Note for interpreters: please interpret from the English text.

DIPLOMATIC PROTECTION

Statement of the Chairman of the Drafting Committee,

Mr. Rodriguez-Cedeño

Mr. Chairman,

I have the honour to introduce the first report of the Drafting Committee for the 56th session, dealing with the topic Diplomatic Protection. The report is contained in document A/CN.4/L.647 and add.1.

You will recall that in accordance with our Work Plan, the Commission decided to complete the first reading of the topic of Diplomatic Protection this year opening the way for the completion of the work by the Commission on the last year of this quinquennium. The Drafting Committee is pleased to report that it has completed the first reading of the entire set of articles on this topic.

The Committee held seven meetings on the topic from 4 to 21 of May.

Before proceeding to the introduction of the Committee's report, I wish to thank the Special Rapporteur for the topic, Mr. John Dugard, for his guidance and his full cooperation with the Committee. I would also like to express my appreciation to the other members of the Committee for their active participation and cooperation with the Chair.

Mr. Chairman,

The Commission has before it the completed first reading of the draft articles on diplomatic protection, as adopted by the Drafting Committee. As I will explain shortly, together with the draft articles that were adopted by the Plenary in the last two years, the Drafting Committee has also completed its work on several remaining draft articles referred to it last year and this year. In addition, on completing the entire set, the Drafting

Committee undertook a review of the draft articles as a whole, and made several consequential changes, including to the draft articles adopted in previous years. My presentation, therefore, will cover both the work that was done this year, as well as the necessary amendments that have been made to provisions adopted in previous years. In most cases, the changes were minor stylistic refinements to ensure consistent formulations throughout the text.

I propose to start with a brief overview of the structure of the draft articles, and then proceed to discuss the various parts in chronological order, focusing only on the draft articles that were adopted by the Drafting Committee this year, as well as on the changes made to previously adopted draft articles.

The draft articles on diplomatic protection are divided into four parts. The first part deals with General Provisions and comprises two articles, Part Two is entitled "Nationality", and is subdivided into three chapters, containing draft articles 3, 4 to 8 and 9 to 13, respectively. Part Three is entitled "Local Remedies", containing articles 14 to 16. Part Four is entitled "Miscellaneous provisions", containing articles 17 to 19.

Parts One and Two

Mr. Chairman,

Allow me first to explain a slight reordering of the provisions that were previously adopted on first reading for Parts One and Two. The draft articles adopted by the Commission at its fifty-fifth session in 2002 contained an article 3, in the section on natural persons, which, in paragraph 1, established the principle that the State entitled to exercise diplomatic protection is the State of nationality. This is the basic premise of the entire draft articles, to which certain exceptions are recognized. It was felt that this provision was applicable to both natural and legal persons, and that, therefore it should be situated in a location that made it of more general application. Initial ideas were to include it in Part One, either in article 2, or even in article 1. However, the Committee decided, instead, to situate it at the beginning of Part Two, since it only relates to the

question of nationality covered in the part, as article 3 in a new chapter I entitled "General principles" and which would therefore be applicable to chapters II and III.

In addition, it was decided that former paragraph 2 of article 1, which recognized the exception contained in article 8 to the nationality rule, was better suited as a second paragraph in article 3. Hence, it was reformulated to read "[n]otwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8." In short, therefore, paragraph 1 establishes the default position, where it is the State of nationality of the person, whether natural or legal, that has the right to exercise diplomatic protection. Paragraph 2, in turn, recognizes the exception to this that is that there are some exceptional cases where a State may exercise diplomatic protection over non-nationals.

Mr. Chairman,

In summary, Part One, entitled "General Provisions", remains substantially the same, except for the relocation of paragraph 2 of article 1 to article 3. No other changes were made to articles 1 and 2.

As for Part Two, the articles have been organized into three chapters. The first, entitled "General Principles", contains draft article 3, which I have already introduced.

Chapter II is entitled "Natural persons", and contains draft articles 4 to 8. These provisions were adopted by the Commission in 2002. While some changes were made by the Drafting Committee this year, the provisions remain largely the same. Hence, as already discussed, what was previously paragraph 1 of article 4, has now been moved into new draft article 3. In addition, the title of article 4 was amended to read "State of nationality of natural persons"; so as to align it with what was adopted this year for the equivalent provision for legal persons, namely article 9**.**

The only substantive change considered by the Committee to this group of articles relates to the continuous nationality principle in draft articles 5, 7 and 8. During the

discussion on the equivalent provision in the context of legal persons, namely draft article 10, the Committee took note of the fact that the Government of the United States had in its interventions before the Sixth Committee and in a communication to the Commission, suggested that the end point for the requirement of continuous nationality be changed from the point of the "official presentation" of the claim to the date of "resolution" of the claim. The source of the suggestion came from the decision of an international arbitral tribunal acting in the context of the North American Free Trade Agreement (NAFTA), the *Loewen* case, which had been handed down after the Commission had provisionally adopted article 5 in 2002. The tribunal held that the rule of continuous nationality applied not only through the date of the presentation of the claim, but also through the date of resolution of the claim.

The Committee discussed the issue in great length. The Committee agreed that there was sufficient case law in support of the proposition that if a corporation changes its nationality after the date of official presentation of a claim, but before resolution of the dispute, in principle, the State of nationality no longer may exercise diplomatic protection. However, the Committee was of the view that the relevant articles deal with the entitlement of a State to exercise diplomatic protection and the relevant date, in addition to the date of injury, can only be the date of official presentation of the claim. As drafted, the article cannot subject the exercise of diplomatic protection to some future date of resolution of the dispute. There were also some members in the Drafting Committee who found the requirement of continuous nationality until the "resolution" of the dispute too restrictive and categorical. References were made to situations of change of nationality of a corporation by succession or partition of a State. In respect of natural persons, marriage may result in change of nationality. Therefore such change of nationality after the date of official submission of a dispute and before the resolution of the dispute should be considered in context. There were also questions as to the meaning of "resolution" of a dispute which appeared wider than the date of an award or a judgment. The Committee, however, agreed that a subsequent change of nationality of a legal or natural person after the date of official presentation of a claim, but before, resolution of the dispute, or the date of an award or a judgment, could have a substantive

effect on the entitlement of the State of nationality to continue to exercise diplomatic protection. For this reason, the Committee agreed to retain the reference in the articles to the date of official presentation of the claim, but to elaborate in the commentary the effect of change of nationality following that date. The Committee agreed that it was better to wait for Governments' views on this issue and consider the matter again in second reading.

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Mr. Chairman,

Chapter III of Part Two is entitled "Legal Persons", and contains draft articles 9 to 13, all of which were considered and adopted by the Drafting Committee at this year's session. I will therefore spend a significant part of my statement discussing each of those provisions in turn.

Article 9

Article 9 corresponds to article 17 proposed by the Special Rapporteur. It deals with the question of the State of nationality for purposes of diplomatic protection of corporations. As will be explained, the Committee first dealt with the situation of corporations as the classic example of the types of legal persons on whose behalf diplomatic protection may be exercised. There are, of course, other types of legal persons that may seek the protection of their national States, and that issue will be discussed in due course.

Focusing on the provision at hand, I wish to recall that the Commission considered the article on the basis of a proposal made by the Special Rapporteur in his fourth report, considered at last year's session. Indeed, following the discussion in the plenary, an open-ended working group was established last year to consider this article, primarily with a view to considering the inclusion of the concept of an appropriate link between the corporation and the State of nationality. The working group subsequently held two meetings at which it agreed on the basic policy underlying the provision, and

prepared a revised draft of the article, including several drafting alternatives, for consideration by the Drafting Committee. It was this text that was subsequently referred to the Drafting Committee. Indeed, it was decided that the Drafting Committee would proceed to consider the article; so as to take advantage of the availability of time last year and while the discussion of the working group was still fresh in the members' minds. However, it was agreed at the time not to transmit the article to the plenary, so as to give the Committee the opportunity to further refine the text in light of its subsequent work on the other draft articles in this chapter. Indeed, the following description of the Committee's work on article 9 is based largely on what was done last year, and I wish to thank last year's Drafting Committee Chairman, Mr. James Kateka, for his kind assistance in providing this information to me.

Mr. Chairman,

As I have already mentioned, the Committee proceeded with its work on the basis of the text formulated in the open-ended working group, which read "[f]or the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent][administrative]/[formal] connection." It was understood that the new text replaced both paragraphs of the version that had been proposed by the Special Rapporteur in his fourth report.

The opening phrase "for the purposes of diplomatic protection", had enjoyed general agreement in the Working Group, as it followed the formulation in the corresponding provision in the context of natural persons, namely article 4. The Committee saw no reason to deviate from this approach.

The first issue related to the phrase "in respect of an injury to a corporation" which had been tentatively included in square brackets. The Committee eventually settled for aligning the text with the approach taken in article 4, by simply saying diplomatic protection "of corporations". It was felt that while the two formulations had the same

meaning, the more concise version was preferable, especially since the concept of "injury" to a national is covered in article 1, which is equally applicable to article 9. The Committee also considered a proposal that made reference to "legal persons" instead of "corporations", but it was tentatively agreed that the classic example is that of corporations, and that the articles would be structured in such a manner so as to include a general provision applying the provisions on corporations as appropriate to other legal persons - which was done this year in the form of draft article 13.

The next issue before the Committee related to the way in which the law under which the corporation was formed was to be described. The Working Group proposed two formulations which read: "that according to whose law the corporation was formed" or "determined in accordance with municipal law in each particular case". The Committee had a general preference for the first of the two proposals, as the way forward, since it more clearly dealt with situations where the municipal law did not provide for the nationality of corporations. The Committee considered further options as follows: "is the State under whose law the corporation was formed and with which it has sufficient connection" and "means a State under whose law the corporation was formed". It eventually settled for the latter formulation, which had the virtue of following the formulation in article 4. The formula is meant to be general in nature, since, it was decided that it was not possible to deal with all the possible "hard" cases that may arise, for example, where additional criteria (such as majority shareholding) are required by domestic law for the corporation to hold the "nationality" of the State.

The third, and most difficult, issue was how to describe the notion of an appropriate link. The Committee had various options before it, namely "sufficient", "close and permanent", "administrative", "formal", "genuine and current", "ongoing" or "clear" connection. This matter took up the bulk of the Committee's work on this article. It was recognized that the very act of incorporation, being an act of free choice, was itself an example of a voluntary connection, and the Committee considered views questioning the necessity of including an additional element of connection at all.

Indeed, the Committee considered a proposal which would limit the provision to stating that "[f]or the purposes of diplomatic protection of corporations, a State of nationality means a State under whose law the corporation was formed". The concern was that, by adding cumulative conditions for nationality, it would become either more difficult for the corporation to have the nationality of the State, leading to stateless corporations, or, in the case of a broad formulation of such additional criteria, even the State of nationality of the shareholders could be considered the State of nationality of the corporation itself.

Having said so, the Committee was conscious of the need to maintain flexible formulations so as to avoid requiring a definitive determination of the nationality of the corporation, which might be too difficult to do in practice. At the same time, the prevailing view was that words such as "sufficient" could not be supported by the majority of the Committee, as it was too vague and subjective. Similarly, the Committee felt that the phrase "close and permanent" was too high a standard to be applied and that it had been utilized in a purely descriptive manner in the *Barcelona Traction* judgment. Hence, turning it into a normative requirement would be going further than what the International Court had done. Likewise, the term "formal" was viewed as not adding anything new to the requirement of incorporation.

The Committee next narrowed the proposals before it to two: the first ended the provision at the word "formed", as I have already mentioned, and the second retained the reference to a connection in the form of the following phrase "and with which it has an [appropriate/current] connection".

In the context of considering the first option, the Committee discussed the necessity of adopting an active policy of discouraging the practice of "tax havens", and whether to exclude the possibility that a State which is a "tax haven" may exercise diplomatic protection over one of its corporations. If so, then additional elements relating to the existence of some link to the State, more than just the formal act of incorporation, would be required, and which would be analogous to the *ratio decidendi* in the

Nottebohm case. However, the Committee's view was that the question of a tax haven was not central to the provision, and that the Committee should not necessarily seek to expressly exclude the situation of tax havens. Indeed, it was recognized that the real principle in the *Barcelona Traction* case was the recognition of the act of free choice on the part of the individuals incorporating the company; and the elements recognized by the Court were merely offered as evidence of the exercise of such free choice, beginning with the act of incorporation itself.

Yet, the Committee agreed that it was constrained by decision of the Working Group, following on the position taken by the Plenary, to include some reference to the necessity of an appropriate connection. The Committee thus next considered a proposed formulation, based on the second of the two approaches, which read "and in whose territory it has its registered office or place of its management or another appropriate connection". The formula focuses on examples of the most obvious connections of the formal kind which States usually consider when allowing companies to be incorporated under their laws. The various options are offered as alternatives, in addition to the basic criterion of where the corporation was formed.

I might also mention that the use of the word "and" was intentional since if it were rendered as "or" it would significantly change the scope of the provision by making such protection possible on the sole ground of one of the "links", regardless of the place of formation. This would, for example, potentially allow the State of nationality of the shareholders to exercise diplomatic protection, a situation which the Commission did not support as a general proposition, except in some narrow exceptional situations, as envisaged in draft article 11.

The Committee thus proceeded on the basis of the second of the two proposals, refining it further by rendering it as "and in whose territory it has its registered office or seat of its management or some similar connection". The Committee thought that the phrase "some similar" was more concrete than the initial word "appropriate".

In addition, Mr. Chairman, this year the Drafting Committee added a further precision to what was adopted last year, by replacing the reference to “a” State of nationality meaning “a” State under whose law the corporation was formed, to “the” State of nationality meaning “the” State under whose law the corporation was formed. This precision was added so as to eliminate the possibility of an interpretation that corporations might have dual nationality. If you contrast this with article 4, you will see that there reference is made to “a” State, since multiple nationality is possible in the context of natural persons, as confirmed by draft article 6.

Finally, the Committee also considered the question of the title of the provision at this session, and decided on “State of nationality of a corporation”, which tracked the title of the equivalent article for natural persons. The title reflects the scope of the provision, namely that it is referring to corporations as the subset of legal persons which is primarily the subject of discussion in the context of diplomatic protection. The question of the State of nationality of other legal persons is covered by the provision in article 13.

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Article 10

Mr. Chairman,

I turn now to article 10 on the continuous nationality of the corporation requirement. Before discussing the substance of the provision, allow me to say a word about its location. If you recall, the Special Rapporteur had initially proposed this article as draft article 20, located after what are now draft articles 11 and 12. However, the Committee decided to change its location, placing it directly after article 9 for reasons which I will explain shortly.

As for the structure of the provision, while the original proposal was all in one paragraph, the Committee decided to reflect the text in two paragraphs, the first of which established the basic rule, and the second contained a proviso to the rule.

Paragraph 1

Paragraph 1 extends the requirement of continuous nationality to corporations. This paragraph was largely considered to be uncontroversial as it was based on the equivalent provision for natural persons, contained in draft article 5, which had previously been adopted by the Commission.

As for the formulation of the paragraph, the Committee aligned the provision with article 9, which is not limited to incorporation. Hence, reference is made to the nationality of the corporation, rather than to the State of incorporation or the laws under which the corporation was incorporated.

The Committee also considered whether the reference to a corporation being "a national" was appropriate, or whether it was better to say that the corporation "had its nationality". The concern here was, in part, that a reference to a "national" corporation could be a reference to a State owned corporation. The difficulty was also one of translation into some of the official languages which did not have a term for the corporation being a national. However, it was considered that since the reference to "national" in article 1 was correct, it therefore was also appropriate for this article. It was thus decided to keep "national" in the English original, leaving it to each of the linguistic groups to find an appropriate formulation.

I already explained the Committee's decision to retain the article the date of the official presentation of the claim instead of the resolution of the claim and will not elaborate on it any more.

Paragraph 2

Paragraph 2 of article 10 deals with the situation where the injury takes place to the corporation, but the corporation ceases to exist before the completion of the continuous nationality period. The question arises as to whether a claim may still be

made, even though the company no longer exists. In other words, whether a claim could still be brought even though the continuous nationality rule is not satisfied because the corporation has ceased to exist before the moment of the official presentation of the claim. The Committee took note of the fact that there existed authority, in the separate opinions of several judges in the *Barcelona Traction* case, for the proposition that the State of nationality of the corporation should be entitled to do so. This was reflected in the original proposal of the Special Rapporteur in the form of a proviso to the draft article which read: "provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation".

In principle, the Committee agreed with the basic policy position behind the proviso. However, the Committee considered that the provision had to be aligned with the possibility in article 11, paragraph (a), that the State of nationality of the shareholders might also enjoy the right to exercise diplomatic protection. The issue then was to determine the point at which the State of nationality of the shareholders would be allowed to have the claim. Put differently, the Committee felt it necessary to limit the overlap between this paragraph, allowing for the continued espousal of the claim by the State of nationality of the corporation, and article 11, paragraph (a), recognizing that the State of nationality of the shareholders has the right to make a claim in a similar factual situation. It felt that, in principle, it was for the State of nationality of the corporation to continue to pursue the claim after the demise of the corporation. The issue then was, in what circumstances, could the State of nationality of the shareholders also bring a claim? It was clear, therefore, that draft article 10 had to be drafted in conjunction with draft article 11, a text of which had already been finalized by the Drafting Committee at that stage.

After some discussion on the matter, the Committee proceeded on the basis of a "package" proposal whereby:

- Former draft article 20 was moved up after article 9, but before article 11;
- Draft article 10, paragraph 2 would read "[n]otwithstanding paragraph 1, a State is entitled to exercise diplomatic protection in respect of a corporation which was its

national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation."

- Draft article 11, paragraph (a), would be amended so as to insert the phrase "for a reason unrelated to the injury", and paragraph (b) of that draft article would also have the phrase "had, at the time of the injury" inserted in the first line.

The basic approach behind this proposed structure was to give the State of nationality of the corporation the priority in exercising diplomatic protection in the situation where the injury, which constituted an internationally wrongful act, resulted in the demise of the company. The phrase "as the result of the injury" was thus inserted in order to give effect to this, thereby establishing the basic criterion for the exceptional situation when the State of nationality of the corporation may continue to seek to press the claim after the corporation's demise. This should be contrasted with article 11, subparagraph (a), which envisages the situation where the corporation has ceased to exist for reasons unrelated to the injury. As will be discussed shortly, in that scenario, the State of nationality of the shareholders would be permitted to intervene on their behalf.

I should mention at this point that these modifications to draft articles 10 and 11 were made both to clarify the overlap between the two draft articles, and by way of adding restrictive provisions to the text so as to deal with some of the concerns that had been raised in the Committee, and in the plenary itself, that the exceptions in article 11 were too broad. I will return to this point when discussing article11.

The final text of the paragraph 2 was refined further by replacing the reference to "a State is entitled" to read "a State continues to be entitled" so as to make it clear that a new basis for diplomatic protection is not being created. Instead, where the corporation ceases to exist, the State which otherwise had a right to protect continues to have that right. Furthermore, the text at the end was refined to read "according to the law of that State", referring to the State of incorporation which is mentioned earlier in the paragraph.

The title for article 10 is "continuous nationality of a corporation".

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Article 11

Mr. Chairman,

The Committee undertook its work on draft article 11 on the basis of the proposal by the Special Rapporteur in his fourth report. No changes were made to the chapeau of the provision laying out the basic principle that the State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of the shareholders in the case of injury to the corporation. This reflects the general position in international law as enunciated in the *Barcelona Traction* case. The main focus of the discussion, therefore, was on the two exceptions to that rule recognized in subparagraphs (a) and (b).

Allow me to reiterate, Mr. Chairman, that the Drafting Committee proceeded with its consideration of the two exceptions with caution, knowing that their inclusion had been a source of contention both in the plenary and among some delegations in the Sixth Committee. This consideration was central to the Committee's work on draft article 11 which seeks to strike a balance between recognizing the possibility for the State of nationality of the shareholders to intervene where it is the corporation that was injured, while seeking to place appropriate limitations on such possibility.

Subparagraph (a)

The discussion on subparagraph (a) focused on two key issues: (1) the concern that the exception was too broad, and therefore subject to abuse; and (2) the overlap between the situation envisaged in subparagraph (a) and that covered in the proviso contained in paragraph 2 of article 10, which I have already alluded to.

As regards the first issue, during the initial consideration of subparagraph (a) of draft article 11, the Committee focused on the question of the scope of the reference to

having “ceased to exist according to the law of the State of incorporation”. The concern was that it was possible for a corporation to be wound up in the State of incorporation, thereby “ceasing to exist” there, and then reincorporated in another jurisdiction. Such device could be resorted to by unscrupulous shareholders in order to claim that the corporation had “ceased to exist”, thereby founding a claim for intervention by their State or States of nationality. The Committee was in agreement that the possibility of the State of nationality of shareholders to intervene should be limited in such cases. The concern, however, was that the provision, as initially drafted, was insufficient.

Various approaches were considered. For example, it was suggested that the provision could have been merely rendered as “the corporation ceased to exist”, which would introduce an element of constructive ambiguity, thereby covering, for example, the case of companies which had ceased to exist de facto but not legally. The provision would then be further explained in the commentary. However, such a formulation suffered from the fact that it failed to indicate the applicable law. In addition, it was recognized that the vast majority of cases involved situations where the corporation has ceased to exist in the State of incorporation. Hence, the State of nationality of shareholders would not have a right of action in cases where, for example, the corporation has ceased to exist in a country where it does business, but not where it is incorporated. Indeed, it would be hard to say that the corporation had actually ceased to exist if it was still operational in its place of incorporation, or, more accurately, where it still was “legally” in existence according to the law of the State of its incorporation. It was thus considered necessary to indicate in the draft article that it is only the demise of the corporation under terms of the law of the State of its incorporation, and not of any other State, that would open the way for the State of nationality of the shareholders to claim the right to intervene on their behalf by way of diplomatic protection.

The issue before the Committee, therefore, was how to draft a provision that would recognize such requirement, while preventing the type of abuse that I referred to earlier on. Various possibilities were considered, including:

- retaining the provision as proposed, or a variation thereof, but making it clear in the commentary that in such a situation, even though legally a new entity had been created, the corporation could not be held to have "ceased to exist", because, in substance, it was the same entity. As a matter of policy, therefore, the State of nationality of the shareholders would not be granted the right to interfere so as to give protection in such cases; or
- qualifying the existing text so as to add some further criterion, while recognizing that it was not feasible to try to provide for each possible permutation of factual scenarios involving shareholders.

The Committee proceeded on the basis of the latter idea of qualifying the language by adding the word "legally" after "ceased to exist". The eventual solution was based on a variation of this approach, namely that the corporation had ceased to exist "according to the law of the State of incorporation", without any reference to the "place/State of its incorporation". It was felt that such phrasing had the advantage of greater accuracy by casting the issue in terms of the applicable law for determining when the corporation had "ceased" to exist so as to allow the possibility of intervention by the State of nationality of the shareholder. In addition, by avoiding a reference to the actual place where the corporation had ceased to exist, it was felt that the possibility of abuse would be limited. This will be discussed further in the commentary.

Turning, briefly, to the second issue that arose in the context of this subparagraph, namely the phrase "for a reason unrelated to the injury", as I have already discussed, this phrase was inserted later on as a compromise adopted in the context of the discussion on draft article 10 relating to the continuous nationality rule. As I mentioned when discussing that article, the phrase was included in subparagraph (a) of draft article 11 in order to delineate more clearly the situation where the State of nationality of the shareholder may be permitted to exercise diplomatic protection on behalf of its national in the scenario where the corporation has ceased to exist. It is only when the corporation ceased to exist for a reason unrelated to the injury that the State of nationality of the shareholder may intervene. [The sense was that the State of nationality of the corporation

may have less of an interest in intervening in such situations, therefore leaving resort to their respective national States as the only avenue of redress available to the shareholders.] Viewed in the context of all the articles on legal persons, the Committee considered this to be an acceptable compromise, especially because it further restricted the possibility of intervention by the State of nationality of the shareholders.

Before concluding my discussion of this subparagraph, I might also note, for the record, that the Committee did not agree with the suggestion which had been made in plenary that a time limit be included, i.e. that the claim had to be brought within a reasonable time. It was not clear how that could be done.

Subparagraph (b)

Subparagraph (b) deals with the situation where the corporation in question is injured by the State of incorporation. Obviously, the corporation itself is without protection in such a case as its State of nationality is the wrongdoing State. Therefore, on policy grounds, the provision recognizes, as an exception to the general rule, that the State of nationality of the shareholders could exercise diplomatic protection on behalf of its nationals in such situations, so as to afford some measure of protection.

It was recognized in the Committee that while some, albeit limited, authority for such exception was to be found in the *Barcelona Traction* judgment, it was not without its difficulties. Indeed, it should be recalled that the proposed exception was debated at some length in the plenary last year where it had been a matter of some controversy. The Committee did, however, note that a majority in the plenary had supported the principle in subparagraph (b). Having said so, the Committee viewed its mandate as being to find compromise language that would meet with the support of the entire Commission.

To that end, the Committee took on board the suggestion that had been raised during the course of the debate in plenary, that the provision be limited to the situation where the State of incorporation required incorporation as a precondition for doing

business in that State. The rationale being that if a corporation was voluntarily incorporated in a State, then the shareholders had accepted the risk of investing in that State. On the other hand, where the corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and local incorporation had been, in the words of the provision, a "precondition for doing business there", considerations of equity militated in favour of granting the foreign shareholders the possibility of being protected by their national State or States against the State of incorporation.

As for the drafting of the provision, one suggestion was to add at the end "and the latter State required the corporation to incorporate in that State as a precondition for doing business there". The Committee agreed to work on the basis of that proposal and a further, more refined, version was proposed as follows "where incorporation was required by that State as a precondition for doing business in that State". Several further refinements were made to the latter phrase resulting in the formulation "and incorporation under the law of the latter State was required by it as a precondition for doing business there."

The reference to "latter" State was included so as clarify that the reference is to the State alleged to be responsible for causing the injury, and not to the State of nationality, mentioned in the chapeau. The phrase "under the law of the latter State" was included to insert a more objective standard. The Committee did recognize that there may be situations where the law does not require incorporation, but in reality it is clear that investors are required to incorporate in the State if they wish to do business there. Yet, it was felt that the majority of cases involved situations where there was a legal requirement of local incorporation. Furthermore, the phrase follows the same approach as that in article 9, i.e. the reference being to "under" that State's law.

There was also some discussion in the Committee about the appropriateness of the phrase "doing business". While the Commission considered having a formulation that

worked in all languages, in the end, it was decided that each language would adopt the most appropriate phrasing for the language in question.

In addition, an element of the continuous nationality requirement was subsequently included in the provision, with the insertion of the reference to the corporation having "at the time of the injury" the nationality of the State allegedly responsible for the injury. This was included as part of the overall "package" on draft articles 10 and 11, which I have already discussed. In short, it serves as a reminder that, in accordance with the continuous nationality rule, the corporation had to have, at the time of the injury, the nationality of the State alleged to be responsible for the injury, in order for the exception in subparagraph (b) to be applicable.

Finally, it should be noted that the subparagraph was further aligned with the rest of the draft articles through the inclusion of the phrase "alleged to be" before the word "responsible".

The title of article 11 is "[p]rotection of shareholders". Other suggestions included "State of nationality of shareholders" or indicating in the title that the article provided exceptions to the general rule, or "claims" by shareholders.

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Article 12

You will recall that this article was proposed by the Special Rapporteur as article 19, a savings clause designed to protect the interest of shareholders, as opposed to the interest of the corporation. The article was inspired by the *Barcelona Traction* case. You will also recall that there was general support for this article in the Plenary.

In considering the article, the Drafting Committee agreed that there are instances in which an internationally wrongful act may directly injure the interest of shareholders with no or little effect on the economic viability and activities of the corporation itself,

such as the voting rights of shareholders. In such circumstances, the State of nationality of the corporation will have no interest or incentive to protect the interest of non-national shareholders and it was only reasonable to allow the State of nationality of shareholders to intervene on their behalf. This understanding constituted the bases for this article. With this understanding, the Committee was of the view that it was better to draft the article not in the form of a savings clause or as an exception to article 11 dealing with the right to diplomatic protection of State of nationality of the corporation, but a as an affirmative provision dealing with an independent right of shareholders to diplomatic protection under certain circumstances.

Some members of the Drafting Committee expressed concerns that it was not always easy to distinguish between the injury to the interest of a corporation and the injury to the interest of its shareholders. They felt there may be situations in which an injury to the corporation could also be a direct injury to shareholders. The Committee finally agreed that factual circumstances in a particular case will assist in identifying situations in which there is a direct injury to shareholders which would justify the application of this provision. Nevertheless, the Committee made a number of drafting changes to address these concerns. The opening clause of the article provides "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 key words here are "direct injury", "the rights of shareholders as such" and "as distinct from the corporation itself". These words are aimed at identifying a very special case.

The second part of the article provides that the State of nationality of "any such shareholders is entitled to exercise diplomatic protection in respect of its nationals". The words "its nationals" refer to those shareholders which have the nationality of the State which is exercising diplomatic protection. The Committee was aware that there might be situations in which shareholders of a corporation will have different nationalities and if each State of nationality of shareholders wants to exercise diplomatic protection, there will be multiples claims presented by different States. But the Committee is of the view

that the article deals with the entitlement of States to exercise diplomatic protection and do not deal with priority of claims or complications in case of multiple claims.

The title for draft article 12 is “direct injury to shareholders”.

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Article 13

Mr. Chairman,

I turn now to the last article in the chapter on legal persons, namely draft article 13. The article contemplates the applicability of the provisions on corporations to other legal persons. The Committee agreed on the necessity of including the provision, and limited itself to refining the drafting. In particular, there was some discussion about the inclusion of the Latin reference to “*mutatis mutandis*”. This raised two issues: one of finding a suitable way of expressing the concept other than by means of a Latin maxim, and the other one of substance. As regards the latter, the point was raised that it was difficult to extend the principles relating to corporations to other legal persons which vary quite extensively. However, the Committee was of the view that it was exactly because of this difficulty in ascertaining how the principles would apply in the context of other legal persons, that it was preferable only to state the basic point that the principles in the draft articles pertaining to corporations would have to be adjusted in order to take into account such diversity. It would then be up to a Court to determine which principles do apply to other legal persons.

Various proposals were considered, including:

- limiting the cross reference to those draft articles that would be of greatest relevance, and not, for example, to cite those referring to the relationship between corporations and shareholders, which may be of less relevance in the context of other legal persons; or
- recasting the provision in the form of a proviso so as to state that, in appropriate circumstances, the principles might apply to other legal persons. That would leave

the point open. Similarly, it was proposed that the text provide that the principles "may" be applied, instead of "shall" be applied, but the Committee felt that the provision would then be giving too little guidance, and would be more in the form of a recommendation, which would be of doubtful value; or

- inserting a provision that looked at diplomatic protection in a much broader way, moving away from treating corporations as the archetype legal person, so as to cover the possibility of other, more traditional forms of legal persons, which are not modeled on western corporate structures, and which would be drafted in the form of a proviso. There would then be a further draft article which would cover those legal entities that were similar to corporations, for which the principles established for corporations could be applied; or
- Reformulating the provision as follows: "[n]othing in the present draft articles prevents application, as appropriate, to the diplomatic protection of legal persons other than corporations of principles laid out in articles 9 and 10 in respect of corporations." However, the Committee did not accept this approach since it did not sufficiently affirm that the principles applied to the other legal persons.

It was eventually decided to limit the provision only to articles 9 and 10, so as to exclude the provisions on shareholders which were considered to be of less relevance. Protection of the board members etc, analogous to shareholders, would be covered by the general rules on protection of natural or legal persons, as appropriate. As for the drafting, there was general support in the Committee for finding a more accessible term or phrase to replace the reference to "mutatis mutandis". Proposals included "in appropriate circumstances" or "inasmuch as circumstances allow". Another suggestion was to render the phrase as "with appropriate changes", but that was not accepted because it implied that all the principles would always apply, which was not necessarily the case, and because it was not a question of adapting to the structure of the entities in question, but more one that the principles may apply differently to different entities. The phrase "as appropriate" was seen to be better since it conveyed the idea that in some cases some of the principles might not apply at all because they were not appropriate. The Committee eventually settled for that phrase. The reference to "shall be applicable" was also

acceptable to the Committee because the provision is limited to applicability of articles 9 and 10, which deal with general principles, to other legal persons. A further precision was added to indicate that what is being referred to is diplomatic protection on behalf of other legal persons.

The title of article 13 is "[o]ther legal persons".

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Part Three

Mr. Chairman,

The next part in the draft articles is Part Three, which deals with the exhaustion of local remedies rule. It contains three articles, namely draft articles 14, 15 and 16**,** all of which were adopted by the Commission last year. The only issue that arose this year in the Committee in relation to this part had to do with a refinement to article 14**.**

In finalizing the entire set of draft articles, the Committee took note of the fact that there had been comments in the Sixth Committee questioning the use of the phrase "as of right" in paragraph 2. If you recall, Mr. Chairman, the original idea behind the use of the phrase "as of right" was to limit the range of possible remedies which the injured person would have to exhaust to only those that existed "as of right", thereby excluding discretionary mechanisms of conflict resolution which do not necessary guarantee the possibility of resolving the issue, for example, resort to ombudsmen. However, it was noted in some of the interventions in the Sixth Committee that the phrase seemed to exclude certain types of appeals which were up to the discretion of the Court in question, for example, the certiorari process before the U.S. Supreme Court. The Committee decided to delete the phrase and replace it with "legal remedies". Commentary will elaborate on the meaning of "legal remedies".

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Mr. Chairman,

I turn now to the last part of the draft articles, namely Part Four entitled "[m]iscellaneous provisions". Three articles are to be found in this part, namely draft articles 17, 18 and 19, all of which were considered at this year's Drafting Committee. From the title of the part one can infer the nature of the three provisions, namely that they are less concerned with the rules on the exercise of diplomatic protection, and more with how such rules relate to other areas of international law.

Articles 17 and 18

Mr. Chairman,

Draft article 17 had originally been proposed by the Special Rapporteur as a *lex specialis* provision dealing with special treaty regimes. During the debate in plenary on that article, held last year, it was suggested that the scope of the provision be broadened to also include human rights protection regimes. This year, the Special Rapporteur, in his fifth report, proposed two articles, the first, draft article 26, dealing with human rights protection and the second, proposed as an alternative formulation for draft article 17, formulated more broadly to cover both the application of bilateral treaties as well as human rights protection regimes. After extensive debate in the plenary this year, both articles were referred to the Drafting Committee.

The Committee had several options before it: (1) to reach agreement on one article, including a reference to both human rights treaties as well as to bilateral investment treaties and other investment agreements of that kind; or (2) to draft two separate articles, the first dealing with human rights treaties, and the second on bilateral agreements; or (3) to draft one article with two paragraphs covering both situations. Different preferences were expressed in the Committee. Some members spoke in favour of the more minimalist approach of the first option: it was maintained that having two articles, each trying to characterize a separate process, would be very complex, and that a single provision stating that the articles on diplomatic protection were without prejudice to those other procedures, as proposed in the alternative formulation for draft article 17,

had the virtue of simplicity. Other members doubted whether it was feasible to cover everything in one single article, since the goals of the two types of special regimes were different in nature: for the bilateral investment treaties, the provision would be included to recognize that they may preclude the application of diplomatic protection under general international law, whereas in the context of human rights treaties, the point was to say that such treaties apply even though there is the possibility of diplomatic protection. Initially, the Committee proceeded with the goal of having one provision. However, as I will discuss shortly, it eventually settled for the latter approach, resulting in the adoption of two articles, namely draft articles 17 and 18.

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Article 17

The Committee proceeded to consider draft article 17 on the basis of the first part of the alternative version proposed by the Special Rapporteur in his fifth report this year, which read "[t]hese articles are without prejudice to the rights of States or persons to invoke procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act". First the Committee discussed the concern that the formulation might not adequately cover all possible "procedures other than diplomatic protection". For example, it was not clear that the text would cover the rights of States other than the State entitled to exercise diplomatic protection, as contemplated in article 48 of the articles on the Responsibility of States for internationally wrongful acts. One suggestion was to include two paragraphs in the provision, one to deal with rights which exist under general international law and accrue to subjects other than the State attempting to exercise diplomatic protection, and then a second dealing with the treaty-based regimes, whether for human rights or investment. However, the Committee was of the view that it would be too difficult to attempt to provide for all possible procedural permutations, and that the approach should rather be to draft a single omnibus provision, based on the new text for draft article 17.

Various suggestions were made to refine that text further, including: inserting a reference to invoking "rights as well as" procedures; adopting a broader and more

comprehensive formulation such as "[t]hese articles are without prejudice to the rights of States, injured persons or other entities to have resort to action or procedures other than diplomatic protection…", or "[t]hese articles are without prejudice to the rights of States or persons other than resort to the exercise of diplomatic protection to secure redress". The Committee eventually settled for a variation of the latter formula, together with a more comprehensive reference to "States, injured persons or other entities" which was subsequently refined to refer to "natural" instead of "injured" persons. The provision was further aligned with article 1 so as to make reference to "resort to action".

It was understood in the Committee that the formulation, although cast in general terms, applied to all the possible situations that might arise. Indeed, it was felt that limiting the provision to a general reference to the existence of other procedures was the better approach, as opposed to trying to provide for all such possible scenarios. Strictly speaking, it was not necessary to distinguish whether the right in question was based on treaty, customary international law or on some other procedure, like that envisaged in article 48 of the State Responsibility draft articles. This will be explained in the commentary. What will also be clarified in the commentary is that the provision should not be read as implying that a State is making an election by resorting to procedures other than diplomatic protection.

The Committee was also of the view that this article does not deal with domestic remedies, instead it deals with remedies under international law other than diplomatic protection. Even though it was understood that the rights of States to resort to actions or procedures which were permitted under international law, to be absolutely clear, the Committee added the words "under international law" after the words "actions or procedures". The Committee also had in mind certain types of human rights which are protected by international law and where States other than the State of nationality of the injured person may be permitted to intervene. These articles will have no effect on such other rights that States may have. Of course, international law includes rights that are created under regional arrangements and commentary will explain this further.

The title of the article is “actions or procedures other than diplomatic procedure” which comes from the text of the draft article itself.

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Article 18

Mr. Chairman,

Upon completing a text for draft article 17, the Committee considered whether it sufficiently covered the position of special treaty regimes like bilateral investment treaties (“BITs”). Again, a range of views were expressed. Some members felt that the provision adequately covered BITs, or, if not, that the text could be further amended to include a reference to actions or “procedures” which might take care of the matter adequately. It was even suggested that, while it was useful to note that procedures other than the exercise of diplomatic protection may exist, as was done in draft article 17, it was strictly not necessary to say that diplomatic protection would be excluded by a treaty provision that impliedly or expressly forbids States to resort to diplomatic protection. Another option was to make it clear in the commentary to draft article 17 that procedures in BITs would take priority over the general rules of diplomatic protection.

Some members also did not agree that BITs automatically precluded diplomatic protection. In their view, one must look at the terms of any specific BIT to see the relationship between to the two regimes.

However, the prevailing view in the Committee was that a provision had to be included to deal with BITs. It was felt that draft article 17 was too general in that it did not adequately contemplate the possibility of the position being governed by special rules. Instead, it dealt with human rights protection regimes which are not special to diplomatic protection, but which operate in parallel to the general rules on diplomatic protection. It was also felt that, while draft article 17 focused on the existence of other rights, a provision covering special treaty regimes such as BITs would place emphasis on the obligation of the parties to resort to the procedures in those agreements, as opposed to the procedures for diplomatic protection under general international law. In addition, as a

matter of policy, it was also felt that, since the subject of diplomatic protection operated in the context where thousands of BITs were specifically concluded to vary the general regime of diplomatic protection, it would be unwise to overlook such a reality in the draft articles themselves.

I should also mention, Mr. Chairman, that a dissenting opinion was expressed in the Committee on the inclusion of a further *lex specialis* provision dealing with BITs. In terms of that view, it was recalled that the plenary had, in its debate on the article last year, considered that a special procedure was not always a *lex specialis* because there may still be room for diplomatic protection if that procedure did not work. The idea then, therefore, was not to make an exclusion by the way of *lex specialis*, but rather to leave the matter open by means of a without prejudice clause, which the Committee had adopted as draft article 17. In addition, it was stated that these draft articles should not impose certain interpretation on bilateral agreements between States. It was up to the States who concluded BITs to include or exclude diplomatic protection in total or partially by the terms of their agreement.

The Committee subsequently considered a proposal for an additional provision stating that "[t]hese articles do not apply where, and to the extent, the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States, is governed by special treaty provisions". The provision was specifically intended to cover bilateral foreign-investment protection treaties. It was recognized that, in some such treaties, recourse to diplomatic protection is not excluded altogether, hence the reference to "where and to the extent".

The Committee agreed to the inclusion of such an additional provision in order to make it clear that, where bilateral investment treaties apply, the draft articles do not supersede or contradict what is in those treaties. It was suggested that the formula be refined further to say that the draft articles would not apply where, and to the extent, "they are inconsistent with any applicable special treaty provisions". This additional

phrase was added to prevent the interpretation that, to the extent that a bilateral treaty applied, the draft articles would necessarily be excluded: they are only excluded to the extent that they are inconsistent with the treaty. To the extent the draft articles remain consistent with the special treaty, they will continue to apply.

I should also note, for the record, that the following alternative formulation of the provision, based on article 73 of the Vienna Convention on Consular Relations, was also considered: "[t]hese articles shall not affect special treaty provisions dealing with the protection of corporations or shareholders of corporations, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States." It was maintained that such a formula would be more prudent than a provision that stated that diplomatic protection would *a priori* be excluded by a conflicting bilateral treaty. However, the prevailing view in the Committee was that it was preferable to adopt a text more in the form of an exclusionary clause, as had been initially proposed, subject to the mitigating language that had been introduced, namely that the draft articles would not apply "where, and to the extent that, they are inconsistent with special treaty provisions".

As for the location of the proposed additional provision, the Committee did consider initial proposals to have it as an additional paragraph to draft article 17, or even as the first paragraph to that article. However, the Committee opted instead to place the provision in a separate article, draft article18, to make the distinction between it and draft article 17 clearer.

The Committee settled on the following text for article 18: "These articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions dealing with the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States." The provision was initially placed at the end of what is now chapter III of Part Two dealing with the diplomatic protection of legal persons. However, on reflection, it was felt that such a location would be unduly restrictive since it would not take into account the fact that BITs could include special rules relating to the exhaustion of local remedies

or dealing with natural persons who are investors. The Committee thus opted for moving the provision back into Part Four, after draft article 17, so as to give it a more general application. As a consequence, the reference to "the protection of corporations or shareholders of a corporation" was deleted, and the words "those concerning" were inserted after the word "including".

The title of article 18 is "Special treaty provisions"

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Article 19

Mr. Chairman,

If you recall, the plenary this year undertook an extensive debate regarding the Special Rapporteur's proposal for an article 27 on the diplomatic protection of ships' crews. The plenary eventually decided not to refer the draft article to the Drafting Committee, but instead instructed the Committee to consider drafting a provision dealing with the connection between the protection of ships' crews and diplomatic protection.

At the beginning of its work on the provision, the Committee was faced with the following options: (1) adopting the text of the draft article as proposed by the Special Rapporteur, albeit with the word "diplomatic" being deleted; (2) drafting an article which would indicate that both the flag State and the State of nationality of the crew members had the right to exercise protection in respect of crew members; (3) drafting an article giving priority to the flag State; and (4) having a without prejudice clause similar to that proposed in paragraph 73 of the fifth report which read "these draft articles are without prejudice to the exercise of protection by the State of nationality of a ship [or aircraft] of the crew of such a ship [or aircraft], irrespective of whether the persons are its nationals". Additional suggestions included: giving the State of nationality of the crew member the first option to exercise diplomatic protection, which would have to be done within a reasonable time, which would give priority to the nationality principle; and dealing with the issue within the confines of the without prejudice clause in draft article 17.

The Committee held an extensive discussion on the matter. For some, the concern was that there was no basis upon which to establish a substantive rule giving priority to one or the other State in question. As such, a without prejudice clause was the safer way forward. Others were of the view that a without prejudice clause was insufficient, and that it would not reflect the majority view during the plenary debate that some kind of protection by the flag State was possible. At the same time, it was conceded that the majority of the Commission did not consider that the protection in question to be "diplomatic protection" as envisaged in the draft articles. Having said so, it was felt that the compromise could be along the lines of making some affirmative statement that protection exists, while not qualifying it as "diplomatic" protection. Others were of the view that it was not appropriate to deal with other forms of protection in a set of articles dealing with diplomatic protection.

Initial drafting suggestions included formulating a provision such as "[t]hese draft articles are without prejudice to the protection the State of nationality of a ship is entitled to exercise in respect of the crew of the ship irrespective of whether they are nationals of the State of nationality of the ship, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act." However, such provision was not considered satisfactory to those members who preferred a more affirmative statement over a simple without prejudice clause.

The Committee then considered a further proposal which took a different approach, namely of drafting a provision which would indicate what the State of nationality of the ship could do, without making any reference to "diplomatic protection" or even to "protection", thereby preserving the various views expressed in the Committee. The emphasis therefore would be on formulating an affirmative provision listing all the things the State of nationality of the Ship could do in the case of an injury, for example that it could make some kind of representation and that it could claim reparation. Such provision would be based primarily on the authority of *M/V "Saiga" (No.2) case*. In terms of a further suggestion, the proposed provision would also include

an affirmative statement that such rights of the State of nationality of the ship do not prevail over the right of the State of nationality of a crew member to exercise diplomatic protection. The point being to ensure that no priority would be established in favour of the State of nationality of the ship.

This proposal for a different approach was then discussed extensively in the Committee on the basis of the following working formulation: "[w]ithout prejudice to the exercise of diplomatic protection by the State of nationality of members of crew of a ship, the State of nationality of the ship is entitled to claim cessation of the wrongful act and reparation for injury caused to members of the crew irrespective of nationality when they have been injured in the course of an injury to a vessel as a result of an internationally wrongful act." The "without prejudice" phrase was included as a means of indicating the basic relationship between the protection by the national state of the crews and whatever action the State of nationality of the ship could do, without saying anything about priority.

As a result of this initial discussion, the following proposal for an article 19 was placed before the Committee:

> "1. The State of nationality of a ship is entitled to claim cessation of a wrongful act and reparation for the injury caused to members of the crew, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.
>
> 2. Paragraph 1 does not affect the right of the State of nationality of any such members to exercise diplomatic protection in respect of its nationals."

Suggestions for modifications to this text included: (1) replacing the words "is entitled to claim" with "is entitled to exercise diplomatic protection and as a consequence of it sees fit to claim"; and (2) making a reference, either in the text of in the commentary, to the context in which the right being referred to arises by including the phrase "as recognized by the International Tribunal for the Law of the Sea".

However, in response to concerns that the proposed text was, in fact, establishing a system of priority, it was suggested that the content of paragraph 2 could be placed as an opening clause to paragraph 1. The text was therefore reformulated as follows: "[t]he right of the State of nationality to exercise diplomatic protection on behalf of its nationals is not affected by any right of the State of the flag of a ship to seek redress for damage suffered by members of the crew, irrespective of nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act." Hence, reference would first be made to the right of the State of nationality of the crew members to exercise diplomatic protection on their behalf, which is the subject of the draft articles, and then in the latter half of the provision, recognition is given to the fact that the State of nationality of the ship may also seek redress on behalf of such crew members, irrespective of their nationality. Again, no reference was being consciously made to a priority between the two States.

This formula served as the basis for the eventual compromise in the Committee, with some modifications. For example, the reference to "any" right of the flag State was considered vague and was replaced with the more affirmative "the". Likewise, the phrase "seek redress for damage" was considered unduly restrictive and was replaced with "seek redress". Several other minor stylistic refinements were also suggested. Hence the Committee narrowed the formulation for the draft article to the following two possible versions: (1) "[t]he right of a State to exercise diplomatic protection on behalf of its nationals is not affected by the right of the State of nationality of a ship to seek redress on behalf of members of the crew, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act"; or (2) "[t]he right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf 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 the course of an injury to the vessel resulting from an internationally wrongful act." The Committee then adopted the latter of the two options as draft article 19.

As for the title, the Committee considered the following options: “protections of ships’ crews” and “ship crews”, but settled for “ships’ crews” which was in line with the title for article 8 on stateless persons and refugees.

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Mr. Chairman,

This concludes my report on the consideration by the Drafting Committee of the draft articles on diplomatic protection this year. The Committee recommends to the Plenary the adoption of the entire draft articles on first reading.

Thank you for your attention.