Document:-
A/CN.4/2881

Summary record of the 2881st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2006, **vol. I**

gas, for political, technical and also normative reasons, in the light of the United Nations resolutions already adopted on the matter. As Mr. Opertti Badan had pointed out, the Commission already had a mandate for its future work. However, at the start of the next quinquennium, the newly constituted Commission could review the question in the light of political, legal and other considerations. For his own part, he would want to see a very broad consensus reached before the Commission addressed the subject of oil and gas.

43. Mr. BAENA SOARES said that, as one of the longest-serving members of the Commission, he was a strong believer in mandates. Since the Commission already had a mandate from the competent authority, it must not shrink from carrying it out. It could hardly request the General Assembly to reiterate or alter that mandate, or decide to fulfil it only in part; to do so would undermine its credibility as a body.

44. Mr. CANDIOTI (Chairperson of the Working Group), thanking the members of the Commission for their comments and the support expressed, noted that no specific suggestions on the draft articles had been made. It should be remembered that the Commission was only beginning its consideration of the draft on first reading, and that much remained to be done before the work was completed.

45. The CHAIRPERSON, speaking as a member of the Commission, saluted the efforts that had produced results on a highly technical subject that had significant implications. At the previous session, he had said that the topic needed to be refocused, and he was gratified to see that that had been done, although he would have liked to see more emphasis placed on groundwaters, not least in the title of the Working Group's report.

46. If he heard no objection, he would take it that the Commission wished to refer the draft articles contained in the report of the Working Group on Shared natural resources to the Drafting Committee.

It was so decided.

The meeting rose at 12.45 p.m.

2880th MEETING

Tuesday, 23 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

Organization of work of the session (*continued*)[*]

[Agenda item 1]

1. The CHAIRPERSON extended a welcome to Sir Kenneth Keith, a judge of the International Court of Justice, and expressed gratification that the Commission's work aroused the interest of eminent figures in the field of international law. He then invited the Chairperson of the Drafting Committee on reservations to treaties to inform the Commission of the Committee's membership.

2. Mr. KOLODKIN (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties was composed of Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson and Mr. Yamada, together with Mr. Pellet (Special Rapporteur) and Ms. Xue, *ex officio*.

3. The CHAIRPERSON submitted the programme for the following fortnight, which would complete the first part of the session, and noted that the programme had been drawn up in such a way as to enable the Commission to complete its work as originally planned.

The meeting rose at 10.14 a.m.

2881st MEETING

Tuesday, 30 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Diplomatic protection[**] (*concluded*) (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[138])

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. KOLODKIN (Chairperson of the Drafting Committee) introduced the texts and titles of the draft articles adopted by the Drafting Committee, as contained in document A/CN.4/L.684 and Corr.1–2, which read:

---

[*] Resumed from the 2872nd meeting.

[**] Resumed from the 2871st meeting.

[138] Mimeographed; available on the Commission's website. The text reproduced in this volume includes the corrigenda A/CN.4/L.684/Corr.1–2.

DIPLOMATIC PROTECTION

Part One

GENERAL PROVISIONS

Article 1. Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Article 2. Right to exercise diplomatic protection

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

Part Two

NATIONALITY

Chapter I

GENERAL PRINCIPLES

Article 3. Protection by the State of nationality

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

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Chapter II

NATURAL PERSONS

Article 4. State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Article 5. Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

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

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

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6. Multiple nationality and claim against a third State

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

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

Article 7. Multiple nationality and claim against a State of nationality

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

Article 8. Stateless persons and refugees

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

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

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

Chapter III

LEGAL PERSONS

Article 9. State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Article 10. Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11. Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(*a*) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(*b*) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Article 12. Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13. Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

Part Three

LOCAL REMEDIES

Article 14. Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

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

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

Article 15. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

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

(*c*) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(*d*) the injured person is manifestly precluded from pursuing local remedies; or

(*e*) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16. Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17. Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18. Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19. Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(*a*) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(*b*) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(*c*) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

2. The Drafting Committee had held 10 meetings on the topic from 8 to 16 May 2006, as well as one additional meeting on 19 May to review the text, and had succeeded in completing the second reading of all the draft articles. It had reviewed the draft articles adopted on the first reading at the fifty-sixth session,[139] taking into account the comments made by Governments either in the Sixth Committee or in writing and the views expressed by members of the Commission in plenary, as well as the recommendations of the Special Rapporteur in his seventh report.

3. The Drafting Committee was submitting its report with the recommendation that the Commission adopt the draft articles on second reading.

4. The Drafting Committee had decided to retain the structure of the draft articles as adopted on first reading. Two draft articles had been merged and one new draft article had been added.

5. Part One was entitled "General Provisions" and contained the first two articles applicable to the entire set of draft articles.

6. Draft article 1 dealt with the definition of diplomatic protection for the purposes of the draft articles and the scope of the draft articles. During the plenary debate, several speakers had expressed opposition to the inclusion of the reference to the State adopting "in its own right" the cause of its national, which had been included on first reading as a reflection of the principle in the *Mavrommatis Palestine Concessions* case. There had also been a suggestion by the Government of Italy that the Commission take a different approach to draft article 1 by inserting a reference to the rights of the injured individual (its national). The Drafting Committee had proceeded on the basis of a proposal which had emerged from the plenary debate and which had avoided any reference to the basis upon which the State was invoking diplomatic protection, focusing instead on the responsibility of the injuring State. The understanding had been that such reformulation did not prevent the State from acting in its own right, a principle which was well established in international law. Instead, the new formulation reserved the question as to whether the State was acting in its own right or that of the individual, or both. That proposal had become the basis of the article subsequently adopted on second reading.

7. The opening phrase, "[f]or the purposes of the present draft articles", had been added to limit the definition to the draft articles. Next, the provision stated that "diplomatic protection consists of the invocation by a State ... of the responsibility of another State for an injury caused by an internationally wrongful act"; that was a conscious attempt to align the text with the language of the 2001 draft articles on responsibility of States for internationally wrongful acts.[140] Thus, the Drafting Committee had decided to indicate that the State of nationality would be "invoking" the responsibility of the wrongdoing State through diplomatic action or other means of peaceful settlement "with a view to the implementation of such responsibility". The latter phrase further captured the notion that diplomatic protection was a process of invocation of responsibility for the purpose of implementing such responsibility. The understanding was that reference was being made to State-to-State claims.

[139] See footnote 7 above.

[140] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

8. With regard to the phrase "through diplomatic action or other means of peaceful settlement", the Drafting Committee had also considered whether the word "action" had to be aligned with other terminology used in the draft articles, such as "diplomatic protection" in draft article 2 and "international claim" in draft articles 14 and 15. The prevailing view had been that the reference to diplomatic "action" was nonetheless appropriate in the draft article since it was one of the forms of diplomatic protection, which, as a broader concept, also included "other means of peaceful settlement", it being recalled that the latter phrase had been inserted during the first reading to make it clear that diplomatic action did not include resort to the use of force.

9. One of the issues considered in the Drafting Committee had been whether low-level interactions between States would be regarded as diplomatic protection and thereby require the exhaustion of local remedies, the concern being that such a requirement could interfere with the daily interaction between States. The Committee's understanding had been that what was important was whether the action in question amounted to the invocation of the responsibility of the respondent State. If so, then the draft articles, including the provisions on the exhaustion of local remedies, would apply.

10. The reference to "natural or legal person" had been inserted to replace the word "national" in the text adopted on first reading because of the difficulty faced by some States in categorizing legal persons as "nationals". In his report, the Special Rapporteur had proposed (para. 10 of the report), on the suggestion of the Netherlands, to include a reference to draft article 8 so as to recognize the extension of diplomatic protection to stateless persons and refugees under that article. However, the Drafting Committee had felt that it was not necessary to include exceptions in a definition.

11. It would be recalled that in his seventh report (para. 21), the Special Rapporteur had proposed a paragraph 2 specifically excluding the exercise of consular assistance from the scope of the draft articles. However, as there had been no support for the proposal in the plenary, the Drafting Committee had decided not to include such a paragraph, leaving the issue to be covered in the commentary.

12. The title of draft article 1 remained "Definition and scope", as in the text adopted on first reading.

13. Draft article 2 established the principle that it was States that were entitled to exercise diplomatic protection in accordance with the provisions of the draft articles. The Drafting Committee had adopted the same text as had been adopted on first reading.

14. In his seventh report (para. 24), the Special Rapporteur had included a second paragraph in his proposal for draft article 2, dealing with the obligation of the respondent State to accept a claim of diplomatic protection made in accordance with the draft articles, as had been proposed by the Government of Austria. The Drafting Committee had noted that the Special Rapporteur's proposal had been opposed in plenary, and it had decided not to include the new paragraph, but to refer to the matter in the commentary.

15. Italy had proposed an even more far-reaching addition to draft article 2, purporting to establish a duty of a State to exercise diplomatic protection on behalf of its injured national in certain cases involving serious breaches of international law. The Drafting Committee had also taken into account similar proposals made during the plenary debate. Nonetheless, the Committee's view had been that such proposals had not been supported by the majority in the Commission and, accordingly, should not be dealt with in the draft articles.

16. The title of draft article 2 remained the same as that adopted on first reading, namely "Right to exercise diplomatic protection".

17. The Drafting Committee had decided to retain the structure of Part Two as adopted on first reading. Part Two, which dealt with the nationality of claims, was divided into three chapters, the first establishing the general principle applicable to both natural and legal persons, the second and third dealing with natural and legal persons respectively. Part Two was entitled "Nationality".

18. With regard to Chapter I of Part Two, which comprised only draft article 3, the Drafting Committee had decided to retain the title "General principles".

19. For draft article 3, the Drafting Committee had had before it a proposal for a reformulation of paragraph 1, based on a proposal by the Government of the Netherlands. However, it had been of the view that the original formulation was preferable because it answered the question as to which State was entitled to exercise diplomatic protection, whereas the new proposal emphasized the State of nationality and was more open-ended, since it begged the question of which State was the State of nationality.

20. The Drafting Committee had also decided to retain the text of paragraph 2 adopted on first reading, replacing the word "non-national" by "person that is not its national" to make the text more precise.

21. The title of draft article 3 was "Protection by the State of nationality".

22. Chapter II of Part Two dealt with the nationality of natural persons and comprised draft articles 4 to 8. The Drafting Committee had decided to retain the title "Natural persons", used in the text adopted on first reading.

23. The Drafting Committee had noted that the Special Rapporteur had included in his proposal for draft article 4 a suggestion by the Government of Austria that the reference to "succession of States" in the text adopted on first reading be replaced by "a consequence of the succession of States" (para. 30). However, the Committee had not accepted the proposal, since it was already implied that it was as a consequence of any of the factors listed in the draft article, namely birth, descent, naturalization and succession of States, that nationality was acquired.

In addition, a specific reference to the "consequences of succession" would require a consideration of the consequences of succession of States, which was beyond the scope of the current topic. The Drafting Committee had also regarded the matter as having been dealt with by the inclusion, on the suggestion of the Government of Uzbekistan, of a reference to the "law of the State" conferring the nationality, a suggestion that the Committee had accepted. Indeed, the phrase "in accordance with the law of that State" had been inserted before the list of the various possibilities to indicate that it would be that law that would govern the matter, as long as it was not inconsistent with international law. The Committee had further decided to tighten the text by replacing the phrase "the individual sought to be protected" by "that person".

24. As to the phrase "not inconsistent with international law" at the end of the provision, the Drafting Committee had noted, as had been pointed out during the plenary debate, that it created a *lacuna* in the case of individuals upon whom nationality had been conferred in a manner inconsistent with international law. Under the draft articles, the conferral of such nationality would not be opposable to other States, leaving those individuals without the possibility of diplomatic protection. The matter had been dealt with in the commentary to the text adopted on first reading, specifically with regard to the case of women having a new nationality conferred on them automatically upon marriage. However, after considering proposals for dealing with the issue in the text in the form of a "without prejudice" clause, the Committee had decided against doing so as that would be tantamount to recognizing that an unlawful situation would nonetheless have consequences for the respondent State. Instead, it had decided to refer more extensively to the issue in the commentary.

25. The title of draft article 4 remained "State of nationality of a natural person".

26. Draft article 5 dealt with the continuous nationality rule in the context of natural persons, and in the new version adopted by the Drafting Committee on second reading had four paragraphs.

27. On paragraph 1, the Drafting Committee had decided against specifying that diplomatic protection could be exercised "only" in the manner set forth in the paragraph, because it was possible for a State to exercise diplomatic protection under the draft articles in respect of a person who was not its national, particularly in the case of stateless persons and refugees mentioned in draft article 8. The Committee had, however, accepted the suggestion that the text adopted on first reading should be modified to require that the nationality had to remain that of the claiming State continuously from the *dies a quo* to the *dies ad quem*; whereas the text adopted on first reading had required such conformity of nationality only at both those dates. At the same time, it was recognized that this was a more restrictive provision and that it placed a burden on the claimant State to prove continuity over what could be a substantial period of time. Therefore, the Committee had included an additional sentence at the end of the paragraph establishing a rebuttable presumption in favour of continuity if the relevant nationality existed at the two relevant dates.

28. With regard to the question of the *dies ad quem*, the ending date for purposes of the continuous nationality rule, the Drafting Committee had decided to retain the date of the official presentation of the claim, as had been proposed in the text adopted on first reading and which had been supported by the majority in the Commission. The Drafting Committee had felt that the date of the resolution of the claim proposed by the Government of the United States was not sufficiently supported in State practice and that the particular state of affairs that had given rise to the application of the later date for the *dies ad quem* in some decisions, namely that the individual had acquired the nationality of the respondent State after the date of the official presentation of the claim, could be dealt with separately in what was now paragraph 4. In addition, it had been considered illogical to base the admissibility of a claim on the question whether the relevant nationality had existed at the date of the settlement of the claim. The Committee had also harmonized all the references in the draft articles to the "time" of injury to read "date" of injury.

29. Although the Special Rapporteur had proposed including a reference to the "predecessor State" in paragraph 1, the Drafting Committee had nonetheless decided to deal with the question of succession of States in paragraph 2, since it was not a common situation, thereby leaving paragraph 1 to deal with the vast majority of cases of diplomatic protection, which typically did not involve predecessor States.

30. Paragraph 2 was based on the text adopted on first reading, with the added refinement of the reference to the "predecessor State". Some concerns had been expressed that paragraph 2 could be read as being open-ended and allowing some scope for "nationality shopping". However, the Drafting Committee had considered that the phrase "for a reason unrelated to the bringing of a claim" sufficiently met those concerns and that the provision maintained a certain level of flexibility in the continuous nationality rule. It had been agreed that the commentary would make it clear that the reason had to be one unrelated to the advancement of the commercial interests of the individual. The reference to the "former" State had been added at the end of the paragraph to make it clear that it was the State of nationality, not the predecessor State, that was being referred to.

31. For paragraph 3, the Drafting Committee had retained the text adopted on first reading. Paragraph 4 had been introduced following the proposal by the United States to extend the *dies ad quem* to the date of the making of the award, following the decision in the *Loewen* case. While the Committee had not accepted the extension of the *dies ad quem* to that date for all cases of diplomatic protection, it had favoured the inclusion of paragraph 4 as a useful accommodation to cover the unique factual situation of the individual acquiring the nationality of the respondent State after the date of the official presentation of the claim. It had been decided to locate that provision at the end of the article because paragraphs 2 and 3 dealt with admissibility. Paragraph 4 addressed the case of a claim that had been admissible but was no longer so.

32. The title of draft article 5 had been modified to read "Continuous nationality of a natural person" so as to align it with draft article 9.

33. With respect to draft article 6, the Drafting Committee had retained the version of paragraph 1 adopted on first reading, changing the word "individual" to "person" for the sake of consistency in the text.

34. The Drafting Committee had noted the Government of Austria's proposal to delete paragraph 2. However, it had seen no reason to depart from the formulation of the paragraph adopted on first reading, which could be regarded as an innovative element in the draft articles, as it recognized the fact that two or more States could not be prevented from jointly exercising diplomatic protection on behalf of a dual national.

35. The title of draft article 6 remained "Multiple nationality and claim against a third State".

36. With regard to draft article 7, the Drafting Committee had decided to retain the text adopted on first reading, including the word "predominant", which had been debated at length during the first reading and had not been opposed by the Commission during the debate in plenary. It had also decided not to align the provision with the new language in draft article 5, since it would be difficult to provide continuity of nationality between the *dies a quo* and the *dies ad quem*. What was important was predominance at the two critical points in time.

37. The title of draft article 7 remained "Multiple nationality and claim against a State of nationality".

38. For draft article 8, the Drafting Committee had essentially adopted the same formulation for the entire provision as in the text adopted on first reading, with an amendment to paragraph 2. The main issue considered had been whether to retain the threshold for protection adopted on first reading, namely "lawful and habitual residence", or to adopt a lower threshold, such as "lawfully staying", as had been proposed, *inter alia*, by the Nordic countries. With regard to stateless persons in paragraph 1, the Committee had noted that the 1961 Convention on the reduction of statelessness made reference to "habitual" residence and that "habitual residence" was a term increasingly accepted in private international law. Clearly, for purposes of diplomatic protection such habitual residence would have to be "lawful", or else the protecting State would probably be unwilling to exercise its discretion to protect. Therefore, the reference to "lawfully and habitually" in the text adopted on first reading had been appropriate.

39. Similar considerations had applied to refugees in paragraph 2. The Drafting Committee had decided to retain the threshold in the text adopted on first reading since, for the purposes of the progressive development of the rules of diplomatic protection, it was wiser to recognize a higher threshold. In short, if the individual was recognized as a refugee by the State wishing to exercise diplomatic protection on his or her behalf, then the assertion of the right to protect was opposable to the respondent State when the individual had been lawfully and habitually resident in the claimant State.

40. The Drafting Committee had also decided to include a reference, in paragraph 2, to the recognition of a refugee being "in accordance with internationally accepted standards", so that such recognition should not be limited to that in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol but should cover, for example, individuals under the protection of the United Nations High Commissioner for Refugees who were not recognized as refugees but were lawful residents in States. The effect of that additional language was to provide a broader standard to cover a range of people. The Committee had preferred a reference to "international standards" as opposed to "international law" so as to avoid the implication that only the 1951 Convention and its Protocol or some other treaty (such as one of the regional conventions) were being referred to.

41. The Drafting Committee had retained paragraph 3 as adopted on first reading. The title of draft article 8 was "Stateless persons and refugees", as adopted on first reading.

42. Chapter III of Part Two dealt with the nationality of legal persons and comprised draft articles 9 to 13. The Committee had also decided to retain the title of the chapter adopted on first reading, namely "Legal persons".

43. The text of draft article 9 adopted on first reading had been substantially modified in response to comments from Governments and those made by members of the Commission in plenary session. There had been three major concerns concerning the text adopted on first reading. First, the last phrase of the text seemed to suggest a genuine link requirement between the corporation and the State exercising diplomatic protection, but did not specify the content of such a link. Second, the cumulative requirements to be satisfied in order to allow a State to exercise diplomatic protection did not take account of the possibility that a corporation might be incorporated in one State but have its registered office in another, in which case it was unclear which State was entitled to exercise diplomatic protection. Third, the text adopted on first reading had not allowed for the fact that more than one State might have sufficient interest in exercising diplomatic protection and that there should be some criteria to identify those States. At the same time, only one State should eventually be entitled to exercise diplomatic protection for a corporation, and every effort should be made to avoid the possibility that more than one State would be so entitled.

44. The Drafting Committee had redrafted the text of article 9 in the light of those concerns. Draft article 9 did not purport to interfere in or affect how internal law might define nationality of a corporation. It viewed the nationality of a corporation from the perspective of international law, and even then only for the purposes of exercising diplomatic protection.

45. The present text of draft article 9 comprised two sentences and recognized the State of incorporation as the State of nationality of a corporation. However, it acknowledged that, in certain specific situations, the State in which both the seat of management and the

financial control of the corporation were located would be considered to be the State of nationality. That was a recognition that there might be circumstances in which the connection between the corporation and the State of incorporation was so insignificant that it would not justify giving priority to that State for exercising diplomatic protection, and that instead there was another State with a stronger interest to exercise diplomatic protection. The cumulative criteria for establishing such an insignificant connection with the State of incorporation, however, were set rather high and were to be found in the second sentence of paragraph 2. They were situations in which: (*a*) the corporation was controlled by nationals of another State or States; (*b*) the corporation had no substantial business activities in the State of incorporation; and (*c*) the seat of management *and* the financial control of the corporation were both located in another State. In such situations, that State, namely the State in whose territory the seat of management and the financial control of the corporation were located, was considered to be the State of nationality for the purposes of exercising diplomatic protection. The requirements were cumulative. In any other situation, the State of incorporation would be considered the State of nationality, entitled to exercise diplomatic protection. That provision had been constructed specifically to make it clear which State might be considered the State of nationality of a corporation for the purposes of exercising diplomatic protection.

46. The draft article was entitled "State of nationality of a corporation", as in the text adopted on first reading.

47. Draft article 10 was in many respects similar to draft article 5 and dealt with the general principle of continuous nationality for corporations. Many of the issues that had been raised in the context of draft article 5 also applied to draft article 10 and for that reason it had been redrafted. The present text comprised three paragraphs instead of two.

48. Paragraph 1 corresponded to paragraph 1 of draft article 5. The modifications were related to the requirement of "continuity" of nationality between the two relevant dates of injury and the presentation of the claim. The paragraph also addressed the issue of the predecessor State, which had been addressed in a separate paragraph in the context of natural persons in draft article 5. Paragraph 1 asserted the principle that a State was entitled to exercise diplomatic protection in respect of a corporation that had been its national or a national of its predecessor State continuously from the date of injury to the date of the official presentation of the claim. The second sentence, as in paragraph 1 of draft article 5, made a presumption in favour of continuity of nationality if the nationality had existed at both those dates. As in draft article 5, that presumption was, of course, rebuttable.

49. Paragraph 2 was new and corresponded to paragraph 4 of draft article 5. It excluded diplomatic protection of a corporation that became the national of the defendant State after the date of the official presentation of the claim. Under draft article 10, the corporation must remain the national of the same State at the time of injury and the presentation of the claim. The change of nationality between those two dates would exclude the right to diplomatic protection. Moreover, the issue of the predecessor State in draft article 10 was covered in its paragraph 1. The reference to the predecessor State was intended to allow diplomatic protection for a corporation which had been a national of a predecessor State at the time of injury and a national of a State that had succeeded that State at the time of the presentation of the claim.

50. Paragraph 3 dealt with the dissolution of a corporation after the date of injury but before the date of the official presentation of the claim. Under that paragraph, a State was entitled to exercise diplomatic protection for a corporation that had been its national at the time of injury but had ceased to exist, as the result of the injury, according to the law of the State of incorporation.

51. The title of draft article 10 remained unchanged and read: "Continuous nationality of a corporation".

52. Draft article 11 had been generally accepted by Governments and therefore no substantial modification had been necessary. A suggestion by one Government to extend the scope of the draft article to trustees, debenture holders or other financial stakeholders in a corporation had not been supported in the plenary and had therefore not been included in the draft. The text was thus almost identical to that adopted on first reading, with some minor changes. The first word, the definite article "The", had been replaced by the indefinite article "A". In subparagraph (*b*), the phrase "the time of the injury" had been replaced by the phrase "the date of the injury", in the interests of consistency with other provisions. Lastly, the phrase "under the law of the latter State", in the same subparagraph, had been replaced by the phrase "in that State". The latter change was intended to take account of situations in which an injured corporation was compelled to incorporate in the State that had caused the injury, in order to be able to do business there. Such compulsion might take the form either of legislation or of other pressures so strong that the corporation had no choice in the matter. The commentary would elaborate on the issue, explaining that the subparagraph referred not to reasonable modes of inducement but to any pressure that amounted to compulsion. The title of the draft article ("Protection of shareholders") remained unchanged.

53. With regard to draft article 12, there had been no calls from Governments or members of the Commission for its modification, although there had been a suggestion that it might be superfluous, given the provisions of draft articles 2 and 3. The Drafting Committee had, however, felt that, since the draft article was intended to articulate a significant exception made in the *Barcelona Traction* case that had been generally viewed as an important contribution to the diplomatic protection of corporations, it should be retained. It had not been found necessary to provide separately for situations in which there were shareholders from several States of nationality, since, in practice, the various States of nationality of shareholders generally cooperated with one another. In any case, all were entitled to exercise diplomatic protection in respect of shareholders who were their nationals. The title of the draft article ("Direct injury to shareholders") remained unchanged.

54. Turning to draft article 13, Mr. KOLODKIN recalled that the article was intended to apply to other, non-commercial legal entities. It had not elicited much comment and seemed generally acceptable. There had been some question as to whether it should apply only with respect to the principles contained in draft articles 9 and 10—which essentially related to nationality issues—or also to those contained in draft articles 11 and 12. The Drafting Committee had taken the view that there were many other forms of legal entity that were neither corporations nor organized for commercial purposes and that it would therefore be more appropriate to draft a provision that covered all such other legal persons. The use of the phrase "as appropriate" had been felt to provide a safeguard that made it unnecessary to limit the article to the principles contained in draft articles 9 and 10. As the commentary would explain, the phrase meant that the provisions would apply to the extent that the legal characteristics of a legal person were analogous to those of a corporation. The title ("Other legal persons") remained unchanged.

55. Part Three dealt with the exhaustion of local remedies rule and comprised only two draft articles, as opposed to the three in the text adopted on first reading. That was because the Drafting Committee had decided to merge two of the three original draft articles.

56. Draft article 14, paragraph 1, set out the general rule of the exhaustion of local remedies. The Drafting Committee had considered a suggestion that it was not necessary or desirable to specify that local remedies must be exhausted only by the injured person, but had decided that the text adopted on first reading should be retained because it tracked the traditional formulation of the rule and made it clear who had to exhaust local remedies. The fact that they had been exhausted by someone else served only as an indication of the effectiveness or otherwise of local remedies, so that the issue would be best dealt with under the corresponding rubric in draft article 15 (formerly 16).

57. The only change to paragraph 2 had been the insertion of the word "causing" before the words "the injury", in the interests of consistency. Paragraph 3 comprised the text of what had been adopted as draft article 15 on first reading. The Drafting Committee had decided on that course of action, because the text dealt with the type of claim that required exhaustion of local remedies in situations in which claims were brought both for direct injury to the State and for injury to the individual. By combining the two, the Committee had avoided the question of reformulating the title of former draft article 15, as had been suggested by some Governments.

58. The title of draft article 14 ("Exhaustion of local remedies") remained as adopted on first reading.

59. Draft article 15 corresponded to draft article 16 adopted on first reading and contained the exceptions to the exhaustion of local remedies rule. The revised text included five provisions, as against four in the first version, because the Committee had decided to divide subparagraph (*c*) into two separate provisions. In subparagraph (*a*), it had decided to adopt a new formulation to cover both the reasonable possibility of redress, which had appeared in the text on first reading, and the reasonable availability of remedies to provide effective redress. The concept of reasonable availability had been introduced in response to the concern that the phrase "reasonable possibility of success" was too open-ended: there might be a range of reasons why success might not be reasonably possible. He noted, in that context, that the Committee had declined to revert to the phrase "futile and manifestly ineffective", a test which it had rejected on first reading as no longer reflecting the law in that regard. Subparagraph (*b*) had not been changed.

60. As for subparagraph (*c*), it would be recalled that the first version had attempted to cover two situations: that in which there was no relevant connection between the injured person and the State alleged to be responsible; and that in which the circumstances of the case otherwise made the exhaustion of local remedies unreasonable. The Committee had considered several proposals to adopt provisions covering either one of the situations but had eventually decided to retain both, albeit reformulated and in separate subparagraphs. Both provisions, it had been felt, covered specific types of difficulty that individuals faced in attempting to exhaust local remedies, although it was also understood that both situations were rare. Whereas subparagraphs (*a*) and (*b*) dealt with failures in the administration of justice, subparagraph (*c*) and new subparagraph (*d*) covered special situations in which exhaustion of local remedies would not be expected for reasons of equity. Thus, by providing for the lack of a "relevant" connection, subparagraph (*c*) covered the situation of the *Aerial Incident of 27 July 1955* case, in which it had been unreasonable to expect the individuals concerned to have to exhaust local remedies in a State with which they had no relevant connection. The wording of the subparagraph was based on the first part of that adopted on first reading, with some technical refinements.

61. Subparagraph (*d*), which was based on the second part of subparagraph (*c*) as adopted on first reading, dealt with such special circumstances as cases in which entry was denied, where the safety of the person concerned was at risk or where criminal conspiracies obstructed the bringing of proceedings. In all those cases, it might be unreasonable to require the exhaustion of local remedies. The Drafting Committee had, however, decided to tighten up the language. The reference to circumstances that made "the exhaustion of local remedies unreasonable" had been replaced by a provision that spoke of an injured person being "manifestly precluded from pursuing local remedies". The new wording, rather than considering the "reasonableness" of the circumstances, focused on the effect of the special circumstances, namely the fact that they precluded the pursuit of local remedies. It also served to minimize the overlap with subparagraph (*a*), the distinction between the two being that under subparagraph (*d*), local remedies might be available in fact, but there were circumstances that precluded the injured person from taking advantage of them. The matter would be discussed in the commentary, which would make the point that the provision was an example of progressive development of international law.

62. The wording of subparagraph (*e*) remained unchanged, as did the title of draft article 15 ("Exceptions to the local remedies rule").

63. Part Four contained the same miscellaneous provisions as had been adopted on first reading, subject to some drafting refinements, together with the addition of one new article. The title remained "Miscellaneous Provisions".

64. Draft article 16 corresponded to draft article 17 adopted on first reading. The Drafting Committee had considered proposals to merge it with draft article 17 (old draft article 18) but rejected them on the grounds that the two provisions dealt essentially with two different issues: the former with human rights protection and the latter with bilateral investment treaties. The wording adopted was based on a text suggested by the Government of the Netherlands. To the original list of States, natural persons or other entities entitled to resort to other procedures, the Drafting Committee had added a reference to legal persons, since they, too, might be the beneficiaries of rights and existing remedies, for example, under the ICSID Convention on the settlement of investment disputes between States and nationals of other States. It had retained the reference to "other entities" in order to cover, for example, international organizations involved in the protection of human rights. It had also decided to retain a reference to international law, since, unlike domestic remedies, remedies available under international law might be affected by the operation of the draft articles.

65. The title of draft article 16 ("Actions or procedures other than diplomatic protection") remained unchanged.

66. Draft article 17, which corresponded to draft article 18 adopted on first reading, dealt with the situation of special investment treaties, either bilateral or multilateral; but it had been redrafted to take into account criticisms levelled against the earlier text. The provision made it clear that, while the draft articles established general rules, it must be borne in mind that special rules concerning or excluding diplomatic protection applied elsewhere. States were fully entitled to conclude treaties establishing specific conditions for diplomatic protection or excluding diplomatic protection altogether. The Drafting Committee had considered various formulations to replace the phrase "special treaty provisions" in the text adopted on first reading, finally settling on wording taken from article 55 of the draft articles on responsibility of States for internationally wrongful acts, which referred to "special rules of international law".[141] The reference to inconsistency with special rules of international law had been retained in order to stress that, if the relevant provisions of the draft articles were not inconsistent, they could still apply in the interpretation of special provisions. The phrase "such as treaty provisions for the protection of investments" had been included so as to indicate that the Commission had in mind mostly but not exclusively that type of treaty provision. The reference to "treaty provisions" as opposed to "treaties" reflected the recognition that not only special treaties for the protection of investments but also provisions within other treaties, such as treaties of friendship, commerce and navigation, might derogate from the residual rules contained in the draft articles on diplomatic protection.

67. The title of draft article 17 had been changed to read "Special rules of international law".

68. With regard to draft article 18, which corresponded to draft article 19 of the text adopted on first reading, Mr. KOLODKIN said that, despite suggestions that it should be deleted as not being strictly applicable to diplomatic protection, the Drafting Committee had decided that it served the useful function of recognizing a procedure that might be of assistance to ships' crews. The only change to the previous wording was the replacement of the words "in the course of an injury" by the phrase "in connection with an injury", in order to indicate that the injury to a crew member might arise not only during the injury to a vessel but also as a consequence of that injury. The Drafting Committee had also considered but rejected a proposal to locate the provision after draft article 16.

69. The title of draft article 18 had been amended to read "Protection of ships' crews".

70. Turning to draft article 19, he said that the provision dealt with one aspect of the consequences of diplomatic protection. Since the text adopted on first reading had not contained any provision of that kind, Governments had not had the opportunity to express their views on a specific text. The question had, however, been raised in the Special Rapporteur's seventh report (paras. 93–103). Views had been divided within the Commission as to whether the draft articles should deal with the consequences of diplomatic protection at all and, if they did, why only certain aspects of such consequences should be considered. The view had also been expressed that, even if any such provision were to be included, it should not be compulsory but should appear in the form of a recommendation. Similar views had been expressed in the Drafting Committee, some members of which had suggested that such a provision was better suited to inclusion in a resolution or recommendation that could be adopted in connection with the final text of the draft articles but independently of them. It had ultimately been agreed that the content of such a provision was in the realm of progressive development and that what was important was how it was formulated and explained in the commentary. On that basis, it had been agreed to draft a provision in which the ideas were expressed in non-binding language. The result was the text now before the Commission.

71. Draft article 19 gave expression to three ideas: that States should consider the possibility of exercising diplomatic protection (subpara. *a*); that they should consult the injured person on whether to do so and on what forms of reparation should be sought (subpara. *b*); and that compensation obtained should be transferred to the injured person (subpara. *c*). He drew the Commission's attention to the use of the word "recommended" in the title of the draft article and the word "should" in the chapeau, both of which indicated the recommendatory nature of the provision.

[141] *Ibid.*, p. 30.

72. The language of subparagraph (*a*), which provided that a State should give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury had occurred, was not intended to undermine the importance of such protection when the injury was not significant. On the contrary, the intention was to emphasize the utility of the institution of diplomatic protection as one means for the peaceful settlement of disputes among States when their nationals were injured, although it did not undermine a State's discretion as to whether to exercise diplomatic protection.

73. Subparagraph (*b*) provided that States should, whenever feasible, take into account the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought. States normally did so as a matter of effective management of a particular dispute, but the word "feasible" was intended to take account of situations in which there were a number of injured persons and consultations could not reasonably be held with each individual as to whether a State should exercise diplomatic protection or what form of reparation they preferred. The subparagraph was also intended to take account of situations in which injured persons might not want their State of nationality to exercise diplomatic protection for their benefit, and the State should take that preference into account in formulating its own decision. It was useful for a State to consider such issues in consultations with injured persons.

74. Subparagraph (*c*) provided that the State should transfer to the injured person any compensation obtained for the injury from the responsible State, subject to any reasonable deductions. It recognized that the primary beneficiary—the injured person—should be the recipient of compensation, but it also took account of situations in which the State might have incurred costs and was entitled, in accordance with its laws and practices, to deduct those costs from compensation.

75. The draft article was entitled "Recommended practice", which accurately reflected its character and purpose.

76. The CHAIRPERSON invited the Commission to proceed to adopt the draft articles on diplomatic protection, as contained in document A/CN.4/L.684 and Corr.1–2, on second reading.

PART ONE

GENERAL PROVISIONS

Draft articles 1 and 2

Draft articles 1 and 2 were adopted.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Draft article 3

Draft article 3 was adopted.

CHAPTER II

NATURAL PERSONS

Draft article 4

77. The CHAIRPERSON, speaking as a member of the Commission, said, with reference to the French text, that the phrase "*de toute autre manière non contraire au droit international*" should be replaced by the phrase "*d'une manière non contraire au droit international*", thus bringing the text into line with the French text of draft article 5, paragraph 2.

78. Mr. GAJA said he had suggested the new wording because, in the French version, the words "not inconsistent with international law" appeared to qualify only the noun "manner", an ambiguity that did not arise in the English text.

79. Mr. ECONOMIDES said that although Mr. Gaja had done sterling work on the French text, there remained room for improvement. He therefore suggested that the French-speaking members of the Drafting Committee should review the text again.

80. The CHAIRPERSON said that he would welcome the opportunity to take part in such a review. He had also been intending to query the wording of draft articles 5 and 9.

Subject to possible editorial amendments to the French text, draft article 4 was adopted.

Draft articles 5 to 8

Draft articles 5 to 8 were adopted.

CHAPTER III

LEGAL PERSONS

Draft article 9

Subject to possible editorial amendments to the French text, draft article 9 was adopted.

Draft articles 10 to 13

Draft articles 10 and 13 were adopted.

PART THREE

LOCAL REMEDIES

Draft article 14

81. Mr. VALENCIA-OSPINA said that while he did not object to the text of draft article 14, he wished to draw attention to the absence of any reference to the Calvo clause in the commentary. In his third report on the topic,[142] the Special Rapporteur had proposed a draft article 16 on the Calvo clause, which had been considered by the Commission at its fifty-fourth session in 2002.[143] As the Special Rapporteur had emphasized at the time, the Calvo clause had been an integral part of the history and development of the exhaustion of local remedies rule and continued to be of relevance. The Commission had subsequently decided not to refer draft article 16 to the Drafting Committee—a decision which he did not question. The Special Rapporteur had, however, indicated that, if that provision were to be omitted, the subject would have to be dealt with extensively in the commentary, specifically to draft article 10 and draft article 14 (*b*) of

[142] *Yearbook … 2002*, vol. II (Part One), document A/CN.4/523 and Add.1, pp. 75–83, paras. 119–158.

[143] *Ibid.*, vol. II (Part Two), pp. 64–66, paras. 253–273.

the text adopted on first reading, which had now become draft articles 14 and 15, paragraph (*e*) of the text adopted by the Drafting Committee on second reading. But no reference to the Calvo clause, as such, appeared in any of the commentaries to the text adopted on first reading. During the presentation of his third report, the Special Rapporteur had given a very complete exposition of the genesis and relevance of the Calvo clause.[144] Hence the Commission would be well advised to explain why it had decided to make no reference to the Calvo clause, even in the commentary.

82. Draft article 14, paragraph 1, introduced the idea of bringing an international claim. As had been explained in the commentary adopted on first reading, the phrase "bring an international claim" had been chosen in preference to "present an international claim", as the word "bring" more accurately reflected the process involved than the word "present", which suggested a formal act to which consequences were attached and was best used to identify the moment in time at which the claim was formally made. The second reading text used the expression "presentation" in draft articles 5, 7, 8 and 10, although draft article 5 contained a reference to both the bringing and the presentation of a claim. If there was a distinction between bringing and presenting, then clearly the draft articles were using two different criteria *ratione temporis* to establish the relevant date. But in all cases except with regard to the exhaustion of local remedies, the draft articles used the phrase "presentation of the claim"; the notion of bringing the claim was employed only in draft article 14. It was not apparent that such a distinction was warranted. Moreover, it could be argued that the presentation, rather than the bringing of the claim, should be the criterion for the exhaustion of local remedies.

83. Unnecessary controversy as to the effective date and the distinction between bringing and presenting a claim could be averted by replacing the whole phrase "bring an international claim in respect of an injury to a national or other person referred to in draft article 8" with the more succinct expression "exercise diplomatic protection". That minor drafting change would not only ensure coherence with the rest of the text, but would also avoid the theoretical issue of the difference between "bringing" and "presenting" a claim. Furthermore, it would have the added advantage of eliminating the repetition of the persons with respect to whom the State had the right to exercise diplomatic protection, since it would cover the natural and legal persons mentioned in draft article 1 and the stateless persons and refugees mentioned in draft article 8.

84. Mr. MANSFIELD said that, while he appreciated the reasoning behind the proposal made by Mr. Valencia-Ospina, he had difficulties with it. There had been substantial discussion both in the plenary meetings of the Commission and in the Drafting Committee of the significant difference between formally presenting a claim—the "upper end" of diplomatic protection—and the kind of informal discussion, negotiation or inquiry that typified the lower levels of diplomatic action. For small States, discussions, inquiries and notification were more important than a formal presentation of a claim. It would therefore be unacceptable to suggest that such informal action could not take place until local remedies had been exhausted. The advantage of the current formulation was that it did not imply that the informal lower end of diplomatic protection or action must be preceded by the exhaustion of local remedies. For that reason, although a different term had been employed in that draft article, there was merit in its retention.

85. Mr. DUGARD (Special Rapporteur) said he subscribed to Mr. Mansfield's explanation of the reasons for the adoption of the wording in question, which had been debated in depth in the Drafting Committee. Although he appreciated the clarity and succinctness of Mr. Valencia-Ospina's proposal, he suggested that the existing formulation should be retained.

86. He wished to apologize for failing to include a reference to the important institution constituted by the Calvo clause in the commentary. He would insert a paragraph on that subject, which the Commission could discuss at a later stage. It would not, however, be appropriate to discuss the considerations leading to the rejection of the original draft article 16, as that was not the practice followed with respect to the commentary on second reading.

87. Mr. VALENCIA-OSPINA thanked the Special Rapporteur for his willingness to include a mention of the Calvo clause in the commentary. He was, of course, aware of the difference between bringing and presenting a claim, but it was precisely for the grounds stated by Mr. Mansfield that it was vital to identify methods of action other than the formal presentation of a claim. Draft article 14 provided that a State might not bring a claim unless local remedies had been exhausted, which meant that the text was asserting precisely the opposite of what Mr. Mansfield wished it to say.

88. Mr. CANDIOTI said that draft article 14 should contain wording as clear and succinct as that to be found in draft article 3, paragraph 1, on the nationality rule. It should simply provide that a State could not exercise diplomatic protection until the injured person had exhausted local remedies. Those two draft articles set forth the two general rules; the terms, conditions and exceptions came afterwards. The unambiguous, concise wording proposed by Mr. Valencia-Ospina had great merit, since it obviated any confusion. The draft article referred to international claims, but there could be international claims which did not necessitate the exhaustion of local remedies. Exhaustion of local remedies was a basic rule of traditional diplomatic protection which had been incorporated in the first draft. The notion of diplomatic protection had subsequently been very clearly defined and the wording proposed by Mr. Valencia-Ospina was therefore appropriate.

89. The commentary to paragraph 3, which referred to mixed claims where there had been injury to both the State and the protected person, should emphasize that, in that case, local remedies should first be exhausted when an international claim was brought preponderantly on the basis of an injury to the protected person.

[144] *Ibid.*

90. Mr. MANSFIELD reiterated that a failure to exhaust local remedies should not preclude general diplomatic action. The definition of diplomatic protection included the whole spectrum of diplomatic action. The wording proposed by Mr. Valencia-Ospina raised a problem inasmuch as the exercise of diplomatic protection was defined so as to include all levels of diplomatic action. If the draft article were to use the term "present" instead of "bring", that would be a different proposition. He personally could accept wording to the effect that a State might not present an international claim before all local remedies had been exhausted. Mr. Valencia-Ospina's proposal was too broad as it stood and therefore caused the problem to which he had just alluded.

91. The CHAIRPERSON suggested that, as a compromise, the word "bring" should be replaced by "present".

92. Mr. ECONOMIDES endorsed the proposal by Mr. Valencia-Ospina and the statement by Mr. Candioti. The newly proposed wording was shorter, more elegant and perhaps more attractive. Nevertheless he could accept the compromise suggested by the Chairperson.

93. Mr. KOLODKIN (Chairperson of the Drafting Committee), responding to a query by the Chairperson, said that while he fully agreed with Mr. Mansfield as to the substance, he was prepared to accept the compromise solution.

94. Mr. DUGARD (Special Rapporteur) said that although, like Mr. Kolodkin, he was prepared to accept the amendment, the reasons given by Mr. Mansfield for opposing Mr. Valencia-Ospina's proposed formulation were nonetheless correct.

Draft article 14, as amended, was adopted.

Draft article 15

Draft article 15 was adopted.

PART FOUR

MISCELLANEOUS PROVISIONS

Draft article 16

95. Mr. VALENCIA-OSPINA said that draft article 16 was a "without prejudice" clause referring to the subjects to which the draft articles, as a whole, applied, namely States, natural persons (nationals, individuals, stateless persons and refugees) and legal persons (corporations and legal persons other than corporations), as provided for in draft articles 1, 8, 9 and 13. Draft article 16 added another category—other entities—an example of which was given in paragraph (1) of the commentary to draft article 17 of the text adopted on first reading,[145] namely non-governmental organizations. In his introduction of the Drafting Committee's report, the Chairperson of the Drafting Committee had explained that the reference had been retained in order to cover international organizations involved in the protection of human rights. But, as it stood, the provision implied that those other entities were not legal persons, because a distinction was drawn between legal persons and other entities. If that was indeed the intention of the Commission, those other entities were not subject to diplomatic protection, since they were not legal persons and did not therefore fall within the scope of the draft articles pursuant to draft article 1. If that were so, there would be no need to mention other entities in the text of the article. It was inconsistent to refer in a "without prejudice" clause to entities that were not covered by the draft articles as a whole. He therefore suggested that the reference to "other entities" should be deleted.

96. Mr. GAJA said that, despite the fact that the wording of draft article 16 might be read as implying that "other entities" were not legal persons, that was a misapprehension. Consequently, the text did not fully support Mr. Valencia-Ospina's interpretation. The main point made by the draft article was not that people who had been injured could resort to procedures other than diplomatic protection but that when, for instance, human rights were infringed, States other than the State of nationality might be able to intervene and other entities, such as international organizations, might also have a role. It did not purport to say that individuals or legal persons could benefit both from diplomatic protection and from other remedies. Its purpose was to show that while diplomatic protection sought to offer some protection to legal persons and particularly to individuals, rights of other institutions to resort under international law to other means or procedures to secure redress were not affected by the draft articles. The substance of draft article 16 did not appear to be contradictory.

97. Mr. CHEE said that, on a matter of fact rather than of interpretation, the term "legal person" referred to a commercial corporation, whereas "other entities" meant bodies of a non-commercial nature. He cited the example of the Harvard Corporation, which engaged in commercial activities. If, in that context, it were to suffer injury, it ought to be able to obtain protection. That, in his view, was the import of draft article 16.

98. The CHAIRPERSON, speaking as a member of the Commission, said that the expression "actions … other than diplomatic protection" was somewhat ambiguous: it was hard to see how States, in their relations with other States, could directly benefit from diplomatic protection. The end of the draft article, however, was quite clear as to the objective pursued. Perhaps the Special Rapporteur could try to cover in the commentary the substance of the explanation that Mr. Gaja had just given.

99. Ms. XUE said that, as a member *ex officio* of the Drafting Committee, she would not normally be advocating drafting changes at the present stage. However, Mr. Valencia-Ospina had made a very good point: the protection of "other entities" was beyond the purview of the draft on diplomatic protection. All that was needed was a logically coherent saving clause to address human rights protection for natural and legal persons.

100. Mr. ECONOMIDES agreed: the logic of the draft article was problematic, since it referred to the rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures

[145] *Yearbook … 2004*, vol. II (Part Two), p. 20, para. 60.

other than diplomatic protection, thereby giving the impression that natural and legal persons could exercise diplomatic protection. That was certainly not the way diplomatic protection was understood. Some more neutral formulation should be found, along the lines of "These draft articles are without prejudice to any actions or procedures to which States, natural persons and legal persons might resort to secure redress …".

101. Mr. DUGARD (Special Rapporteur) said that the issue had been debated at some length in the Drafting Committee whose position, namely that the phrase "or other entities" should be included, had been comprehensively explained by Mr. Gaja. It was difficult to see how that position could be reversed. The proposed deletion of the phrase "or other entities" was a matter, not of form, but of substance.

102. Mr. Sreenivasa RAO said that the issue of other entities had not been discussed at any stage in the consideration of the topic, and that inclusion of that point, however legitimate it might be, was not within the scope of the exercise. He would prefer the phrase "or other entities" to be deleted.

103. Mr. BROWNLIE pointed out that the phrase "legal persons" was regarded as not covering unincorporated associations, the assumption—perhaps a careless one—being that it referred to corporations. Accordingly, legal persons and unincorporated associations was the usual pairing. However, the phrase "or other entities" would probably not do much harm.

104. Mr. CHEE concurred with the Special Rapporteur that to omit the phrase "or other entities" would be, not a drafting issue, but one of substance. The phrase was intended to cover the situations to which he had already alluded, and should be retained.

105. Mr. FOMBA said that the fundamental idea behind draft article 16 was that the exercise of diplomatic protection as an institution was without prejudice to resort to other actions or procedures. However, there seemed to be some confusion about the scope of the draft article *ratione personae*: if the concept of "other entities" were eliminated from the article, other organizations of a social, economic or other nature could be wrongly excluded.

106. Mr. KOLODKIN (Chairperson of the Drafting Committee) said that he had no proprietary interest in the text: it had been adopted by a committee of which he had been elected Chairperson. It had been adopted after lengthy, in-depth discussions in which, among other things, the questions now raised had been aired. All members of the Commission who were members of the Drafting Committee had participated in the discussion. In the first place, the text in no way implied that any natural or legal person had the right to exercise diplomatic protection. On the contrary, at least in the English and Russian versions, it made it clear that States, natural persons, legal persons or other entities could resort to mechanisms *other than* diplomatic protection for the protection of their rights. Secondly, the phrase "other entities" had been included precisely to ensure that the text had the broadest possible scope. It had been pointed out that even States and international organizations could be viewed as legal persons, yet after extensive discussion, the Drafting Committee had decided to include the phrase as it filled what would otherwise be a gap. While he was entirely in the hands of the Commission, he personally would prefer to leave the text as it stood. If there were problems with the versions in French or in other languages, those problems could be addressed in specific language groups.

107. Mr. KATEKA suggested that, if the Commission could not agree on the text, a straw poll should be taken.

108. Mr. DAOUDI said that the present discussion had arisen because the provision had been discussed only in the Drafting Committee. All members of the Commission were entitled to express their views on the issue in plenary session. The problem was not one of form solely, but of substance. Mr. Valencia-Ospina's remarks would help to ensure that the draft text to be submitted to the General Assembly would be logical and consistent. He did not see why, in a text dealing with diplomatic protection, it was necessary to draw attention to the existence of mechanisms other than diplomatic protection. While he had no objection to mentioning all possible forms of protection for persons under international law, that did not necessarily warrant the inclusion of a provision like draft article 16. Accordingly, he would prefer the matter to be covered in the commentary; however, if draft article 16 was to be retained, he supported Mr. Economides' proposal to redraft it as a simple "without prejudice" clause.

109. Mr. MOMTAZ said that Mr. Valencia-Ospina's point was well taken: the phrase "other entities" clearly referred to non-governmental organizations and universities, which were indisputably legal persons. Yet to speak of "legal persons or other entities" was to imply that those other entities were not legal persons. To resolve the problem, the words "or other entities" could be deleted and it could be explained in the commentary that the term "legal persons" was to be understood as referring not only to corporations but also to non-governmental organizations and universities.

110. Mr. DUGARD (Special Rapporteur) said that some speakers had given the impression that the phrase "or other entities" had emerged out of nowhere and had not been discussed in plenary. That, of course, was incorrect: it had appeared in draft article 17 of the text adopted on first reading.[146] The Drafting Committee had actually incorporated an additional phrase, "legal persons", that had not appeared in the original text. Mr. Momtaz had asserted that all other entities were covered in the phrase "legal persons", but the Drafting Committee had taken the view that there were some entities that might not qualify as legal persons. It had been fairly difficult to find a way to address legal persons other than corporations. The special provision contained in draft article 13 would probably cover most but not all non-governmental organizations and human rights organizations, and the Drafting Committee had wanted the draft to be as comprehensive as possible.

[146] *Ibid.*

The problem raised by Mr. Valencia-Ospina would best be dealt with in the commentary.

111. The CHAIRPERSON noted that the phrase had elicited no comment or observation from Governments. Draft article 16 simply indicated that the system set up under the 19 articles of the draft was in no way incompatible with any other actions that might be implemented by the various entities listed in order to secure redress under a general or special system of international responsibility.

112. Mr. BROWNLIE proposed that the Commission should follow the advice of the Chairperson of the Drafting Committee and adopt the text submitted by the Drafting Committee, particularly in view of the fact that Governments had not criticized the expression "or other entities".

113. The CHAIRPERSON said that the debate had raised a number of interesting points, which the Special Rapporteur would try to cover in the commentary.

Draft article 16 was adopted.

Draft articles 17 to 19

Draft articles 17 to 19 were adopted.

114. The CHAIRPERSON said he took it that the Commission wished to adopt on second reading, the titles and texts of the draft articles on diplomatic protection, as a whole, as amended.

It was so agreed.

115. Mr. DUGARD (Special Rapporteur) expressed his gratitude to the Commission for having adopted the draft articles on second reading. In particular, he wished to thank the Chairperson of the Drafting Committee, Mr. Kolodkin, the other members of the Drafting Committee and the Chairperson of the Commission for guiding it through the final stage of the proceedings.

Organization of work of the session (*continued*)

[Agenda item 1]

116. Mr. KOLODKIN (Chairperson of the Drafting Committee) announced that the Drafting Committee on responsibility of international organizations was composed of Mr. Economides, Ms. Escarameia, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Valencia-Ospina and Mr. Yamada, together with Mr. Gaja (Special Rapporteur) and Ms. Xue (Rapporteur), *ex officio*. The Drafting Committee on shared natural resources was composed of Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson and Mr. Pambou-Tchivounda (Chairperson of the Commission), together with Mr. Yamada (Special Rapporteur) and Ms. Xue (Rapporteur), *ex officio*.

The meeting rose at 12.30 p.m.

2882nd MEETING

Friday, 2 June 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*concluded*)* (A/CN.4/562 and Add.1, A/CN.4/566, A/CN.4/L.686 and Corr.1)

[Agenda item 3]

Report of the Drafting Committee

1. Mr. KOLODKIN (Chairperson of the Drafting Committee on international liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)), introducing the report of the Drafting Committee on the Commission's second reading of the draft principles on the allocation of loss arising out of hazardous activities (A/CN.4/L.686), said first of all that the question of the final form of the instrument had continued to elicit different views at various stages of the Commission's consideration of the topic, and that the majority of Commission members had favoured an outcome in the form of principles; it was on that basis that the Drafting Committee had proceeded. It should be recalled that the Commission had adopted texts cast as principles in the past: in 1950, for example, it had adopted the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[147]

2. The title and structure adopted on first reading had been retained.[148] The Drafting Committee had been mindful of the fact that some of the principles, such as draft principle 1, on scope of application, or draft article 2, on the use of terms, would not qualify as principles in the strict sense of the term. It had nevertheless decided to retain the term "principle", a decision that simply reflected the Commission's wish to arrive at a text that was legally non-binding and used the term with some coherence and consistency.

3. The Drafting Committee was conscious that through the draft principles the Commission was endeavouring to

---

* Resumed from the 2875th meeting.

[147] See footnote 86 above.

[148] See footnote 55 above.