

DIPLOMATIC PROTECTION

Statement of the Chairman of the Drafting Committee

30 May 2006

Mr. Roman A. Kolodkin

I have the honor to introduce the first report of the Drafting Committee for this session, which is devoted to the topic of Diplomatic Protection. The texts and titles of the draft articles of this topic are contained in document A/CN.4/L.684.

Mr. Chairman,

The Drafting Committee held 10 meetings from 8 to 16 May on this topic, as well as one additional meeting on 19 May to review the text. I am pleased to report that the Committee was able to complete the second reading of the entire draft articles.

Before turning to the outcome of the Drafting Committee's work, I wish to pay tribute to the Special Rapporteur, Mr. John Dugard, whose mastery of the subject, perseverance and positive disposition greatly facilitated the task of the Drafting Committee. I also wish to express my appreciation to the members of the Drafting Committee for their very helpful contributions to the drafting process, and their constructive manner, as well as the good spirit in which they discussed the articles.

The Drafting Committee reviewed the draft articles adopted on first reading in 2004. It took 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 the plenary, as well as the recommendations

of the Special Rapporteur in his seventh report. Through you, Mr. Chairman, I wish to request the members of the Commission who notice some discrepancies in other language versions of the draft articles to inform either me or the Secretariat.

Mr. Chairman,

Finally, I am pleased to say that the Drafting Committee is submitting its report with the recommendation that the Commission adopts the draft articles on second reading.

Mr. Chairman,

The Committee decided to retain the first reading structure of the draft articles. Two draft articles have been merged and one new draft article has been added.

Part One

Part One is entitled “General Provisions”, and contains the first two articles applicable to the entire set of draft articles.

Draft article 1

Draft article 1 deals with the definition of diplomatic protection for the purposes of the draft articles, as well as 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 been also the suggestion by Italy that the Commission take a different approach to draft article 1 by including a reference to the rights of the injured individual

(its national). The Committee proceeded on the basis of a proposal which emerged from the plenary debate and which avoided any reference to the basis upon which the State was invoking diplomatic protection, focusing instead on the responsibility of the injuring State. It was understood by this that such reformulation did not prevent the State from acting in its own right, which is well-established in international law. Instead, the new formulation reserves the question as to whether the State is acting in its own right or that of the individual, or both. The proposal I just referred to became the basis of the article subsequently adopted, on second reading.

The opening phrase “[f]or the purposes of the present draft articles” was added to limit the definition to the draft articles. Next, the provision refers to “...diplomatic protection consists of the invocation by a State...of the responsibility of another State for an injury caused by an internationally wrongful act”, which was a conscious attempt to align the text with the language of the 2001 draft articles on the Responsibility of States for internationally wrongful acts. Thus, it was 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 captures the notion that diplomatic protection is a process of invocation of responsibility for the purpose of implementing such responsibility. It is also understood by this provision that reference is being made to State to State claims.

As regards the phrase “through diplomatic action or other means of peaceful settlement” the Committee also considered whether the word “action” had to be aligned with other terminology used in the draft articles such as “diplomatic protection” in article 2, and “international claim” in

articles 14 and 15. The prevailing view was 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 includes “other means of peaceful settlement”; it being recalled that the latter phrase had been inserted during the first reading to clarify that diplomatic action did not include resort to the use of force.

One of the issues considered in the Committee was whether low-level interactions between States would be considered diplomatic protection, and thereby require the exhaustion of local remedies. The concern being that requiring such exhaustion of local remedies could interfere with the daily interaction between States. The Committee understood, however, 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 of the exhaustion of local remedies, would apply.

The reference to “natural or legal person” was inserted to replace the word “national” in the first reading text because of the difficulty faced by some States in categorizing legal persons as “nationals”. In his report, the Special Rapporteur had proposed, 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 the conditions laid down in draft article 8. However, it was felt that it was not necessary to include exceptions in a definition.

Finally, if you recall, the Special Rapporteur, in his report, proposed a paragraph 2 specifically excluding the exercise of consular assistance from the scope of the draft articles. The Committee recognized that there had been

no support in the plenary to this proposal, and it decided not to include such paragraph, leaving the issue to be covered in the commentary.

The title of draft article 1 remained “Definition and scope”, as had been adopted on first reading.

Draft article 2

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

I might recall here that the Special Rapporteur had included a second paragraph in his proposal for the draft article, in his seventh report, 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 Austria. The Committee noted that the Special Rapporteur’s proposal had been opposed in plenary, and it was decided not to include the new paragraph, but to refer to the matter in the commentary.

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

The title of draft article 2 remains the same as that adopted on first reading, namely “Right to exercise diplomatic protection”.

Part Two

The Committee decided to retain the structure of Part Two, as had been adopted on first reading. Part Two, which deals with the question of the nationality of claims, is divided into three chapters, the first establishing the general principle applicable to both natural and legal persons, and the second and third dealing with natural and legal persons, respectively.

Part Two is entitled “Nationality”.

Chapter I, “General Principles”

As regards Chapter I of Part Two, which contains only draft article 3, the Committee decided to retain the title “General Principles”

Draft article 3

As regards draft article 3, the Committee had before it a proposal for a reformulation of paragraph 1, based on a proposal by the Netherlands. The Committee, however, was of the view that the original formulation was preferable because it answered the question of which State is entitled to exercise diplomatic protection, whereas the new proposal emphasized the State of nationality, which was more open-ended as it begged the question of which State was the State of nationality.

The Committee also decided to keep the first reading text of paragraph 2, with a replacement of the word “non-national” with “person that is not its national” to add more precision to the text.

The title of draft article 3 is “Protection by the State of nationality”.

Chapter II, “Natural Persons”

Chapter II of Part Two deals with the nationality of natural persons, and includes draft articles 4 to 8. The Committee decided to retain the first reading title “Natural Persons”.

Draft article 4

The Committee noted that the Special Rapporteur had included in his proposal for the draft article 4 a suggestion by Austria that the first reading reference to “succession of States” be replaced by “a consequence of the succession of States”. However, the Committee did not accept 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, referring specifically to the “consequences of succession” would require a consideration of the consequences of succession of States, which is beyond the scope of the present topic. The matter was also considered to be 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, which the Committee accepted. Indeed, the phrase “in accordance with the law of that State” was 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 further decided to tighten the text by replacing the phrase “the individual sought to be protected” with “that person”.

As regards the phrase “not inconsistent with international law”, located at the end of the provision, the Committee noted, as had been pointed out during the plenary debate, that this created a lacunae in the case of individuals upon whom nationality had been conferred in a manner

inconsistent with international law. Under the draft articles, the conference 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 first reading commentary, 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 decided against doing so as it would be tantamount to recognizing that an unlawful situation would nonetheless have consequences for the respondent State. Instead, it was decided to refer more extensively in the commentary to the issue.

The title of draft article 4 remains “State of nationality of a natural person”.

Draft article 5

I turn now to draft article 5, dealing with the continuous nationality rule in the context of natural persons, which in the new version adopted by the Drafting Committee on second reading has four paragraphs.

As regards paragraph 1, the Committee decided against specifying that diplomatic protection could “only” be exercised in the manner set forth in the paragraph, because it is possible for a State to exercise diplomatic protection, under the draft articles, in respect of a person that is not its national, particularly for stateless persons and refugees mentioned in draft article 8.

The Committee did, however, accept the suggestion that the first reading text 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 first reading only required such conformity of nationality at both those points. At the same time, it is recognized that this is a more restrictive provision and that it places a burden on the claimant State to prove continuity over what can be a substantial period of time. Therefore, the Committee 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.

As regards the question of the *dies ad quem*, the ending date for purposes of the continuous nationality rule, the Committee decided to retain the date of the official presentation of the claim, as had been proposed in the first reading text, and which had been supported by the majority in the Commission. It was felt that the date of the resolution of the claim proposed by the United States was not sufficiently supported in State practice, and that the particular factual situation which gave rise to the application of the later date for the *dies ad quem* in some decisions: namely that the individual acquired the nationality of the respondent State after the date of the official presentation of the claim, could be dealt with separately – in what is now paragraph 4. In addition, it was considered illogical to base the admissibility of a claim on whether at the point of the settlement of the claim the relevant nationality existed. I could also mention here that the Committee harmonized all the references in the draft articles to the “time” of injury to read “date” of injury.

Although the Special Rapporteur proposed to include a reference to the “predecessor State” in paragraph 1, the Committee 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 do not involve predecessor States.

Paragraph 2 is based on the text of the first reading with the added refinement of the reference to the “predecessor State” as I have just mentioned. With respect to this paragraph some concerns were expressed that it could be read as being open-ended and allowing for a certain amount of “nationality-shopping”. However, it was 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 was agreed that the commentary will clarify that it has to be a reason unrelated to the advancement of the commercial interests of the individual. The reference to the “former” State at the end of the paragraph has been added to clarify that it is the State of nationality, and not the predecessor State, which is being referred to.

For paragraph 3, the Committee retained the text adopted on first reading.

As mentioned earlier, paragraph 4 has been introduced following the proposal of 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 did not accept the extension of the *dies ad quem* to that date for all cases of diplomatic protection, it did support 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 was decided to locate this provision at the end of the article because paragraphs 2 and 3 deal with admissibility. Paragraph 4 deals with a case of a claim that was admissible but is no longer so.

The title of draft article 5 has been modified to read “continuous nationality of a natural person” so as to be aligned with draft article 9.

Draft article 6

I turn now to draft article 6. The Committee adopted the first reading version of paragraph 1, with the change of the word “individual” to “person” for the sake of consistency in the text.

As regards paragraph 2, the Committee noted the proposal to delete it, on the suggestion of Austria. However, the Committee saw no reason to depart from the first reading formulation of the paragraph which could be considered as an innovative element in the draft articles. It recognizes the fact that two or more States cannot be prevented from jointly exercising diplomatic protection on behalf of a dual national.

The title of the draft article 6 remains “Multiple nationality and claim against a third State”.

Draft article 7

With regard to draft article 7, the Committee decided to retain the first reading text, including the term “predominant” which was debated at length during the first reading and which had not been opposed by the Commission during the debate in plenary. The Committee 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 *dies ad quem*. What is important here is predominance at the two critical points in time.

The title of draft article 7 remains “Multiple nationality and claim against a State of nationality”.

Draft article 8

For draft article 8 the Committee adopted essentially the same formulation for the entire provision as in the first reading text, with an amendment to paragraph 2. The main issue considered was whether to retain the first reading threshold for protection, 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. As regards Stateless persons, in paragraph 1, the Committee noted that the *Convention on the Reduction of Statelessness*, of 1961, makes reference to “habitual” residence. It was also noted 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 likely not be willing to exercise its discretion to protect. Therefore the first reading reference to “lawful and habitual” was appropriate.

Similar considerations applied to refugees in paragraph 2. The Committee decided to retain the first reading threshold since, for purposes of what is progressive development of the rules of diplomatic protection, it was wiser to recognize a higher threshold. In short, if the individual is 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 is opposable to the respondent State when the individual was lawfully and habitually resident in the claimant State.

The Committee also decided to include a reference, in paragraph 2, to the recognition of a refugee being “in accordance with internationally accepted standards”, which is not limited to that in the 1951 Convention relating to the Status of Refugees and its Protocol but should cover, for

example, individuals under the protection of the High Commissioner for Refugees which are not recognized as refugees but are lawful residents in States. The effect of this additional language is to provide a broader standard to cover a range of people. The Committee preferred a reference to “international standards” as opposed to “international law” so as to avoid the implication that what is being referred to here is only the 1951 Convention and its Protocol, or some other treaty (such as one of the regional conventions).

The Committee further retained paragraph 3 as had been adopted on first reading.

The title of draft article 8 is “Stateless persons and refugees” as adopted on first reading.

Chapter III, “Legal Persons”

I turn now to Chapter III of Part Two, dealing with the nationality of legal persons, and including draft articles 9 to 13. The Committee also decided to retain the first reading title of this Chapter, namely “Legal Persons”.

Draft article 9

The text of the first reading of draft article 9 was substantially modified in response to comments from governments and those made by Commission members in the plenary. You may recall that there were three major concerns with the first reading text:

1. that the last phrase of the text seemed to suggest a genuine link requirement between the corporation and the State exercising diplomatic protection and then not specifying the content of such genuine link;

2. that 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 may be incorporated in one State but have its registered office in another State and in this case it was unclear which State was entitled to exercise diplomatic protection; and

3. that the first reading text did not take account of the fact that there may be more than one State which will have sufficient interest in exercising diplomatic protection and that there should be some criteria to identify those States. At the same time, there should be eventually only one State that would 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 entitled to such exercise.

The Drafting Committee redrafted the text of article 9 in view of these concerns. Before describing the article, I wish to emphasize that draft article 9 does not intend to interfere or affect how internal law might define nationality of a corporation. It views the nationality of a corporation from the perspective of international law and even then only for the purposes of exercising diplomatic protection.

The present text of draft article 9 comprises two sentences and recognizes the State of incorporation as the State of nationality of a corporation. It, however, recognizes that under certain specific situations, the State in which both the seat of management and the financial control of the corporation are located would be considered the State of nationality. This is to recognize that there may be circumstances in which the connection between the corporation and the state of incorporation is so insignificant that would not justify giving priority to that State for exercising diplomatic protection. And instead, there is 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, are rather high and are set out in the second sentence of paragraph 2. They are situations in which: (a) the corporation is controlled by nationals of another State or States; (b) the corporation has no substantial business activities in the State of incorporation; and (c) the seat of management *and* the financial control of the corporation are both located in the another State. In such situations that State, namely the State in whose territory, the seat of management and the financial control of the corporation are located, is considered the State of nationality for the purposes of exercising diplomatic protection. The requirements are cumulative. In any other situation, the State of incorporation will be considered the State of nationality, entitled to exercise diplomatic protection. This provision was constructed specifically to provide clarity on which State may be considered the State of nationality of a corporation for the purposes of exercising diplomatic protection.

The article is entitled “State of nationality of a corporation”, the same as in the first reading text.

Draft article 10

Draft article 10 is in many respects similar to draft article 5 and deals with the general principle of continuous nationality for corporations. Many of the issues that were raised in the context of draft article 5 also apply here and for that reason, draft article 10 before you is redrafted. The present text of draft article 10 comprises of 3 paragraphs instead of 2.

Paragraph 1 corresponds to paragraph 1 of article 5. The modifications you will notice in this paragraph are related to the requirement of “continuity” of nationality between the two relevant points of injury and

the presentation of the claim. The paragraph also addresses the issue of the predecessor State which was addressed in a separate paragraph in the context of natural persons in draft article 5. Paragraph 1 asserts the principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was 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, makes a presumption in favor of continuity of nationality, if the nationality existed at both these dates. As in draft article 5, this presumption is, of course, rebuttable.

Paragraph 2 is new and corresponds to paragraph 4 of draft article 5. It excludes diplomatic protection of a corporation that becomes the national of the defendant State after the date of the official presentation of the claim. You will note that 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. You will also note that the issue of the predecessor State in article 10 is covered in paragraph 1. The reference to the predecessor State is intended to allow diplomatic protection for a corporation which was a national of a predecessor State at the time of injury and a national of a State that succeeded that State at the time of the presentation of the claim.

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

The title remains unchanged and reads “Continuous nationality of a corporation”.

Draft article 11

Draft article 11 was generally accepted by governments and therefore no substantial modification was necessary. There was a suggestion by one government to extent the scope of this article to include more than shareholders of a corporation such as trustees, debenture holders or other financial stakeholders. This idea was not supported in the plenary and the Drafting Committee did not include it. Therefore the text that is before you is identical to the first reading text with some minor changes. First the definite article “The” at the start of the opening clause is changed to “A”. Second, in sub-paragraph (b), the words “the time of the injury” were changed with “the date of the injury” to be consistent with the use of the same words in other provisions. And finally, the words “under the law of the latter State” in the first reading text in subparagraph (b) has been replaced with the words “in that State”. This change was intended to take account of situations in which the injured corporation was compelled to incorporate in the State that caused the injury in order to be able to do business. The new wording takes account not only when the law of the State requires a corporation to incorporate in that State, but also where there are such other strong pressures on the corporation, in the absence of the requirement by the law of the State, that the corporation has no choice but to incorporate itself in that State. The commentary will elaborate on this issue and will explain the paragraph does not include reasonable modes of inducement, but it intends to include such other pressure that would amount to compelling the corporation.

The title of the draft article remains unchanged and reads “Protection of shareholders”.

Draft article 12

Draft article 12 also did not lead to any comments for modification by governments or in the plenary. There was a suggestion that the article may be superfluous in view of draft articles 2 and 3. But the Drafting Committee felt that the article was intended to articulate a significant exception made in the Barcelona Traction judgment that has been generally viewed as an important contribution to diplomatic protection of corporations and should therefore be retained and be stated clearly.

The Drafting Committee also did not find it necessary to deal with the question of when there are shareholders from several States of nationality. In practice, usually various States of nationality of shareholders cooperate with one another. At any rate they all are entitled to exercise diplomatic protection of shareholders who are their nationals.

The title of the article remains unchanged and reads “Direct injury to shareholders”.

Draft article 13

Draft article 13 is the last draft article in this Chapter and deals with other legal persons.

You will recall that this article was intended to apply to those other legal entities which are non-commercial. This article was not the subject of much comment and seemed generally acceptable. There were some questions raised as to whether the application of the principles should be limited to those in draft articles 9 and 10, essentially dealing with nationality

issues, or should it also extend to the other two articles. The Drafting Committee was of the view that there are many other forms of legal entity that not corporations or organized for commercial purposes and it would be more appropriate to draft a provision that covered all such other legal persons. The phrase “as appropriate” in the article was regarded to be a sufficient safeguard that made it unnecessary to limit the article to the principles contained in articles 9 and 10. The Drafting Committee therefore redrafted draft article 13 as is now before you. The commentary will explain that the caveat “as appropriate” means that to the extent that the legal characteristics of a legal person are analogous to a corporation, the provisions would apply.

The title remains unchanged and reads “Other legal persons”.

Part Three

I will now turn to Part Three which deals with the exhaustion of local remedies rule. The Part is entitled “Local Remedies”.

The second reading version of Part Three now only contains two draft articles, as opposed to the first reading which had three. As will be explained shortly, this was because the Committee decided to merge two of the draft articles adopted on first reading.

Draft article 14

Draft article 14 lays down, in paragraph 1, the general rule of the exhaustion of local remedies. While the Committee decided to retain the first reading text, it did consider the suggestion that it was not necessary or desirable to state that the “injured person” shall exhaust local remedies, but that it sufficient that local remedies be exhausted, even if by someone else.

The idea being that, as a matter of policy, it may not be necessary for the individual to exhaust local remedies if they were exhausted by another entity. Nonetheless, it was felt that the first reading text was still to be preferred since it makes clear who has to exhaust local remedies, and because it tracks the traditional formulation of the rule. The Committee also was of the view that the fact that local remedies were exhausted by someone else served only as an indication of the effectiveness or not of those remedies (and as such was best dealt with under the corresponding rubric in draft article 15 [16]).

The Committee adopted paragraph 2 with the only change to the first reading text being the addition of the word “causing” before “the injury” for the sake of consistency of the text.

Paragraph 3 contains the text of what was adopted as draft article 15 on first reading. The Committee decided to subsume former draft article 15 into draft article 14 because it deals with the types claims that require exhaustion of local remedies in the situation where both a claim for direct injury to the State as well as a claim for injury to the individual are brought. In doing so, the Committee avoided the question of reformulating the title of former draft article 15, as had been suggested by Governments.

The title of draft article 14 remains “Exhaustion of local remedies”, as adopted on first reading.

Draft article 15

Draft article 15, corresponds to draft article 16 adopted on first reading and, contains the exceptions to the local remedies rule. The text adopted on second reading includes five provisions, as opposed to four in the first reading version. As will be explained shortly, this related less to the

Committee adopting an additional ground and more to its decision to separate what was subparagraph (c), on first reading, into two provisions.

Turning first to subparagraph (a), the Committee decided to adopt a new formulation to cover both the questions of the reasonable possibility of redress, which had been the subject of the first reading version, as well as of reasonable availability of remedies to provide effective redress. The Committee introduced the concept of reasonable availability into the provision in order to address the concern that the standard of “reasonably possibility of success” was too open-ended since there may be a range of reasons why success may not be reasonably possible. I may also note here, that the Committee declined to revert to the “futile and manifestly ineffective” test which it had rejected on first reading as no longer reflecting the law on this matter.

The Committee adopted subparagraph (b) as had been formulated on first reading.

As regards subparagraph (c), the Commission will recall that the first reading version attempted to cover two situations: (1) the lack of relevant connection between the injured person and the State alleged to be responsible; or (2) where the circumstances of the case otherwise made the exhaustion of local remedies unreasonable. The Committee considered several proposals to only adopt either one, but eventually decided to retain both concepts, even if reformulated, but in separate subparagraphs. It was of the view that both concepts usefully covered specific types of difficulties individual face in attempting to satisfy the exhaustion of local remedies case; it being understood that these are typically rare situations. The Committee understood the distinction between subparagraphs (a) and (b) as opposed to subparagraph (c) and what is now (d) is that subparagraphs (a) and (b) deal

with failures in the administration of justice, whereas subparagraphs (c) and (d) cover special situations where injured persons may find themselves in which exhaustion of local remedies would not be expected for reasons of equity.

Subparagraph (c) provides for the lack of a “relevant” connection, thereby covering, for example, the situation of the *Aerial Incident* case, where it was unreasonable to expect the individuals in question to have to exhaust local remedies in a State with which they had no relevant connection. The formula of subparagraph (c) is based on the first part of the subparagraph adopted during first reading with some technical refinement.

Subparagraph (d), is, as I have already explained, based on the second part of subparagraph (c) as adopted on first reading and deals with special circumstances, for example, cases of denial of entry, or where it is unsafe for the individual, or where criminal conspiracies obstruct the bringing of proceedings. It may be unreasonable to require in all such cases that those individuals exhaust local remedies.

The Committee, however, decided to tighten the language from the “circumstances making it unreasonable” to “manifest preclusion”, to mitigate the open-endedness of the original formula by focusing on the effect of the special circumstances, namely where they preclude the right in question, as opposed to looking at the “reasonableness” of the circumstances. The new formula also served to minimize the overlap with subparagraph (a), the distinction being that in subparagraph (d) local remedies may be available in fact, but there are circumstances which preclude the injured person from taking advantage of those local remedies. These matters will be discussed in the commentary, which will make the point that this has been included by way of progressive development of international law.

As regards subparagraph (e), the Committee decided to retain the same formulation as had been adopted on first reading.

The title of article 15 remains “exceptions to the local remedies rule”, as had been adopted on first reading.

Part Four

Part Four contains 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 of Part Four remains “Miscellaneous Provisions”.

Draft article 16

Draft article 16 corresponds to draft article 17 adopted on first reading. The Committee considered proposals to merge it with draft article 17 which corresponds to the first reading of draft article 18, but rejected them on the basis that the two provisions are essentially dealing with two different issues, the former with human rights protection, and, in the case of the latter, with bilateral investment treaties.

The Committee decided to adopt a proposal for reformulation along the lines of a suggestion by the Government of the Netherlands. The provision adopted by the Committee merely indicates that the draft articles do not affect the rights of the State to exercise diplomatic protection, as well as the rights of other States, the rights of natural and legal persons and of other entities to resort to other procedures. The Committee further added a reference to “legal persons” since they may also be the beneficiaries of rights and existing remedies, for example, under the ICSID convention. The Committee, nonetheless, decided to retain the reference to “other entities” to

cover, for example, international organizations involved in the protection of human rights. The Committee also decided to retain a reference to international law so as to preserve only other remedies available under international law since they may be affected by operation of the draft articles. Domestic remedies, on the other hand, by definition would not be affected by the draft articles and, therefore, there would be no need to preserve those as well.

The title of draft article 16 remains “Actions or procedures other than diplomatic protection”.

Draft article 17

I now turn to article 17, which corresponds to draft article 18 on the first reading, dealing with the situation of special investment treaties, whether bilateral or multilateral, and which has been reformulated to take into account some criticisms leveled against the first reading text. Draft article 17 clarifies that while the draft articles establish general rules, we are nonetheless aware that there are special rules concerning or excluding diplomatic protection that apply elsewhere. If another treaty establishes some specific conditions that apply to diplomatic protection, or exclude diplomatic protection altogether, then that is up to the treaty.

The Committee considered various formulations to replace the reference in the first reading text to “special treaty provisions”. It settled on a new formula based on article 55 of the articles on Responsibility of States for internationally wrongful acts of 2001, which refers to “special rules of international law”. The reference to the extent of the “inconsistency” with special rules of international law has been retained to reiterate the point that, if the relevant provisions in the draft articles are not inconsistent, they could

still apply in the interpretation of the special provisions. The phrase “such as treaty provisions for the protection of investments” has been included so as to indicate that the Commission had in mind mostly, but not exclusively, those types of treaty provisions. In addition, the reference to “treaty provisions” as opposed to “treaties” reflects the recognition that it is not only special treaties for the protection of investments, but also those provisions within other treaties, such as FCN treaties, that may derogate from the residual rules contained in the draft articles on diplomatic protection.

The title of draft 17 has been changed to now read “Special rules of international law”.

Draft article 18

Draft article 18 corresponds to draft article 19 adopted on first reading. It deals with the protection of ships’ crews. The Committee decided first to retain such a draft article, despite suggestions that it be deleted for not being strictly applicable to diplomatic protection. It was of the view that it served the useful function of recognizing a procedure that might be of assistance to ships’ crews. The Committee decided to maintain the formulation adopted on first reading, with the only change being the replacement of the words “in the course of an injury” with “in connection with an injury” to indicate that the injury to the crew may also arise as a consequence of the injury to the ship as opposed to during the injury to the vessel. The Committee also considered but did not accept a proposal to locate the provision after draft article 16.

The title of draft article 18 has been amended to read “Protection of ships’ crews”.

Draft article 19

I will now draw your attention to the last draft article, draft article 19 entitled “Recommended practice”.

This draft article deals with an aspect of the consequences of diplomatic protection. The first reading text did not contain any provision of this kind and governments, consequently, have not had an opportunity to express their views on a particular draft article. You will, however, recall that the question of certain aspects of the consequences of diplomatic protection was raised by the Special Rapporteur in his report of this year. You will also recall that the views in the plenary were divided on whether or not the draft articles should deal with consequences of diplomatic protection and even if the answer would be in the affirmative why only certain aspects of such consequences should be considered. There was also the view that even if any provision of this nature is to be included in the draft, it should not be compulsory and should be in the form of a recommendation.

Similar views were expressed again in the Drafting Committee. Some members of the Committee suggested that such a provision was better suited for inclusion in a resolution or a recommendation that the Commission can adopt, in connection with the final text of the draft articles, but independently from them. The Drafting Committee agreed that the content of a provision of this nature was in the realm of progressive development. What was important was the way it was formulated and explained in the commentary. On that basis, the Drafting Committee agreed to draft a provision in which the ideas therein are expressed in a non-binding language. The result is the text now before you.

You will note that the draft article expresses three ideas. The first idea is to encourage States to exercise diplomatic protection; the second is consultations with injured persons on whether or not to exercise diplomatic protection and if so what forms of reparations should be sought; and thirdly, the transfer of compensation obtained from the responsible State to the injured person.

I draw your attention to the chapeau of the draft article and the use of the word “should”, indicating the recommendatory character of the provision.

Subparagraph (a) provides that a State which is entitled to exercise diplomatic protection *should* give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred. The language does not intend to undermine the importance of the diplomatic protection when the injury is not significant. On the contrary, the first part of the subparagraph states precisely the importance of exercising diplomatic protection. The second part of the sentence highlights the importance of diplomatic protection especially when the injury is significant. Subparagraph (a) does not undermine the discretion of a State as to the exercise of diplomatic protection. The intention of this subparagraph is to emphasize the utility and the practicality of the institution of diplomatic protection as one of the means of peaceful settlement of disputes among States when their nationals are injured.

Subparagraph (b) provides that States *should* take into account, whenever *feasible*, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought. This is something that States normally do as a matter of effective management of a particular dispute. The word “feasible” intends to take account of situations where there are multitude of injured persons and one cannot reasonably expect that

consultations should take place with every single injured person as to: whether a State should exercise diplomatic protection; or that what form of reparation they prefer. Therefore, this subparagraph should be understood within the context of reasonableness and feasibility. It intends to take account of situations where injured persons may not want their State of nationality to exercise diplomatic protection for their benefit and the State should take this preference into account in formulating its own decision. These are relevant issues that are useful for the State to consider in consultations with injured persons.

Subparagraph (c) provides 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 recognizes that the primary beneficiary of diplomatic protection, the injured person, should be the recipient of compensation. But it also takes account of situations in which the State exercising diplomatic protection may have incurred expenses and is entitled in accordance with its laws and practices to deduct those costs from compensation.

The draft article is entitled “Recommended practices” which correctly corresponds to the character and the purpose of the draft article.

Mr. Chairman,

This concludes my introduction of the report of the Drafting Committee and I thank you for your attention.