem harsh, responses to the *Loewen* decision by such writers as Jan Paulsson¹⁸ and Matthew Duchesne¹⁹ had been very critical. In those circumstances, it was small wonder that the Netherlands Government doubted whether the *Loewen* case truly reflected the law as it currently stood.

34. In the light of the uncertainty surrounding the *dies ad quem*, the Commission must make a choice between the date of the official presentation of the claim and the date of the resolution of the claim. The authorities were inconclusive and the response of States, although scanty, favoured the date of the presentation of the claim. The Commission must be guided by principle and policy. Principle supported the date of the presentation of the claim, as that which most favoured the interests of the individual. So, too, did policy, if policy was equated with fairness. Many years might pass between the presentation of a claim and its final resolution and it would be unfair to deny the individual the right to change nationality, through marriage or naturalization, during that period. Moreover, the date of presentation was significant, as it was the date on which the State of nationality showed its clear intention to exercise diplomatic protection. Perhaps the strongest statement on policy was to be found in the *Eschauzier* case, on which the United States relied for its position.

35. Different policy considerations applied where the national on whose behalf the claim was brought acquired the nationality of the respondent State after the presentation of the claim, as had occurred in *Loewen* and many of the other cases on which the United States relied. In such circumstances, fairness dictated that the date of the award should be selected as *dies ad quem*, as the contrary position would be grossly unfair. It was therefore proposed that the Commission retain the official date of presentation of the claim as the *dies ad quem* for the continuous nationality rule, but that an exception be made for the case in which the national on whose behalf the claim was brought acquired the nationality of the respondent State after the presentation of the claim. In such a case, the date of the resolution of the claim should be the *dies ad quem*.

36. The questions before the Commission were thus to consider whether to retain draft article 5, paragraph 2; whether to extend the continuous nationality rule to the period between the *dies a quo* and the *dies ad quem*; and whether to retain the date of the presentation of the claim as the *dies ad quem* in most circumstances, subject to the exception outlined above. In short, draft article 5 still required considerable attention.

¹⁴ See League of Nations, *League of Nations Conference for the Codification of International Law, Bases of Discussion for the Conference Drawn up by the Preparatory Committee*, vol. III (C.75.M.69.1929.V), *Responsabilité des Etats en ce qui concerne les dommages causés sur leur territoire à la personne ou aux biens des étrangers*, Point XIII, National Character of the Claim, pp. 140–145, cited in M. Duchesne, “The continuous-nationality-of-claims principle: its historical development and current relevance to investor–State investment disputes”, in *The George Washington International Law Review*, vol. 36, No. 4 (2004), p. 794.

¹⁵ Duchesne, *loc. cit.* (footnote above), p. 795.

¹⁶ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, pp. 243–244.

¹⁷ *Yearbook ... 2002*, vol. II (Part Two), draft article 4 [9], pp. 70–72.

¹⁸ See J. Paulsson, “Continuous nationality in *Loewen*”, *Arbitration International*, vol. 20, No. 2 (2004), p. 213, and *Denial of Justice in International Law*, Cambridge University Press, 2005.

¹⁹ Duchesne, *loc. cit.* (footnote 14 above).

37. With regard to draft article 6, there had been no strong opposition from Governments, although the United Kingdom had queried whether it yet constituted a rule of customary international law.

38. As for draft article 7, the provision had been hotly debated in the Commission but broadly welcomed by States, although some had raised questions about the use of the word “predominant”. Italy, for example, had suggested that the provision should revert to the requirement of a genuine link. As no State had raised any objection of principle, any further amendments might be made by the Drafting Committee.

39. Draft article 8 had also been highly controversial within the Commission, but, surprisingly, it had been generally welcomed by States. A number of suggestions had been made relating to the wording but there had been no objection to the principle. The final wording should therefore be left to the Drafting Committee.

40. With regard to the claims of corporations and the shareholders of corporations, covered in draft articles 9 to 13, the comments by States had raised two important questions: first, whether the final phrase “or some similar connection” should be retained, since it implied that a genuine link between the corporation and the State exercising diplomatic protection was required. Secondly, there was the problem of the corporation “formed” (incorporated) in one State but with a registered office in another State. That raised the question of which State could exercise diplomatic protection.

41. Aware that the phrase might be misunderstood, the Commission had, in its commentary to draft article 9, gone out of its way to make it clear that a “similar connection” did not imply a genuine link.²⁰ Despite that, States seemed unhappy with the phrase, believing, understandably, that it would be construed as requiring some form of genuine link. In his view, therefore, the Commission should eliminate the requirement. Secondly, it should consider the question of a corporation that had a registered office in a State other than that in which it was incorporated. During the drafting process, the Commission had inclined to the view that the State that protected the corporation should be required to show not only that the corporation had been formed in its territory but also that it had its registered office in that territory. In the commentary, it had been emphasized that the Commission did not wish to contemplate the suggestion that a corporation might possess dual nationality.²¹ That was an error, and one that must be rectified. In commercial life it was not infrequent for a corporation to be formed in one State and have its registered office in another. Guatemala had put forward a useful proposal, whereby draft article 9 would be divided into three paragraphs. Paragraph 2 would read: “For the purposes of diplomatic protection of corporations, a corporation has the nationality of the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection”. Paragraph 3 would read:

“Whenever the application of paragraph 2 means that two States are entitled to exercise diplomatic protection, the State with which the corporation has, overall, the closest connection shall exercise that protection”. That might be the best solution, but the Commission would clearly have to give the draft article further close consideration.

42. As for draft article 10, on continuous nationality of a corporation, he had already discussed the continuous nationality rule in respect of natural persons. It was therefore unnecessary to revisit the arguments in favour of the continuous nationality requirement between the *dies a quo* and the *dies ad quem*. Once more, the Commission would be wise to refer to the “predecessor State”, as suggested by the United States in relation to draft article 5. Again, he believed that the *dies ad quem* should be the date of the official presentation of the claim.

43. The United States, however, objected to draft article 10, paragraph 2, arguing that the protection of extinct corporations should not be an exception to the rule of continuous nationality. It claimed that “a State may continue to exercise protection with respect to the claims of a corporation so long as the corporation retains a legal personality, which can be as bare as the right to sue or be sued under municipal law”. It therefore argued that there was no need for such a provision. Unfortunately, it failed to consider the concerns raised in that connection by judges (notably the United States judge, Judge Jessup, in the *Barcelona Traction* case), tribunals and scholars, all of which had been examined exhaustively in his fourth report on diplomatic protection.²² In the light of the failure of the United States to refute (or even to consider) those authorities, and in the absence of a wider comparative survey of corporate law and practice to establish that many legal systems allowed corporations to sue and be sued following dissolution, his inclination was to retain paragraph 2; that position was supported by the United Kingdom Government, which, however, favoured deletion of the phrase “as the result of the injury”. That suggestion too, he was inclined to accept.

The meeting rose at 6 p.m.

2868th MEETING

Tuesday, 2 May 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

²⁰ *Yearbook ... 2004*, vol. II (Part Two), p. 30, paras. (4)–(6) of the commentary to draft article 9.

²¹ *Ibid.*, para. (7) of the commentary.

²² *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/530 and Add.1.