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Summary record of the 2871st meeting

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66. Other suggestions that had been made could impose even more serious restrictions on the ability of States to deal with their nationals' claims, such as requiring the consent of claimants for the exercise of diplomatic protection, or for the form and amount of redress. States must retain control over their claims negotiations with other countries, for those negotiations were often a key element in resolving dangerous crises. In that context, a State might be led to lodge a claim against the will of its national, or to fix a form and an amount of recovery that did not satisfy its national. For example, one element of the 1981 Algiers Declaration,⁴⁷ which had resolved a potentially dangerous situation in relations between Iran and the United States, had been the compulsory resolution of claims from nationals of both countries by means of a bilateral arbitration process; subsequently a large number of claims had been settled by the two sides through bilateral negotiation. The Supreme Court had dismissed one corporation's suit challenging the right of the United States Government to settle its case in that manner against its will. If the United States Government had been unable to agree to a compulsory settlement of its nationals' claims, the Accords might well have collapsed, with potentially serious consequences.

67. In short, States must retain the right to exercise diplomatic protection and settle such claims even when the claimant objected. Any other rule could seriously impair the ability of Governments to resolve foreign policy crises.

The meeting rose at 1.05 p.m.

2871st MEETING

Friday, 5 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, 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.

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

[Agenda item 2]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. KATEKA, after commending the Special Rapporteur's willingness to accommodate the views of Member States and of the Commission, said he

⁴⁷ See *Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States*, ILM, vol. 20, No. 1 (January 1981), p. 223.

endorsed the Special Rapporteur's belief that European citizenship was applicable to consular assistance and not to diplomatic protection. He was of the view, however, that the Special Rapporteur had overemphasized the importance of article I-10, paragraph 2 (c) of the Treaty establishing a Constitution for Europe, which surely related to diplomatic representation under the 1961 Vienna Convention on Diplomatic Relations and to consular assistance under the 1963 Vienna Convention on Consular Relations rather than to diplomatic protection.

2. He had some difficulty with the revised proposal for draft article 1, contained in paragraph 21 of the report. The addition of the phrase "or a person referred to in article 8" created problems on which he would elaborate when commenting on draft articles 3 and 8. Paragraph 2 of the revised draft article was unnecessary: it did not detail exhaustively enough what was not covered by diplomatic protection.

3. With regard to draft article 2, he did not share Italy's view that a State had a legal duty to exercise diplomatic protection, which, as the Commission had correctly stated, was a discretionary right. Thus, he did not see the desirability of adding a second paragraph to the draft article, declaring that a State was under an obligation to accept a claim of diplomatic protection. In his view, if a claimant State fulfilled the requirements for the exercise of diplomatic protection, the respondent State was obliged to comply. Paragraph 2 could, however, find a place in the commentary.

4. In connection with the reservations that he had previously expressed concerning the need for draft article 3, paragraph 2, on the exercise of diplomatic protection in respect of a non-national, he would take the opportunity to express his views concerning draft article 8 on stateless persons and refugees. During the first reading, he had expressed misgivings regarding the draft article.⁴⁸ In theory, it was right for the Commission and some States to express solidarity with refugees by seeking to protect their human rights; and for countries of the North, which did not suffer from the phenomenon of refugees to the same extent as those of the South, the progressive development contained in draft article 8 was ideal. In practice, however, the provision would have the tendency to make permanent what was supposed to be a situation of limited duration. Some countries already played host to refugees in the hundreds of thousands—a heavy burden in an environment where burdens were rarely shared by the international community.

5. In that regard, he agreed with Austria's comment that an open definition of the term "refugee", as suggested in the commentary to draft article 8, should be avoided: the definition contained in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol was sufficient. The 1969 OAU Convention governing the specific aspects of refugee problems in Africa had adopted the definition contained in the Convention relating to the Status of Refugees, but had gone further by saying that the term "refugee" also applied to "every person who, owing to external aggression, occupation, foreign domination or

⁴⁸ See footnote 7 above.

events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” (art. 1, para. 2). He wondered if the Special Rapporteur could clarify whether that definition could be of global application.

6. In many instances, injury was caused by the State of origin of the refugee, in that it had violated the primary rules that had led to the refugee situation. That raised the question of whom the refugee should be protected against. Experience had also shown that a country of origin might attack refugee camps in the host nation in reprisal for alleged wrongs committed in the context of ethnic conflicts. That had occurred in the Great Lakes region of Africa. He therefore concurred with Belgium’s comment that, if the broad interpretation of diplomatic protection was to be retained, draft article 8, paragraph 3 should be deleted in order to allow for certain informal remedies against the State of nationality of the refugee.

7. Some members of the Commission and some States had deplored the excessively high threshold set by the phrase “lawfully and habitually resident” and wished to replace it by “lawfully staying”, which appeared in article 28 of the Convention relating to the Status of Refugees. That Convention had, however, been adopted as a result of events occurring in Europe before 1951. The definition might have been acceptable as applicable to Europe after the Second World War, but modern realities would hardly permit such a low threshold.

8. As for draft articles 17 and 18, he shared the Special Rapporteur’s view that each should be retained as a separate provision. It would, however, be inappropriate to replace the phrase “special treaty provisions” by the phrase “special regimes”. Since, as Morocco pointed out, the 1969 Vienna Convention did not recognize the concept of “special treaties”, draft article 18 should simply state that “the present draft articles do not apply where, and to the extent that, they are inconsistent with provisions provided for under bilateral and multilateral treaties regarding the protection of investments”.

9. He supported the inclusion of draft article 19. Some concern had been expressed that the provision did not belong to diplomatic protection, although it should be pointed out that the United Kingdom had said the same about draft article 8. If, however, draft article 8, which related to non-nationals, was acceptable, logic demanded that the Commission should support the seeking of redress on behalf of crew members who were not nationals of the State of nationality of a ship. The flag State should be entitled to seek redress for such crew members.

10. He was in favour of the inclusion of a new draft article 20 to deal with the consequences of diplomatic protection. In view of the fact that the draft articles were already receiving their second reading, such a provision should be modest rather than radical. Although the draft articles were mainly premised on the *Mavrommatis* case, as well as partly on the *Barcelona Traction* case, the Commission should not be wholly tied to the *Mavrommatis* fiction. Some progressive development

was called for to recognize the growing importance of the individual in international law. Lastly, he noted that, in paragraph 6 of the report, the Special Rapporteur linked the fate of the draft articles with that of the draft articles on responsibility of States for internationally wrongful acts.⁴⁹ He hoped that one day both sets of draft articles would lead to a diplomatic conference that would adopt treaties on both topics.

11. Mr. KEMICHA said that, in response to the oft-repeated question of whether the Commission was engaged in the codification or the progressive development of international law, he was inclined to say that the two went hand in hand. The Special Rapporteur’s intellectual honesty and scrupulous attention to every facet of the subject had ensured that advances had been made in both respects, albeit sometimes gingerly.

12. The main surprise in the report was the encouragement given to the Commission by some States to adopt a new approach that would give the individual a more significant role in the exercise of diplomatic protection, while—to cite the comment by Italy—leaving unchanged the basic concept according to which the right to exercise diplomatic protection belonged to the State.

13. Taking his cue from the *LaGrand* and *Avena* cases, and partially adopting the proposal by Italy, the Special Rapporteur suggested a new wording for draft article 1, covering not only nationals but also those individuals covered by draft article 8 (Refugees and stateless persons). He himself would have preferred the formulation suggested by Italy, which referred to the State’s “own rights and the rights of its national”, but, even as it stood, the proposed new wording constituted a significant advance.

14. Like other members, he considered paragraph 2 to be superfluous: the distinction between diplomatic protection and consular assistance could more usefully be made in the commentary.

15. Draft article 2, as currently worded, might also appear redundant; some States, such as the Netherlands, favoured its deletion, while others, such as the United Kingdom, found it a useful vehicle for affirming the discretionary nature of the State’s power to exercise diplomatic protection. Italy, on the other hand, saw it as an opportunity to engage in the progressive development of international law by imposing on the State the obligation to exercise diplomatic protection on behalf of the injured person upon request “when the protection of fundamental values pertaining to the dignity of the human being and recognized by the international community as a whole is at stake”. The Special Rapporteur seemed to have opted for the approach suggested by Austria, whose comment concerning the “corresponding obligation of the other States to accept such claims by a State” formed the basis for the new paragraph 2 of draft article 2. Having heard the wide range of reactions to the new paragraph from other members of the Commission, he had a better understanding of the reasons for opting for a minimalist but innovative approach, although he himself could not share the Special Rapporteur’s views in that regard.

⁴⁹ See footnote 8 above.

16. Draft articles 3 and 4 presented no particular problem for him, although the Drafting Committee would need to take particular care in finalizing their wording.

17. Having read the comments on draft article 5 contained in paragraph 31 *et seq.* of the report, he was inclined to support the position adopted by the Special Rapporteur, who had wisely opted, in paragraph 1, for the date of the official presentation of a claim to meet the requirements of the continuous nationality rule, at the same time providing for an exception in paragraph 2, in cases where a national in respect of whom a claim was brought had acquired the nationality of the respondent State after the presentation of the claim. He would make no comment on the insertion of the word “only” in paragraph 1, since that was a matter for the Drafting Committee. Paragraph 3 was useful and should be retained.

18. Draft articles 6 and 7 presented only drafting problems. Draft article 8, meanwhile, represented, as everyone had agreed, a real advance in the progressive development of international law. With regard to the Special Rapporteur’s request for guidance in paragraph 51 concerning the meaning to be given to the term “refugee”, in the light of the suggestion by the Nordic countries that the phrase “lawfully and habitually resident” in paragraph 2 should be replaced by the phrase “lawfully staying”, he said that, although the proposal evidenced a generous approach towards the difficulties suffered by refugees throughout the world, the Special Rapporteur seemed to wish to consolidate the progress already made without risking the displeasure of the many States that had not expressed an opinion and whose positions on that question were very much less liberal.

19. With regard to draft articles 9 to 12, he noted the efforts the Special Rapporteur had made to accommodate the two main problems that States had seen in the previous wording of draft article 9—namely, the possible need for a genuine link between the corporation and the State exercising diplomatic protection (para. 53 of the report), and also the problem of the corporation formed in one State but with a registered office in another (para. 54)—by proposing to add a second paragraph making provision for a corporation that “has the nationality of the State under whose law the corporation was formed or in whose territory it has its registered office or the seat of its management”. The complexity of business life in an age of globalization meant that no definition could cover all the cases that arose in the real world. He therefore supported the approach advocated by Mr. Pellet, whereby the possibility of there being more than one State of nationality would enhance the effectiveness of the diplomatic protection of corporations.

20. With regard to draft articles 14 to 16, it was noteworthy that only the latter had been the subject of comment by States. He supported the proposed new wording of draft article 16 contained in paragraph 81 of the report, his own preference being for the longer version of its paragraph (a).

21. Like the Governments of Qatar and El Salvador, he considered that draft articles 17 and 18 should be merged, since the same problems arose in the context of protection

of human rights and of treaty provisions relating to the settlement of disputes between corporations or shareholders of a corporation and States.

22. Lastly, he wished to express his support for the proposed new draft article 20, which appeared in paragraph 103 of the report. The Special Rapporteur had noted in paragraph 102, that, despite the rule established by the *Mavrommatis* case, with its recognition of the discretionary nature of the State’s exercise of diplomatic protection, which formed the foundation for the draft articles, no rule of customary international law existed in that regard. The proposed new draft article remedied that deficiency. He was in favour of the existing wording, from which the square brackets could be deleted. As for the question of whether a State “shall” or “should” transfer compensation received to the national in respect of whom it had brought the claim, or whether the State could decide for itself, he was inclined to think that there was little difference between the two versions, since a State was always sovereign in matters that ultimately concerned only its own nationals.

23. Mr. PELLET asked why Mr. Kemicha favoured the wording for draft article 1 proposed by Italy, which confused diplomatic protection proper with the separate question of a State’s own rights. An injury to a State was an “immediate” injury. He did not see what was gained by including a reference to the violation of the State’s own right.

24. Mr. KEMICHA said that he supported the text proposed by Italy because it placed the individual and the State on an equal footing with regard to injury suffered. The proposal represented a real advance in the development of the individual’s involvement in diplomatic protection. Perhaps the provision was premature, but it undoubtedly prefigured the course of international law.

25. Mr. PELLET said that his objection was to the inclusion of the reference to the rights of the State, which was irrelevant in the context of diplomatic protection.

26. Mr. Sreenivasa RAO, after commending the Special Rapporteur’s careful and scholarly approach and his willingness to innovate and accommodate the views of others, even when they went against his inclination, said that in considering the topic it was important to keep in view the origin and nature of diplomatic protection. Clearly, for diplomatic protection to be invoked, certain preconditions must first be satisfied. It was essentially a default procedure, as opposed to diplomatic representation, which was more flexible. The fact that diplomatic protection had been abused in the past could also not be ignored. While the *Mavrommatis* fiction was deplorable in some respects, it had undeniably served a useful purpose in helping the State to sponsor the claim of its injured national at the international level; even under modern conditions, an injured person could not make a claim in his or her own right in the absence of special arrangements among States.

27. In that context, he concurred with the view expressed in paragraph 3 of the report that “the ultimate goal of diplomatic protection is the protection of the human rights

of the individual”, rather than with the assertion by Mr. Pellet that the interests of natural and legal persons were identical and that they needed to be protected equally. He wondered whether that was the case at all times and in every respect. The problems associated with the nationalization or expropriation of the assets of a foreign company were different from those encountered in, for example, the case of appropriation by a State of the private property of an alien without proper compensation. In an age when bilateral investment protection agreements were common, diplomatic protection for corporations and legal persons was perhaps not as relevant as it had been in the immediate post-colonial era. It was understandable that the invocation of diplomatic protection in isolated or non-systematic cases might no longer be readily forthcoming.

28. The Special Rapporteur had sufficiently distinguished between diplomatic and consular protection, but comments by Mr. Gaja and Mr. Kolodkin should be taken into consideration for the purpose of the commentary. With regard to the right of more than one State to sponsor a diplomatic claim on behalf of a person possessing multiple nationality, the best policy was, as far as possible, to allow only the State most closely connected with the interests of the person concerned to sponsor the diplomatic claim.

29. Turning to the consideration of individual articles, he said that he concurred with most of the comments on the various articles made by Mr. Kolodkin at the previous meeting. With regard to draft article 1, the important point was that the exercise of diplomatic protection was essentially a discretionary right of the State of nationality of the injured person. There were circumstances in which a State might decide, under pressure and against its original inclination, to exercise such protection, but the question whether it was obliged to sponsor a diplomatic claim in cases of egregious breaches of human rights that were of a peremptory nature was an important one, on which more thought was required. The arguments advanced so far were not very convincing.

30. The proposed new paragraph 2 of draft article 2 was unnecessary: the conditions required for the right of diplomatic protection to be exercised were the same as those under which the responsible State would be obliged—under penalty of sanctions—to respond positively to any claim made by the State of nationality of the injured person.

31. With regard to draft article 5, the question of the relevant dates and periods for establishing continuous nationality was crucial to the subject of diplomatic protection. The proposed revision of draft article 5, which appeared in paragraph 47 of the report, was acceptable.

32. Draft article 8 was also acceptable, and he was glad that most States saw the provision in a positive light. Unlike some members of the Commission, he believed that the issue of the definition of a “refugee” was best resolved by reference to the law governing the matter.

33. Draft article 9, like draft article 7, raised few problems. He doubted that, in practice, the test of a

“predominant” link would differ from that of a “genuine” or “effective” link. Certainly, the establishment of a registered office would not, in itself, lend any special weight to the effectiveness of the link that needed to be established.

34. With regard to draft article 11, the points made by Mr. Matheson (2868th meeting, above, para. 39) should be borne in mind. The problems of all the shareholders, whether domestic or foreign, should be treated on an equal basis and a claim of diplomatic protection should be made only in order to ensure compensation no less prompt and adequate than that afforded to domestic shareholders.

35. With regard to draft article 16, the Commission should, when considering whether local remedies could be deemed to have been exhausted without having actually been resorted to, continue to be guided by the well-tested criteria of non-availability or ineffectiveness, rather than the test of futility.

36. As for the suggestion made in paragraph 103 of the report concerning the obligation of the sponsoring State to seek and quantify damages having regard to the actual injury suffered by the national and to transfer any sum received to the national concerned, he was sympathetic to the ideas expressed by the Special Rapporteur and Mr. Pellet. After listening to the comments by Mr. Matheson (2870th meeting, above, para. 61 *et seq.*) and Mr. Kolodkin (2870th meeting, para. 55), however, he had become convinced that the Commission should tread with great caution in that area. There was more to the issue than met the eye.

37. He hoped that the second reading could be completed at the current session as expeditiously as possible, thereby moving forward the Commission’s work on the progressive development and codification of international law in the area of State responsibility. He noted, however, that, although the Commission was entitled to consider all the current trends in a given field, it could not be totally academic in its approach and ignore the political sensitivities of its immediate audience, the Member States, in framing recommendations.

38. Ms. XUE said that the draft articles on diplomatic protection had aroused great interest among government departments, academic institutes and law schools in China. While the government departments considered that the draft articles on issues such as the nationality and continuous nationality principles and the exhaustion of local remedies basically reflected customary international law and State practice, they had adopted a more guarded approach to the articles involving progressive development.

39. She believed that those draft articles that were of a technical nature—as opposed to those involving questions of policy or principle—should be retained with as little amendment as possible. The draft articles must be predicated on the basic principle established in the *Mavrommatis* case that a State of nationality had the right, under international law, to exercise diplomatic protection in respect of its injured nationals.

40. The existing text of draft article 1 was precise enough not to require any mention of persons referred to in draft article 8; any such mention would merely disrupt the logic of the original text. By merging the *Mavrommatis* fiction with the ruling of the ICJ in the *LaGrand* case, the amendment proposed by Italy was likely to cause confusion and practical difficulties. If diplomatic protection could be exercised only when the interests both of the nationals and of the State of nationality were injured, the principle of continuous nationality embodied in draft article 5 would not serve much purpose. Since diplomatic protection involved the interests of natural or legal persons, their rights should normally be protected through recourse to domestic legal procedures. The *Mavrommatis* rule had, however, provided a legal basis for State intervention. Obviously such diplomatic action was often prompted by diplomatic, economic and other considerations as well as by a concern to protect the rights and interests of the individuals concerned. In practice, the former still weighed more heavily than the latter in a State's decision whether or not to exercise diplomatic protection, notwithstanding the increasingly benign influence of human rights law on the rules of diplomatic protection. For that reason, the text of the draft article rightly emphasized the protection of the rights and interests of individuals and adequately reflected State practice and *opinio juris*.

41. While she basically agreed with the Special Rapporteur's comprehensive analysis of the distinction between diplomatic protection and consular assistance (paras. 15–20), she was not convinced of the need to add a second paragraph to draft article 1. The relevant explanation could be placed in the commentary in order to enlighten the layman. In fact, confusion arose not only between diplomatic protection and consular assistance, but also between diplomatic protection proper and the diplomatic protection exercised by embassies which, as article 3 of the Vienna Convention on Diplomatic Relations made clear, was wider in scope than that of consular assistance, yet different from that of the subject matter being examined by the Commission. Clarification of that point in the commentary to draft article 1 would be helpful.

42. Consular assistance was both preventive and remedial. A lack of information might prevent an embassy or consulate from forestalling the unjustifiable detention or torture of its nationals or affording them legal assistance, with the result that it would be in a position to make diplomatic representations only after the violation of rights had occurred. The principal distinction between consular assistance and diplomatic protection was that the former mainly consisted in efforts to urge the receiving State to preserve and respect, within its own legal procedure, the rights and interests of the nationals of the sending State and to urge the receiving State to fulfil its international obligations. That function of consular assistance was both a right and a duty. Diplomatic or consular representatives did not make direct claims, whereas in the case of diplomatic protection, it was the State that made a direct claim on behalf of its nationals. There was, however, a link between the two institutions and, in some circumstances, they constituted different stages or procedures for representation.

43. The example of the European Union was not pertinent and the concept of European citizenship was inappropriate to the context of the Commission's deliberations, since a citizen of the European Union was not a national of all the member States of the European Union and, from a legal point of view, the concept of a "European citizen" diverged from that of a national. For that reason, citizenship of the European Union did not fulfil the nationality requirement for the purpose of diplomatic protection and even if, one day, it evolved into nationality, it could only replace the nationality of States rather than being additional to it. Applying the principle of nationality among the member States of the European Union and the principle of European citizenship outside the Union would not only lead to legal confusion, but also create inequality *vis-à-vis* non-member States of the Union.

44. On draft article 2, she concurred with the Special Rapporteur that diplomatic protection was a right, not an obligation, of a State. A State's obligation to protect its nationals did not necessarily have to be met through diplomatic protection. Even when domestic laws stipulated that the Government had an obligation to extend diplomatic protection to its nationals, that protection encompassed assistance by embassies or consulates and was therefore broader in scope than the diplomatic protection being discussed by the Commission. The issue of whether a State was obliged to accept a claim of diplomatic protection merited careful analysis. While a State undoubtedly bore responsibility for its internationally wrongful act, it was questionable whether redress for such acts had to be pursued through diplomatic protection. Under international law, while it was incumbent upon States to settle international disputes peacefully, they were entitled to choose the means of settlement. An obligation on the part of a respondent State always to accept a claim of diplomatic protection from another State was not in line either with general practice or with the fundamental principles of international law.

45. There was no need to amend draft article 3, but the proposed amendment to draft article 4 was desirable.

46. Draft article 5 on continuous nationality was rather controversial. First, it was necessary to consider whether the principle of continuous nationality was absolute or relative. There was, however, no need to consider the issue of stateless persons or refugees, as their special situation had rendered their nationality non-existent or meaningless. As for the *dies ad quem*, many legal writers contended that the date of the official presentation of the claim was more certain than the date of its resolution. Since the *dies ad quem* was important for determining the admissibility of claims and the jurisdiction of courts, the question arose why it differed in practice in the manner noted by Umpire Parker in *Administrative Decision No. V* (p. 143 of the decision). The criticism of the decision in the *Loewen* case, quoted in paragraph 42 of the report, was possibly too severe. Although the arbitrators had, perhaps, opted for the least plausible date, their decision was highly relevant to the principle of continuity and meant that the nationality link must exist from start to finish, "from the date of the events giving rise to the claim ... through the date of the resolution of the claim". In other words,

if the nationality of the natural or legal person were to change after the official presentation of the claim, the claimant State would have the obligation to terminate diplomatic protection and the respondent State would have the right to request the claimant State to terminate that protection. Situations such as that in the *Loewen* case had seldom been discussed, mainly because cases in which an applicant's nationality had changed between the official presentation of a claim and its resolution were rare. The example given by the Netherlands could not invalidate the *Loewen* decision, because the same situation could also arise where the individual was left without any possibility of receiving diplomatic protection, if his nationality changed before diplomatic protection was exercised. That was the continuity rule adopted by the Commission under article 5.

47. The only exception to the continuous nationality rule contemplated in amended paragraph 1 of draft article 5, proposed in paragraph 47 of the report, was that of the involuntary change of nationality resulting from the succession of States. Nevertheless the definition of "predecessor State" required clarification because, when a State disintegrated, a change of nationality might or might not be compulsory for all its nationals. The proposed amendment to paragraph 2 was acceptable but the inclusion therein of a reference to the nationality of a third State would resolve the controversy over the *dies ad quem*, since diplomatic protection would terminate for any person whose nationality had changed after the presentation of the claim. In paragraph 3 the words "shall not" should be retained, as the obligation was one of prohibition, whereas draft articles 7 and 14 were provisions subject to conditions rather than prohibitions.

48. After due reflection, she agreed that paragraph 2 of draft article 6 should be deleted, as suggested by the Special Rapporteur in paragraph 48 of the report, but the criterion of genuine, effective nationality must not be evaded in practice. In the event of dual or multiple nationality, only the State to which the person had a genuine link should exercise diplomatic protection. Any other solution would likely encourage dual and multiple nationality.

49. In draft article 8, the term "refugees" should be defined in accordance with the 1951 Convention relating to the Status of Refugees. The Nordic countries' proposal would not guarantee that the persons concerned were fully connected with the protecting State and should therefore be rejected. The more stringent criteria applied to the territorial connection between refugees and a protecting state for the purposes of diplomatic protection did not mean that that category of persons would go unprotected.

50. It might be better to retain the original text of draft article 9, in order to preclude the possibility of multiple claims from corporations formed in one State but with a registered office in another. The possibility of exercising diplomatic protection should be reserved for the State to which the company was most closely connected, or whose nationality it actually had. The Commission should devote more attention to the law of corporations and to international economic law. According to the definition given in draft article 9, the subsidiaries of

many transnational corporations might possess multiple nationalities. The element of control should therefore be stressed. The principle of continuous nationality as adopted in draft article 5 applied also to corporations.

51. Given the complex structure of corporations and shareholdings, multiple claims from shareholders should also be avoided whenever possible. The dictum of the ICJ in the *Barcelona Traction* case was not borne out by international practice. Many investment protection agreements did, however, provide guarantees for the rights and interests of corporations and their shareholders. The phrase "for a reason unrelated to the injury" in draft article 11 (a) should be retained in order to prevent the manipulation of the injured State or shareholders. That subparagraph should be brought into line with draft article 10, paragraph 3. Subparagraph (b) should be dropped because, from the outset, corporations could freely choose where to do business. Hence they voluntarily accepted local conditions which might differ from their own domestic law. As long as those conditions were not discriminatory, they could not be cited as a reason for granting additional rights and protection to shareholders.

52. Similarly, there was no need for draft article 12, as the provisions it contained were already to be found in the draft article on natural persons. Moreover, it would be improper to extend the principles of draft articles 11 and 12 to the other legal persons covered in draft article 13.

53. In view of the commentary to draft article 13,⁵⁰ she asked whether public universities which were funded from multiple sources and which enjoyed considerable autonomy would be eligible for diplomatic protection. She considered that it would be unfair to deny them such eligibility.

54. The arguments in the commentary to article 16 (a), listing a series of situations where local remedies are deemed to provide no reasonable possibility of effective redress, if employed out of context as a yardstick for passing judgement, might cease to be convincing, as they could be heavily tainted with subjectivity or even biased. An interested party might well, on the basis of its own subjective assessment or its own domestic legal system, use those arguments as a pretext for rejecting the jurisdiction of the local courts. As judicial systems varied from one State to another, a system unique to one State should not be used as the criterion for judging the appropriateness of that of another State. As long as a judicial system afforded equal treatment to nationals and aliens and did not permit discriminatory provisions or practices, such a system should be deemed appropriate and fair. Those policy considerations should be reflected in some way in the commentary to the draft article; otherwise, developing countries might balk at groundless criticism of their judicial sovereignty, and diplomatic protection might still be used as a tool for interfering in their internal affairs. Accordingly, the current wording of subparagraph (a) should be retained, with no reference to the criterion of obvious futility. The same considerations applied to subparagraph (b).

⁵⁰ *Yearbook ... 2004*, vol. II (Part Two), p. 35, para. (4) of the commentary, footnote 157.

55. As for subparagraph (c), in the event of transboundary damage, the lack of a voluntary connection between the injured person and the State allegedly responsible for the injury did not prevent that person from resorting to local remedies in North America and Europe, especially Western Europe. That trend was therefore a subject amenable to progressive development, that is, in the event of environmental damage, foreign victims would be provided with access to the same judicial remedies as nationals. In the *Trail Smelter* case, major policy considerations, rather than the lack of a voluntary connection, had lain behind Canada's willingness not to insist on the exhaustion of local remedies. The exception referred to in the first part of the subparagraph should therefore be dropped, while the remainder should be retained.

56. She had no objection to the substance of the proposal to draft a new article on the right of the injured national to receive compensation. In the very few cases in which compensation was obtained as a result of China exercising diplomatic protection, that compensation was duly transferred to the persons concerned, without deduction by the State, although Chinese law did not have any specific provisions on the matter. The moot point was not whether there was room for progressive development, or whether the provision to be added should take the form of a draft article or a recommendation. When disbursing compensation, it was necessary to balance the individual rights and interests of injured persons against public order and policy. When large sums of money or a great number of victims were involved and when the State had already devoted huge efforts to reducing losses, providing medical and rescue services and repairing environmental damage, compensation might become a very sensitive matter, as it sometimes raised issues involving not only individual justice, but also collective justice. Whether it should be governed by international law or left to the discretion of States was primarily a policy issue.

57. She rejected criticism that the Commission was being too conservative. The draft articles on diplomatic protection had developed traditional international law in many respects and had fully taken into account the trends in modern international law. Some scholars had failed to comprehend that the rules of diplomatic protection were not a human rights bill, but must strike a balance between States' interests, and between the interests of States and those of individuals. If the Commission neglected that essential balance, favouring one side at the expense of the other, its codification work would not be recognized or accepted by Governments.

58. Mr. FOMBA said the main issue at hand was the very nature of diplomatic protection: did it aim to protect the rights of States or those of individuals? The *Mavrommatis* rule had determined in favour of the State, and, rightly or wrongly, the Commission had followed its lead. Some said wrongly, since it had not taken account of developments in international law and the role accorded to the individual therein—a point brilliantly made by Mr. Pellet and Mr. Momtaz. While he had no intention of breaking the consensus reached, he supported that view.

59. The Commission had likewise been reproached for not having dared, in the context of progressive

development, to impose upon States an obligation to exercise diplomatic protection. Attention had been drawn to the particular case of diplomatic protection following a serious breach of an obligation arising out of *jus cogens*. On the link between the draft articles on diplomatic protection and those on responsibility of States, the trigger for the whole mechanism of diplomatic protection was an internationally wrongful act; thus there was a relationship of cause and effect between the two, and logically speaking, the fate of the two sets of draft articles must be linked.

60. The Special Rapporteur proposed to re-examine the draft articles adopted on first reading in the light of comments made, to amend or replace certain provisions where necessary and to propose one major innovation, namely, a provision devoted to the right of an injured national of a State, or rather, of a person protected, to compensation.

61. Draft article 1 dealt with the definition and scope of diplomatic protection. The new paragraph 2 of the article proposed in paragraph 21 of the report covered the case of refugees and stateless persons, and rightly so.

62. On the distinction introduced between diplomatic protection and consular protection or assistance (the former term being the one employed in the Vienna Convention on Consular Relations), he wondered whether it was really necessary or possible to distinguish clearly between the two institutions. The new paragraph 2 proposed for draft article 1 put forward a solution consisting in stating that diplomatic protection did not include the exercise of consular assistance, but that left the problem unresolved. Either a clear and incontrovertible definition should be given of consular assistance, or else the proposed new paragraph 2 should be deleted. Mention had been made of European citizenship, leading to some very interesting remarks by Mr. Pellet. In that connection, he drew attention to a recent amendment to the 1991 Protocol on the Community Court of Justice of ECOWAS, which now gave States the option to institute proceedings on behalf of their nationals against other member States in cases where attempts at amicable settlement failed (art. 9, para. 3). An analysis of the case law of that African subregional court would be interesting.

63. Turning to draft article 2, he said that the new paragraph 2 was acceptable as long as its scope was limited exclusively to the most pressing cases. On draft article 3, the proposed new version of paragraph 1 did not differ fundamentally from the previous version. The proposed new text of draft article 4 must not be construed as implying that succession of States was the sole means of acquiring nationality through naturalization.

64. The new version of paragraph 1 of draft article 5 proposed in paragraph 47 of the report was more acceptable than the earlier version. The new paragraph 2 seemed logical and was likewise acceptable. No particular problems arose with regard to draft articles 6 to 8. On draft article 9, while the three paragraphs that it now comprised seemed to constitute a step in the right direction (para. 55 of the report), questions remained regarding the article as a whole. Accordingly, it deserved further consideration.

65. Draft article 11 dealt with an important matter, and both its content and its form had been criticized, by Mr. Pellet among others. Those remarks should be taken into account insofar as was possible. He had no particular difficulties with draft article 14; as for draft article 15, the title should be amended for the sake of clarity. On draft article 16, difficulties arose with regard to the classification, evaluation and effectiveness of remedies. Nevertheless, the new subparagraphs (a) and (c) seemed to be a step in the right direction, although their drafting could certainly be improved. The functional autonomy of draft articles 17 and 18 should be reviewed by the Drafting Committee. On draft article 19, he endorsed the views expressed by Mr. Momtaz and others.

66. The proposed new draft article 20 on the right of the injured national, or protected person, to receive compensation was a fundamental provision which merited close consideration. The Drafting Committee should endeavour to take account of the interesting remarks already made about that provision by Mr. Pellet and others.

67. Mr. CHEE said that the seventh report on diplomatic protection was well researched, balanced and written in an accessible style. On draft article 1, the Special Rapporteur devoted much space, beginning with paragraph 15 of his report, to drawing a distinction between diplomatic protection and consular assistance. However, the role of the consular office was not restricted to providing assistance: diplomatic and consular officers could perform their substantive rules interchangeably. Under article 3 of the 1961 Vienna Convention on Diplomatic Relations and article 17 of the 1963 Vienna Convention on Consular Relations, consular officers could perform a representative function, something which was normally reserved for the diplomatic officer. That being the case, the distinction introduced between the functions of diplomatic and consular officers did not seem warranted. Draft article 1 should therefore omit any reference to consular assistance.

68. Pursuant to the proposed new paragraph 2 of draft article 2, when a State exercised diplomatic protection, a respondent State had an obligation to accept a claim of diplomatic protection made in accordance with the draft articles. That raised the question whether a respondent State should be under an obligation to recognize an unacceptable or unfounded claim. The Special Rapporteur's proposal was based on the Austrian comment on draft article 2, reproduced in paragraph 24 of the report, but that view was too one-sided to be acceptable. The proposed new paragraph 2 of draft article 2 should be deleted. Draft article 3 should be merged with draft article 8 in order to streamline the references to diplomatic protection of lawful residents, refugees and stateless persons.

69. He endorsed draft article 4, which covered the traditional mode of acquisition of nationality, with the addition of the phrase "if it is not inconsistent with international law". Draft article 5, on continuous nationality, had found its place in customary international law, supported by the rulings of international tribunals and scholars. Draft articles 6 and 7 were basically procedural. He also supported draft article 9, which reflected the

ruling of the ICJ in the 1970 *Barcelona Traction* case. The reference in draft article 10 to the case of diplomatic protection for a corporation which had ceased to exist appeared to concern recovery of assets from a bankrupt corporation. It applied the same rule as was applicable to natural persons and had his support.

70. On draft article 11, he agreed with the Special Rapporteur's suggestion in paragraphs 63 and 65 of his report that subparagraphs (a) and (b) should be retained. It should be recalled that in the *Barcelona Traction* case, the ICJ had held that bilateral investment treaties should be concluded to protect the interests of foreign shareholders in a corporation. Draft article 12, on direct injury to shareholders, should be retained for the reasons explained in paragraph 69 of the report. With regard to draft article 13, no objections had been voiced extending diplomatic protection to other legal persons, and he agreed with the views outlined in paragraph 70 of the report. He endorsed the revised draft article 14 and, on draft article 15, agreed with the views expounded in paragraph 75 of the report.

71. On draft article 16, relating to exceptions to the local remedy rule, he preferred the shorter of the two proposed new formulations of subparagraph (a), which retained the element of "reasonableness" advocated by Judge Lauterpacht.⁵¹ Draft article 17 was a "without prejudice" clause which enabled victims of injury and States to secure redress for an injury by means other than diplomatic protection, such as conciliation, arbitration or judicial settlement. Draft article 18 recognized the validity of bilateral and multilateral investment treaties for the protection of foreign investors, and merited support. Draft article 19 raised various issues concerning the human rights of ships' crews, for which reason it had his support.

72. In paragraph 96 of his report, the Special Rapporteur observed that State practice in providing compensation for injured nationals was contradictory, some States holding that an injured national had no right to claim any compensation received by the State, while others acknowledged some obligation to disburse compensation to the injured national. He supported the practice of the United States, which had established a Foreign Claims Settlement Commission to distribute funds received from foreign Governments among the various claimants. After all, if injured nationals could not receive compensation from the wrongdoing State, diplomatic protection would be futile from the point of view of the injured person. Accordingly, he supported the proposed article 20, paragraph 2 as set out in paragraph 103 of the report.

73. As to the final form that the draft articles should take, the Special Rapporteur should aim for them to become a convention, as they constituted an exemplary exercise in codification in accordance with article 15 of the Commission's Statute. Lastly, he wished to commend the excellent comment by Italy contained in document A/CN.4/561/Add.2 to the Special Rapporteur's close scrutiny.

⁵¹ See footnote 32 above.

74. Mr. CANDIOTI said that the seventh report on diplomatic protection contained voluminous information, new analysis and useful new proposals that would facilitate a thorough second reading of the draft articles, which should be ready in time for submission to the sixty-first session of the General Assembly. On draft article 1, he agreed that the clearest possible description of what was meant by diplomatic protection was needed. The confusion engendered by the frequent use of the words “protection” and “diplomatic” in lay parlance should be avoided and the institution of diplomatic protection should be clearly differentiated from other concepts such as the protection or assistance afforded by diplomatic and consular missions to their nationals abroad. The distinction would be reinforced if the article stated directly that diplomatic protection was a means of invoking and implementing the responsibility of a State for an internationally wrongful act inflicted on a person who was the national of another State. He agreed with those who advocated abandoning old-fashioned fictions and terminology, and accordingly proposed that the Drafting Committee should consider the following alternative formulation for draft article 1:

“For the purposes of the present draft articles, diplomatic protection consists of resort by a State to diplomatic action or other means of peaceful settlement in order to invoke and implement the responsibility of another State for an injury caused by an internationally wrongful act of this State to a natural or legal person that is a national of the former State”.

Any ambiguities would be dispelled if, from the outset, diplomatic protection was explicitly set within the framework of responsibility of States for an internationally wrongful act.

75. He endorsed the Special Rapporteur’s suggestion in paragraph 6 of his report that diplomatic protection was in fact a subset of the topic of responsibility of States for internationally wrongful acts and that accordingly, the fate of the present draft articles was closely bound up with that of the draft articles on that topic. Strictly speaking, the entire draft was a development of article 44 of the draft articles on responsibility of States. Accordingly, he saw no need to include in draft article 1 the new paragraph 2 suggested by the Special Rapporteur. He agreed with the view that if the article clearly defined what was meant by diplomatic protection, it was neither necessary nor technically desirable to expressly exclude something that was not diplomatic protection. Similarly, he saw no need to include in the definition a reference to the exception set out in draft article 8.

76. On draft article 2, he had a preference for retaining the clear and concise wording used in the version adopted on first reading. Like others, he had doubts about the need for a new paragraph 2 concerning the obligation of the State to accept a claim of diplomatic protection. Perhaps what was meant was that the State to which the internationally wrongful act was attributed should receive the claim and process it in good faith, and if the claim fulfilled the conditions for admissibility laid down in the draft articles, the processing would not stop there but would entail establishing the scope of responsibility and its consequences. But he had doubts even about including a more precise formulation. The 2001 draft on State responsibility for internationally wrongful acts said

nothing on the subject and he was inclined to think that would also be the wisest approach in the context of the articles on diplomatic protection.

77. He endorsed the proposed amendments to draft articles 3 and 4. On draft article 5, he endorsed the new formulation of the principle of continuous nationality and the Special Rapporteur’s arguments for rejecting the date of the final resolution of the claim as *dies ad quem*. The new formulation proposed for paragraph 1 of the article was considerably more exacting than the previous wording, since it required continuity from the date of injury to the date of the presentation of the claim, whereas the previous formulation had required the individual should be a national of the protecting State solely at those two moments. The new requirement was more consistent with the principle of continuity. The same change had been made in the new version of draft article 10 with regard to the continuous nationality of corporations.

78. On the other hand, in draft article 7 on the predominant nationality in the event of multiple nationality, the earlier wording was used: a given nationality had to be predominant only at the time of the injury and at the date of the presentation of the claim. It would be interesting to hear why changes had been made to draft articles 5 and 10 but not to draft article 7.

79. Concerning draft article 8, an exception in favour of stateless persons and refugees, his preference was to maintain the flexible approach to the concept of refugee set out in the draft adopted on first reading. Moreover, he generally agreed with the proposals made by the Special Rapporteur for revision of the wording of draft articles 9 to 11, 13 and 14.

80. With regard to exceptions to the exhaustion of local remedies rule under draft article 16, he tended to prefer the first alternative reformulation of subparagraph (a), and agreed with the proposed changes to subparagraph (c). On the other hand, he would like to retain the earlier version of draft articles 17, 18 and 19, which had been the result of extensive discussion on first reading.

81. He welcomed the Special Rapporteur’s considerable efforts to submit a new draft article 20 on the subject of the right of an injured national to receive compensation obtained by the protecting State as a result of diplomatic protection—a matter not yet broached. He understood the reservations of some members of the Commission about the relatively late submission of the proposal, the advisability of keeping to the Commission’s well-honed methods of work by examining the precedents and implications for each rule and the desirability of giving States the opportunity to study a provision before giving it final form. Nevertheless, he thought it laudable and justifiable to include in the draft articles the principle that injury suffered by a protected natural or legal person should be taken into account in quantifying the claim and that the person had the right to receive any compensation paid. He could accordingly endorse any decision taken to incorporate provisions, recommendations or commentaries along the lines set out in the proposed new draft article 20.

82. Mr. MANSFIELD said that the more the Commission discussed the topic of diplomatic protection and the more

deeply it explored the issues, the less sure he was of its practical significance as a whole, let alone the practical application of some of the relatively rarefied points to which so much time had been devoted. The Commission had always accepted that its work on the topic was essentially residual in character, given the developments in international human rights law on the one hand and bilateral investment treaties on the other. That did not mean that it was not a worthwhile task, but it did suggest an appropriate context in which it could be viewed.

83. It was interesting that few members of the Commission had spoken of their experience in the lodging and processing of formal claims of diplomatic protection of individuals. In 20 years of wide-ranging foreign office legal work, he personally did not recall ever having been on either end of a formal claim, and he suspected that that might well be the case in most smaller countries. Certainly there had been situations in which the actions of the authorities in other States in relation to a New Zealand national had been the subject of enquiries or discussions through consular or diplomatic representatives, but they had not proceeded to the lodging of a formal claim for compensation, hence his hesitation. In a topic such as diplomatic protection, in which the Commission's task was to codify practice and incorporate such changes as experience suggested would be sensible or helpful in current international life, he would be much more comfortable if he could draw on practical case experience from his own or other small States.

84. On the other hand, the relative paucity of small State experience with formal claims was scarcely surprising and might in itself indicate some factors which the Commission should take into account. If it appeared that a State had committed an internationally wrongful act against the national of another State, it was reasonably easy for the State of nationality, even a small State, to make enquiries and have discussions at the diplomatic level about the alleged injury. In many if not most circumstances, that would result in an appropriate resolution of the matter. However, if the wrongdoing State either refused to acknowledge that an internationally wrongful act had been committed or simply refused to do anything about it, there had to be a serious question whether there was anything to be gained from taking the further step of lodging a formal claim. In the absence of a pre-existing dispute settlement agreement, it was unlikely, unless the State of nationality had substantial leverage, that the recalcitrant State would be persuaded to agree to consideration of the claim by an independent tribunal. If that was so, then it might mean that the less formal process of enquiry and discussion at diplomatic level (the "lower end" of diplomatic action) might be of more practical relevance in the diplomatic protection of individuals than the lodging and processing of formal claims. Of course, when large numbers of individuals were involved in a major tragedy or some similar situation, that situation was likely to be governed by a specially negotiated arrangement.

85. In the case of corporations, much of the discussion on the seventh report as well as on the Special Rapporteur's earlier reports suggested that the paradigm about which the Commission needed to be concerned was how to protect small foreign investors in a company whose interests might have been adversely affected by the wrongful act

of a host State and, in particular, how to ensure that the State or States of nationality of those small investors were able to lodge and process formal claims in respect of the wrong committed. He wondered whether that was an accurate picture, or whether it was a fiction that might be as potentially misleading as the *Mavrommatis* fiction.

86. In the case of small businesses, he suspected that, just as with individuals, it was in the process of informal enquiry and discussion through the diplomatic channel that a resolution was most likely to be found, if it was to be found at all. The lodging and processing of formal claims of diplomatic protection, with the attendant tribunals and counsel, was much more likely to involve large multinational corporations, whose decisions as to where they were incorporated and the places from which they conducted their business were usually the result of a complex economic and political analysis. The shareholders of such corporations who might decide to request or press a State or States to exercise formal diplomatic protection in respect of their interests through the lodging of a claim were unlikely to be small investors, but rather, large shareholding interests of parent companies or managers of huge investment funds.

87. Another controlling image that seemed to underlie the Commission's discussions on claims in respect of corporations was that of an arbitrary confiscation of corporate assets or rights through some form of nationalization. However, a quite different image could be the lobbying for a claim of diplomatic protection by a foreign company that had a monopoly on a particular industry, as a means of effectively blocking the passage of legislation by the host State which the latter had come to realize was essential, for example to protect its environment.

88. Precision in legal rules was a good objective, especially when there was reasonable confidence that it would produce a just and equitable outcome in all reasonably imaginable situations, but where the situations of application might vary widely, too much precision might work against the achievement of equity and justice.

89. It was against that background, and with the caveat about the lack of practical cases to draw on, that he would offer a number of comments on the draft articles themselves.

90. In respect of draft article 1, he agreed with those who suggested that it was not necessary to include the proposed new paragraph 2 and that the distinction between diplomatic protection and consular functions was best dealt with in the commentaries. However, in the light of the potential importance of enquiry and negotiation in resolving many situations, he invited the Special Rapporteur to have another look at the fourth sentence of paragraph 16 of the seventh report: as currently worded, it could be interpreted as meaning that the lower end of diplomatic action, such as enquiry, discussion and negotiation, could not be undertaken unless local remedies had been exhausted. He did not think that was what had been intended, it was not what draft article 14 said, and in practical terms it might be useful to emphasize that that was not the case.

91. He had no difficulty with the underlying thought in the proposed new second paragraph for draft article 2, but as other members had noted, the current wording must be modified. Although he sympathized with the thinking behind the Italian proposal to institute a duty to exercise diplomatic protection in certain cases, it raised significant difficulties, and there were other solutions to the problem that it attempted to address. It might be noted in passing that, in the modern world, many people could live their entire lives away from their State of nationality and maintain little or no connection with it. The process of instituting a claim was complex and time-consuming and would be a major undertaking for a small State, and one that could distort national priorities. Such a burden would be unwarranted where little or no connection had been maintained and where there were, for example, other States or non-governmental organizations better positioned to use other and potentially more effective procedures.

92. The thrust of draft article 4 was sound, and the new version was an improvement, but it might benefit from further attention in the Drafting Committee in the light of the comments by Ms. Escarameia and Mr. Pellet.

93. With regard to draft article 5, on which there had been much discussion, he was inclined to think that the Special Rapporteur's proposed formulation struck a reasonable balance.

94. Draft article 8 was particularly important, as it established new categories of persons in respect of whom diplomatic protection might be exercised. Along with draft article 19 on ships' crews, it might prove to be of significant practical benefit. He continued to think that the criterion of "lawfully and habitually resident" raised the bar rather high, but in the end there had been a consensus in the Commission on the formulation, which it was probably not worth revisiting unless there was a clear trend in the comments of States. The meaning of "refugee" was best dealt with in the commentary. Clearly, the claimant State could not invent its own standards as to what persons might be classed as refugees. On the other hand, there might be persons who would be generally recognized internationally as "refugees" who might not, at a particular point in time, fall strictly within the definition of the 1951 Convention relating to the Status of Refugees.

95. In respect of draft article 9, he had never seen the justification for attempts to find ways of including all the various mechanisms through which a company might establish links with a State with formulations such as "or some similar connection". Companies made hard-headed commercial decisions about where they incorporated, and those decisions ought to include the question of what they might expect in terms of diplomatic protection, should it be needed. That said, it seemed to be a fact of life today that many corporations actively sought to have bipolar or multipolar personalities, and paragraph 3 of the proposed new draft was probably the only reasonable way of dealing with that fact, however difficult it might be to apply in any particular case. There again, it was to be hoped that in most cases the situation would be covered by a bilateral investment treaty.

96. He had no practical insights that led him to favour either the earlier or the proposed new version of draft article 10. The same was largely true of draft article 11.

97. With regard to draft article 16, he was among those who favoured the original proposal over the suggested new wording, and there he agreed with Mr. Pellet. The question whether local remedies needed to be exhausted in all circumstances was best left to the judicial body which could fully assess those circumstances. It did not need detailed guidance, and subparagraphs (a) and (c) in the original text seemed quite sufficient. In earlier discussion of subparagraph (c), he had attempted to give some examples of situations in which it would simply be unreasonable for the local remedies rule to be insisted upon.

98. Draft article 19 on ships' crews was of real practical benefit and could be of direct importance for sailors from small States with few, if any, overseas representatives. He was strongly opposed to deleting the provision and sending the issue to another international body, which might take years to get around to considering it. Mr. Momtaz was, however, right to point out that draft article 19 could well be placed after draft article 17.

99. The general policy concerns that underpinned the proposed draft article 20 deserved support in principle. However, Mr. Matheson's comments at the previous meeting on the practical and policy difficulties that could arise with the text as it stood suggested that it was an issue which needed further exploration before the Commission could adopt it. It might be possible to work on it further during the current session and develop some formulations that might attract consensus. As a minimum, it could be dealt with in the commentaries in the light of the discussion in the Commission. As Mr. Gaja had suggested, there were also intermediate possibilities.

100. He had no objection to the work eventually becoming a convention, but saw no strong need for such an outcome. Were it to become a convention, States would probably decide whether to become parties to it on the basis of how the rules would apply to situations they thought most likely to be relevant to them. The situations in respect of possible claims relating to corporations might vary enormously. To that extent, it might be helpful, regardless of whether the eventual outcome was a convention, if the commentaries indicated that while the articles represented an effort to formulate rules of general application, States might wish to use them as reference points for the development in bilateral arrangements of variations on those rules that suited their particular circumstances.

101. It was important for the Commission to complete its work on the topic of diplomatic protection at the current session. He had absolute confidence that, under the Special Rapporteur's guidance, and with careful work in the Drafting Committee, it would be possible to do so.

102. Mr. DAOUDI noted that whereas some members had considered that the draft articles adopted an unduly conservative stance with regard to the development of international law and in particular human rights law, others contended that it departed from the traditional notion of

diplomatic protection, as reflected in the *Mavrommatis* case, by enabling certain categories of persons (stateless persons and refugees in draft article 8) to enjoy diplomatic protection and by involving the protected individual in the protection procedure or granting that person a right to compensation (the proposed draft article 20). Those differing perceptions resulted from the fact that the institution was rapidly evolving. The *Mavrommatis* formula reflected past practice, in which diplomatic protection had been considered to be the right of a State, and had been criticized as a fiction, because the injury had in fact been suffered by the individual. The recent linking of the evolution of the institution of diplomatic protection to that of human rights was an acknowledgement that there was an overlap between diplomatic protection and protection of the rights of the individual. Viewed from that perspective, the individual acquired a limited international legal personality, but did not have the legal capacity to protect his own rights. To remedy that situation, it would be necessary to make use of another fiction, namely, that of representation, in which the State represented its national in the exercise of his rights. That hypothesis would imply either that the individual derived a right of his own from the violation, or else that international law conferred on the individual his own right to diplomatic protection. It was not clear that this was the case, because if the individual had his own rights in international law, the exercise of which he could entrust to the State of which he was a national, nothing would prevent him from entrusting the exercise of those rights to another State—a step which the rules of diplomatic protection did not currently permit. Moreover, it was not established that the individual had a right of his own to diplomatic protection. There was as yet no question of imposing on the national's State an obligation to exercise diplomatic protection on his behalf, as could be seen from the wording of draft article 2 and in paragraph (2) of the commentary, according to which “[a] State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so”.

103. Nor was it certain that this was the case with regard to the recognition of the right of the national to compensation, as set out in the proposed draft article 20, paragraph 2. That had been illustrated by Mr. Matheson at the previous meeting when he had pointed out that the State exercising the protection had the power to engage in bilateral negotiation on compensation and that the United States Supreme Court had recognized the discretionary power of the United States Government in that area.

104. With regard to proposed new draft article 1, paragraph 2, he noted that diplomatic assistance differed from consular assistance, and that the consuls of a State could not grant consular protection to the national of a third State without the prior consent of that State and of the State to which the consul was accredited. That provision reflected the pleadings of the United States before the ICJ in the *LaGrand* case, but as that argument challenged the Court's competence, it had no place in the draft articles.

105. Proposed draft article 2, paragraph 2, which was based on the Austrian proposal, was unnecessary for the reasons set out by Mr. Kolodkin at the previous meeting.

106. The new version of draft article 3, paragraph 1, merely expressed the same idea as the previous version, in different words. As to draft article 3, paragraph 2, he noted that the cases cited in draft article 8 were not the only ones in which a State exercised diplomatic protection in respect of a person who was not its national. In the example of conventions on diplomatic assistance or agreements on the representation of interests when diplomatic relations had been severed, a State could very well exercise diplomatic protection in respect of the nationals of the other contracting party, subject, of course, to the consent of the State *vis-à-vis* which the protection was exercised.

107. He endorsed the new wording of draft article 4 proposed by the Special Rapporteur in paragraph 30.

108. For the convincing reasons given by the Special Rapporteur in paragraph 43 of the seventh report, he considered that the link of nationality should be continuous from the date of injury until the date of the presentation of the claim. He therefore endorsed the new wording of draft article 5, paragraph 1, and also supported the new draft paragraph 2.

109. Draft article 8 was acceptable in its current formulation. The Commission should not adopt the ideas put forward by the Nordic countries. The definition of “refugee” should be the one used in the 1951 Convention relating to the Status of Refugees; he endorsed Austria's reasoning in that regard.

110. The new wording of draft article 9 was in keeping with the evolving structure of modern corporations, and a situation in which two or more States could exercise diplomatic protection was entirely plausible.

111. It was preferable to retain the existing formulation of draft article 16 (a), with the addition of the words “available and”, as suggested by Austria. Draft articles 17 and 18 covered analogous problems, and should therefore be merged to form a single provision.

112. The proposed draft article 20 took into account the rights of the protected person from two perspectives. Under paragraph 1, the person was involved in quantifying the injury suffered, prior to the transfer to him, in principle, of the full amount of the compensation received. The drafting of paragraph 1 did not prevent the State from claiming compensation for the injury it had suffered as a result of the violation of international law by the wrongdoing State when both the State and its national suffered injury. Accordingly, he favoured the current formulation.

113. Paragraph 2 established the right of the person concerned to receive, at the end of the diplomatic protection process, the compensation awarded. As currently worded, it did not establish a clear link between what had been quantified as the injury suffered by the person concerned and what the State must pay him from the sum recovered, after deduction of the costs incurred in bringing the claim. The problem would be more pressing still if the wording “should” was adopted in preference to “shall”.

114. In closing, he said that both the draft articles on responsibility of States and those on diplomatic protection

should take the form of international conventions, since the two subjects were complementary.

115. Mr. ADDO said he fully agreed with the changes the Special Rapporteur had made to a number of the draft articles. However, he was troubled by the proposed draft article 20. He endorsed the right of the injured national to receive compensation, so that a duty should be imposed on the State to hand over the compensation to the injured individual.

116. Where injury was suffered by a natural person or other legal entity recognized by domestic law, the general rule was that the right to bring a claim in respect of the wrong lay with the State of the victim's nationality. There was thus a presumption that nationals were indispensable elements of a State's territorial attributes, so that a wrong done to the national invariably affected the rights of the State.

117. Since the exercise of diplomatic protection was generally viewed as the right of the State, it had been consistently argued, for example in the *Barcelona Traction* case, that the State had absolute discretion in exercising that right. It was further accepted that the decision whether to exercise diplomatic protection was invariably influenced by political considerations rather than the legal merits of the claim. That point was made succinctly in paragraph 79 of the judgment in the *Barcelona Traction* case, in which the Court had found that:

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.

118. As a corollary, the State was under no obligation to transmit the compensation obtained to any of the individuals concerned. Moreover, as the right of protection was that of the State, a State might therefore choose to lodge a claim even in the face of opposition from the injured person.

119. Although the discretionary nature of diplomatic protection had been sharply criticized in recent years as being incompatible with international human rights mechanisms, there was insufficient evidence to support the thesis that general international law already imposed an obligation on States to exercise diplomatic protection, even though that might be desirable as part of the progressive development of the law.

120. In closing, he said that all the draft articles with the exception of the proposed draft article 20 should be referred to the Drafting Committee.

121. The CHAIRPERSON invited the Special Rapporteur to address some general remarks to the Commission to assist it in the process of referring the seventh report to the Drafting Committee.

122. Mr. DUGARD (Special Rapporteur) said that two provisions still raised difficulties. First, there was the proposal by the Government of Italy to impose, in draft

article 2, an obligation on States to exercise diplomatic protection. That proposal had met with the approval of a few members of the Commission, and he was to some extent in favour of it himself. However, the majority of members had either been silent on the subject—implying support for the status quo, which vested discretion in the State—or else had spoken against it. He therefore suggested that the proposal should not be referred to the Drafting Committee, and that instead it could perhaps be pointed out in the commentary that international law was developing in that direction. As for his proposed new draft article 20, according to his own count, 12 members had spoken in favour of its inclusion, while six had been against. Of the 12 in favour, many had expressed the view that the Commission should adopt a cautious and moderate position. Of the six who had spoken against it, four had said that it was unwise or premature to engage in such an exercise. He therefore suggested that all 19 draft articles contained in the seventh report, which had been adopted on first reading,⁵² together with his proposed draft article 20, should be referred to the Drafting Committee for consideration in the light of comments by members of the Commission and by Governments, with the caveat that the latter should not engage in too radical an exercise on the subject, since the majority of the Commission favoured a cautious approach.

123. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer all the proposals to the Drafting Committee for consideration on second reading.

It was so decided.

Organization of work of the session (continued)*

[Agenda item 1]

124. Mr. KOLODKIN (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of diplomatic protection was currently composed of Mr. Brownlie, Mr. Chee, Mr. Candioti, Mr. Economides, Ms. Escameia, Mr. Gaja, Mr. Kemicha, Mr. Mansfield, Mr. Matheson, Mr. Momtaz and Mr. Yamada, together with Mr. Dugard (Special Rapporteur) and Ms. Xue (Rapporteur), *ex officio*.

The meeting rose at 1.10 p.m.

2872nd MEETING

Tuesday, 9 May 2006, at 10.02 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi,

* Resumed from the 2868th meeting.

⁵² See footnote 7 above.