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Chairman: Mr. Baja . . . . . (Philippines)

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03-58513 (E)

The meeting was called to order at 3 p.m.

Agenda item 152: Report of the International Law Commission (*continued*) (A/58/10)

1. **Mr. Grexa** (Slovakia), said that he welcomed the Commission's adoption of draft articles 8, 9 and 10 on diplomatic protection, particularly as the topic had been on the Commission's agenda since 1996. The draft articles gave the State where a violation of international law occurred the opportunity to redress that violation by its own means; he agreed that as local remedies varied from State to State, it would be unreasonable to establish an absolute rule governing their exhaustion.

2. It was true that foreign investment and the involvement of corporations in foreign trade might provide an occasion for the exercise of diplomatic protection. However, given the absence of State practice in that area, a separate set of articles on that issue was unnecessary; article 22 would appear to be sufficient.

3. While bilateral investment treaties were crucial to the establishment of a sound environment capable of attracting foreign direct investment, the draft articles provided necessary general rules for the protection of foreign corporations. He understood the rationale for article 21 (*lex specialis*) but agreed that it should be formulated in more general language, possibly as a "without prejudice" clause.

4. He reiterated his delegation's position that the Commission should base its work on the diplomatic protection of shareholders on the views expressed by the International Court of Justice in the Barcelona Traction case; once revised, draft article 18 might adequately define the threshold for a State's intervention on behalf of its shareholders.

5. His delegation remained unconvinced that the flag State of a vessel should have the right to exercise diplomatic protection in respect of crew members who were nationals of a third State; the matter was sufficiently covered by the Convention on the Law of the Sea. The Commission should proceed with caution when entering into an exercise which might have an impact on other areas of international law.

6. Lastly, he commended the Special Rapporteur's intention to submit his final report on the topic in 2004 so that the draft articles could be finalized in the near future.

7. **Ms. Bole** (Slovenia) said that she supported the proposal of the Austrian and Swedish delegations aimed at revitalizing the Committee's debate, thus making it more effective.

8. She welcomed the Special Rapporteur's plan to submit his final report on diplomatic protection during the coming year. Furthermore, as her delegation had stated in the past, Slovenia considered that flag States should not have the right to exercise diplomatic protection on behalf of the crew members of ships, irrespective of their nationality. Any reference to the decision in *The M/V* "*Saiga*" case should mention only the Convention on the Law of the Sea, on which it was based and which could not be said to have enlarged the scope of diplomatic protection.

9. Her delegation was also opposed to granting international organizations the right to exercise functional protection on behalf of their officials. The advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations* should be considered only as an exception to the nationality principle; the Commission's work should be based on a customary law approach, although it should remain open to new developments in that field.

10. The State of nationality of shareholders should not have the right to exercise diplomatic protection on their behalf; she was pleased that draft articles 17 to 22 granted such a right only in exceptional cases, and she appreciated the Commission's effort to balance existing jurisprudence with the progressive development of international law. As stated in paragraph 86 of the report, any lifting of the "corporate veil" would create difficulties not merely for courts, but also for States of investment.

11. **Mr. Hafrad** (Algeria) said he did not believe that the question of functional protection by international organizations of their officials should be covered by the draft articles because it constituted an exception to the principle of the link of nationality, which was the basis for diplomatic protection. However, the Commission should clarify the issue of competing claims made by the State of nationality and the organization concerned with regard to personal injuries to the latter's officials, which the International Court of Justice had considered in its 1949 advisory opinion on

Reparation for Injuries Suffered in the Service of the United Nations.

12. The question of whether the flag State of a vessel should have the right to exercise diplomatic protection in respect of crew members who were nationals of a third State was adequately regulated by existing legal instruments, including the Convention on the Law of the Sea. Thus, while those instruments did in some cases confer on flag States the right to exercise prerogatives similar to diplomatic protection, that protection was in fact governed by a different legal regime (*lex specialis*), as seen from *The M/V* "*Saiga*" case; moreover, expansion of States' right to intervene under such conditions might weaken the principle of nationality which was the basis for diplomatic protection.

13. **Mr. Kuzmenkov** (Russian Federation) said that the Commission seemed to have made good progress with the topic of diplomatic protection, to which his delegation attached great importance. He wished, however, to draw attention to a number of points that emerged from the draft articles adopted at the fifty-fifth session. First, he expressed support for the Commission's decision to endorse the conclusions reached by the International Court of Justice in the *Barcelona Traction* case concerning the definition of the nationality of a corporation according to its place of incorporation and the definition of the State that was entitled to exercise diplomatic protection as being primarily that corporation's State of nationality. That judgment, despite the criticism directed at it, had made it possible to avoid situations in which several States had the right to exercise diplomatic protection. The judgment made for greater stability in relations between States and investors. Diplomatic protection for natural persons in cases where several States were entitled to exercise diplomatic protection on behalf of persons with dual or multiple nationality was not comparable, since investors' rights to protection were based not on the law on diplomatic protection but on bilateral and multilateral investment treaties. In that connection, the Commission should reconsider the exclusions to the right to exercise diplomatic protection on behalf of the shareholders in a corporation, set out in draft article 18: it might well be possible to make the exceptions less restrictive. For example, draft article 18 (a) could indicate that the right of a State of nationality of shareholders to exercise diplomatic protection arose only when the corporation concerned had ceased to exist as a result of an internationally wrongful act by the State of nationality of the corporation or, in the case described in draft article 18 (b), if the corporation that had ceased to exist had been obliged to be incorporated in that State's territory under its law.

14. The Commission should take particular care in its consideration of draft articles 21 and 22. The former, relating to *lex specialis*, should not be drafted in such a way as to oblige a person to choose between human rights protection mechanisms and diplomatic protection. As for draft article 22, the current text, rather than clarifying the question of protection for legal persons other than corporations, introduced greater uncertainty. It might be preferable to exclude the issue from the scope of the draft articles but include a "without prejudice" proviso.

15. Further thought should also be given to the definition of the word "corporation", namely the legal persons which would be able to claim diplomatic protection from a State under the provisions drafted by the Commission. Not all legal systems defined the term "corporation". The Special Rapporteur had indicated that corporations were legal persons engaged in commerce, but it emerged from later draft articles that the term was applied only to corporations with shareholders. He wondered, therefore, whether it was only in respect of the latter that a State could exercise diplomatic protection.

16. As for the question of what other aspect of the topic should be studied, his delegation considered that the Commission should restrict itself to the issues that had already been identified.

17. **Ms. Dascalopoulou-Livada** (Greece), speaking on the articles on diplomatic protection that the International Law Commission had referred to the Drafting Committee, said that draft article 17 enunciated the basic rule, solidly based on the judgment of the International Court of Justice in the *Barcelona Traction* case, that the State entitled to exercise diplomatic protection with regard to corporations was the State of nationality of the corporation. The proposed article then offered a variety of options for defining the notion of the nationality of a corporation. Although her delegation would have opted for the State of the domicile or *siège social* of the company, as embodied in the civil law system of Greece and many other countries, for the sake of

consensus it was prepared to accept the use of the place of incorporation and registered office as the decisive link for the purposes of diplomatic protection. Taking language from the *Barcelona Traction* judgment, the article might include the following wording: "For the purposes of diplomatic protection, the State of nationality of a corporation is the State under whose laws it is incorporated and in whose territory it has its registered office". The mention of other links beyond those with the State of incorporation, registered office or domicile of the company would detract from the clarity of the provision.

18. Draft article 18 as proposed did not reflect customary international law and directly contradicted the rule stated in draft article 17 by introducing too broad an exception, with the effect that in too many cases the "corporate veil" would be lifted to enable the State of nationality of the shareholders to exercise diplomatic protection in their favour against the State of nationality of the corporation. The *Elettronica Sicula S.p.A. (ELSI)* case was not relevant, since it concerned the interpretation of a bilateral agreement between the United States of America and Italy, and therefore did not justify a drastic departure from the *Barcelona Traction* rule.

19. Draft articles 19 and 20 expressed established rules. However, draft article 21 introduced another exception allowing for the application of "special rules of international law". It remained unclear whether rules relevant to the international protection of human rights would be covered. One solution might be to include a provision stating that diplomatic protection was subsidiary to special regimes for the protection of investments or of human rights, provided the protection afforded under a special regime was guaranteed by a binding decision, such as a judicial decision or an arbitral award. If the protection thus afforded was not satisfactory, diplomatic protection could come into play. In any case, a provision of that kind, expressly covering both natural and legal persons, should be placed in the final clauses of the draft articles.

20. The wording of draft article 22 would cover non-governmental organizations, since they were usually vested with legal personality under domestic law, but might not cover other associations of persons. In all cases not involving corporations, however, the Commission was entering uncharted territory and should proceed with caution.

21. With regard to the draft articles provisionally adopted by the Commission, it was not clear whether draft article 8, paragraph 2, would cover resort to an ombudsman. In draft article 10, the threshold above which local remedies would be presumed exhausted was too low. The phrase in subparagraph (a), "no reasonable possibility of effective redress", was wider than appropriate and should be replaced by something along the lines of "obvious futility". The waiver referred to in subparagraph (d) should be express; to allow for a tacit waiver was a dangerous course to follow. In general, the work on diplomatic protection was well advanced and her delegation expected it to be concluded within the current quinquennium.

22. Her delegation vigorously supported the work on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, believing that, following the elaboration of the draft articles on prevention, it was logical to proceed to the question of liability in relation to the same activities. Although it was no easy matter, ideally both prevention and liability should be dealt with in a normative manner, by way of a convention.

23. There were a number of theoretical options that could be adopted as the basis for liability of the State. The State could be held liable solely if it was found deficient in its duty to exercise due diligence in controlling sources of harm in its territory. However, such a solution would not deviate from the well-known path of State responsibility for wrongful acts and would add little to the law already in force. It would be of no real use to individual victims, who would bear the burden of proof of lack of due diligence on the part of the State and lacked access to international courts. Another option would be to establish an obligation under international law for the State in whose territory the hazardous activity was being conducted to compensate for any transboundary harm the activity caused, in other words, to give the State full primary liability. Such a solution would be unfair to States, since the activity chiefly profited the operator, and could not be seriously considered. The Working Group established by the Commission in 1996 had indicated that the two possible courses of action were resort to the courts of the State where the harm originated or negotiations between the States concerned. Neither course offered anything to the victim from the standpoint of international law. Her delegation believed that the best option was to supplement the civil liability

of the operator with the residual liability of the State. Such a regime of strict liability of a residual character would be without prejudice to the responsibility of the State for any wrongful act committed by it.

24. Most of the recommendations of the Working Group established in 2002 were acceptable to her delegation, which was in favour of retaining the threshold of "significant harm" and covering under the definition of "harm" any loss to persons and property, including elements of State patrimony and natural heritage as well as environment within the national jurisdiction. With regard to damage to the environment, and on other points as well, it would be advisable to take into account the provisions of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters recently adopted in Kyiv under the auspices of the Economic Commission for Europe. Loss of profits should not be altogether excluded from the possibility of compensation. The Kyiv Protocol offered a balanced solution by limiting such compensation to "legally protected" interests.

25. **Mr. Braguglia** (Italy), referring to the topic of diplomatic protection, said that the draft articles relating to the exhaustion of local remedies seemed satisfactory, although it would have been preferable if the requirement that local remedies should be adequate had been made part of the rule rather than expressed in the form of an exception. To state as a principle that local remedies need not be exhausted where they provided no reasonable possibility of effective redress was to state the obvious.

26. Paragraphs 102 to 104 of the Commission's report gave rise to some concern. A majority of the Commission seemed to have spoken in favour of draft article 18 (b), which allowed the State of nationality of shareholders to exercise diplomatic protection on their behalf in cases where the corporation concerned had the nationality of the State responsible for causing injury to the corporation. That, however, constituted a glaring exception to the rule given in draft article 17, according to which only the State of nationality of the corporation could exercise protection. That was the solution adopted by the International Court of Justice in the *Barcelona Traction* case and supported by almost all delegations to the Sixth Committee in 2002. In any case, the exception would cause considerable practical difficulties, owing to the difficulty of knowing who the shareholders of a corporation were.

27. His delegation welcomed the Special Rapporteur's intention to deal in his next report with the diplomatic protection of members of a ship's crew, which would give timely guidance on an important practical issue that was not explicitly covered by the United Nations Convention on the Law of the Sea, and of employees of international organizations. In addition, it would be useful for the Commission to consider the extent to which the draft articles applied to human rights violations, since the State of which an individual was a national did not necessarily play the same role as it did in relation to a breach of obligations concerning the treatment of foreigners.

28. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he commended the way in which the Special Rapporteur and the Commission had approached the topic. The Commission should, however, decide whether its aim should be to formulate a series of recommendations to States or rather to tackle the task of developing a general model treaty that could be applied in the absence of any specific treaty regime. If it decided on the latter option, it would find it difficult to move beyond a preliminary text that would do no more than ease negotiations by representatives of States. There were, however, numerous interests at stake and the financial implications of any statement of liability for injurious consequences arising out of acts not prohibited by international law were considerable. In particular, an effective insurance system would require wide participation by potentially interested States.

29. **Ms. Loffler** (Australia) said that she supported the Special Rapporteur's approach to the subject of the diplomatic protection of corporations and shareholders and noted that draft articles 17 to 19 endorsed the primary rule expounded by the International Court of Justice in the *Barcelona Traction* case, with certain exceptions which reflected the realities of foreign investment. She also supported the proposal to exclude from the scope of the draft articles the question of a flag State's right to bring a claim on behalf of a ship's crew or passengers.

30. Australia welcomed the Commission's resumption of work on the issue of international liability following its consideration of the prevention of transboundary harm from hazardous activities and commended the Special Rapporteur for his first report on the legal regime for the allocation of loss in case of

transboundary harm arising from hazardous activities (A/CN.4/531). On the issue of the appropriate relationship between the State and operators, while the specific procedural and substantive requirements which States imposed on operators would vary from industry to industry, they should focus on contingency plans for responding to incidents that carried a risk of transboundary harm. The State should ensure that operators were in a position to take prompt, effective action in order to minimize harm and were required to maintain appropriate insurance for that purpose. The definition and categories of compensable damage or harm to property and the environment should not be unduly limited, particularly where the property or environment fell within the jurisdiction or control of a State and where the damage or harm resulted in direct loss to the proprietary or possessory interests of individuals or the State.

31. Her delegation would reserve its judgement on the final form of work on the topic until the substance of the draft articles on liability had been determined. However, since international liability did not lend itself easily to codification and progressive development, and noting the diversity of civil liability regimes, the draft articles would be most useful if they took the form of general rules supplementing the law of State responsibility, the laws and practices of existing systems of liability and the remedies available under domestic and private international law. While it might be difficult to articulate general principles of liability in that area, the guiding principle should be that innocent victims should not bear the loss on their own and that primary responsibility for compensation should rest with those in command or control of the activity at the time of the incident. Where the operator did not have the financial resources to provide adequate compensation, the State should provide supplemental funds on the basis that it had authorized the activity and insofar as it had benefited therefrom.

32. **Mr. Henczel** (Poland) said that the annual Sixth Committee debate on the report of the International Law Commission could be made more effective by modifying the way in which the report was presented to the Committee and by restructuring the ensuing discussion. The presentation of the report should be shortened. Although the chapter-by-chapter format could be retained, the presentation should concentrate on the most important achievements and developments of the Commission session and underline the problems on which the views of Committee members would be most desirable. Discussion in the Committee should focus on the specific issues identified in the report on which comments would be of particular interest to the Commission. However, Member States should not wait for the debate in the Sixth Committee but should give the Commission written comments. A more focused discussion would make it possible to shorten the debate, leaving room for side events on international law.

33. On the topic of diplomatic protection, the provisional adoption by the Commission of draft articles 8 to 10 concerning exhaustion of local remedies and the commentaries thereto was a significant achievement. Draft articles 17 to 22, which had been referred to the Drafting Committee, dealt chiefly with the diplomatic protection of corporations and still presented some problems in terms of practical application. The definition of the State of nationality of a corporation in draft article 17 as it had emerged from the Working Group contained too many possible alternatives to be helpful. There was still no agreement on the connection between a corporation and its State of nationality that would create an acceptable basis for diplomatic protection.

34. Draft article 18, while rejecting as a general rule diplomatic protection by the State of nationality of the shareholders in the case of an injury to the corporation, nonetheless set forth reasonable and practicable exceptions in situations where the shareholders might otherwise be left without any State protection of their legitimate interests. Mechanisms provided by bilateral or multilateral agreements on the protection of foreign investments might not always be sufficient to fill the gap. Draft article 19 was a saving clause to protect shareholders whose own rights, as opposed to those of the company, had been injured. Since those independent rights had been recognized in the *Barcelona Traction* judgment, the provision was best kept in a separate article. While the *lex specialis* provision in draft article 21 was not strictly necessary, its inclusion would do no harm. However, it might be useful to reformulate it as a more general provision applicable to the draft articles as a whole.

35. Although it recognized that that there was little State practice on the diplomatic protection of legal persons other than corporations, his delegation nevertheless felt that the issue should be addressed and therefore favoured retaining the provision in draft

article 22. His delegation shared the view of the Special Rapporteur that it was not possible to draft further articles dealing with the diplomatic protection of every kind of legal person, given the great variety of forms that legal persons might take, depending on the internal legislation of a given State. Unilateral extension of legal personality to a wide variety of entities by individual States could create problems in exercising diplomatic protection on behalf of such entities vis-à-vis other States. Even the broad mutatis mutandis formula in draft article 22 would not solve the problem. It might be useful to include in the text of the article a requirement of mutual recognition of the legal personality of a given entity by the States concerned.

36. The topic of a legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities was logically being treated as a continuation of the draft articles on prevention. The Special Rapporteur's submissions for consideration by the Commission served as a useful list of the problems and questions to be analysed and solved. His delegation basically agreed with all the Special Rapporteur's suggestions, subject to some further clarifications. For instance, it was not perfectly clear what criteria should be applied in the "test of reasonableness" in determining the liability of the person in command and control of the hazardous activity. The key suggestion, with which his delegation fully agreed, was to continue the approach adopted in the draft articles on prevention, not only for reasons of formal compatibility, but also because of an objective need for uniformity. For example, it would be desirable to apply the same threshold of "significant harm" as in the draft articles on prevention. Instead of "allocation of loss" or "loss", it might be better to revert to more familiar terms such as "damage" and "compensation".

37. With regard to the debate on the viability of the topic, his delegation viewed it as a logical follow-up to the draft articles on prevention and the issue of State responsibility. It filled a gap in addressing situations where, despite the fulfilment of the duties of prevention to minimize risk, significant harm was caused by hazardous activities. In terms of its scope, his delegation regretted that the issue of the "global commons" had been left out to make the topic more manageable. The environmental unity of the planet was not affected by political borders, and it was an area worth and requiring further study. Although the question of the final form of the work on liability needed to be analysed in depth, it was too early to decide that it was not appropriate for codification and progressive development. Even if that should finally be concluded, it would still be useful to elaborate a set of recommendations or guidelines to help States in their practice. The Commission should continue to work on its model of allocation of loss, which should be general and residuary in character and leave States sufficient flexibility to develop schemes of liability to suit their particular needs.

38. **Mr. Baker** (Israel), referring to the topic of diplomatic protection, observed that the common feature linking the question of flag State responsibility and functional protection by international organizations of their officials was that the nationals concerned found themselves temporarily within a distinct legal framework governed by a specific regime. For example, a distinction must be made between the function of the flag State while the ship was at sea and the responsibility of the State of nationality of each crew member. Similar issues arose with respect to the exercise of functional protection by international organizations, as discussed — though not fully resolved — by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. His delegation continued to endorse the generally held position, which seemed to have gained ground in the Commission, that the scope of the draft articles on diplomatic protection should be confined essentially to the traditional boundaries of nationality of claims and exhaustion of local remedies and to customary international law, under which the State had full discretion in the exercise of diplomatic protection.

39. Turning to the issue of international liability and the question of the procedural and substantive requirements that the State should place on an operator, he said that it would be preferable not to set specific requirements, but rather to establish that States' legislation must include rules governing operators' liability and obligation to compensate; however, consideration should be given to setting a minimum threshold for that obligation.

40. In principle, he would prefer the issue of the basis and limits of allocation of loss to the operator to be settled by domestic legal systems; he doubted that international law should intervene in apportioning such losses. Where the State was not the actual operator, its

commitment could be fulfilled by establishing reasonable procedural and substantive requirements for operators. Consideration should also be given to whether the operator was a national of the State, whether it conducted its activities from the territory of the State and whether the harm caused by the operator occurred in the State.

41. The problem of losses that were not covered by the operator or other sources of supplementary funding could be addressed by requiring operators to carry insurance; it might be preferable for such a requirement to be set by the operator's State of nationality in order to ensure effective enforcement and to prevent any abuse of developing States. As to the nature and extent of State funding in respect of such losses, his delegation was of the view that, where the State itself was the operator or was directly and effectively related to the harmful operation, it should be treated as a private actor in relation to the allocation of loss; in other circumstances, States should be obliged to do their utmost to enact legislation designed to prevent uncovered losses and to exercise due diligence in ensuring the effective enforcement thereof.

42. Because damage to the environment per se could affect all humankind, including future generations, the principle of sustainability should prevail. However, the issue might be better addressed in a separate, environmentally oriented framework rather than by the Commission.

43. As to the final form of the work on the topic, he thought that guidelines or model rules, taking into account the current stage of development of the field, would be preferable to a specific multilateral convention.

44. On the issue of unilateral acts of States, he reiterated his delegation's concern that any attempt to establish a single set of rules for the wide range of unilateral acts was problematic; the question was whether the unique problems relating to specific unilateral acts deserved further consideration by the Commission. In the absence of a systematic analysis of existing State practice in that area it would be difficult, if not premature, to proceed until a wider response from States had been received. Any study of the application of unilateral acts of recognition should be strictly limited to that topic and should not include other complex, controversial issues such as the legal requirements for recognition of a political entity as a State.

45. Turning to the topic of reservations to treaties, he said that the definition of the term "objection" proposed by the Special Rapporteur in draft guideline 2.6.1 did not take into account the fact that the formulation of an objection was not necessarily intended solely to prevent the application of the provisions of the treaty to which the reservation related between the author of the reservation and the State or organization which formulated the objection or to prevent the treaty from entering into force in the relations between them. The State or organization might also object to a reservation on the grounds that it was impermissible because it was prohibited by the treaty or was incompatible with the object and purpose thereof, as provided by article 19, paragraphs (a) and (c), of the Vienna Convention on the Law of Treaties. In such cases, the objection related to the right of the reserving State to make the reservation.

46. While it would be useful for the grounds for objections to reservations to be stated clearly in order to avoid misinterpretation and to allow the reserving State to review the issue in question in its treaty relationship with the objecting State or organization, he saw no need to make such a practice obligatory.

47. Lastly, with respect to draft guideline 2.3.5, he was concerned at the potential problems inherent in enlarging the scope of a reservation at a later date and at the question of compatibility with the logic of traditional international treaty law; at most, such enlargement should be viewed as a late formulation of the reservation and should be treated as such.

48. **Mr. Čižek** (Czech Republic), after noting that the progress made on the topic of diplomatic protection gave rise to hope that the work could be concluded within the current quinquennium, said that his delegation was not convinced of the need to extend the scope of the draft articles either to the protection of a ship's crew and passengers who were nationals of a State other than the flag State or to the so-called functional protection exercised by an international organization on behalf of its officials. On the other hand, the Commission could, perhaps, consider the issue of the delegation to a third State of a State's right to exercise diplomatic protection. Although the Special Rapporteur had noted that the question did not arise frequently in practice and was seldom discussed by the

jurisprudence, article 20 of the Consolidated Version of the Treaty establishing the European Community stated that every citizen of the Union was, in the territory of a third country, entitled to protection on the same conditions as the nationals of that State. The issue therefore was, or could be, a practical one, at least for member States of the European Union.

49. In that context, he noted how delicate and contradictory the issue of the diplomatic protection of shareholders had been at the time when the International Court of Justice had rendered its judgment in the *Barcelona Traction* case, and perhaps still was: there had been criticism not only of the general rule the Court had expounded but also the way in which it had arrived at that rule. His delegation, however, did not favour any modifications to the rule which — together with the exceptions recognized in the judgment — accurately reflected the current state of customary international law in relation to the diplomatic protection of corporations. To depart from the rule by allowing the possibility of two or even more competing claims on behalf of a corporation or its shareholders could, as the Court had pointed out, create an atmosphere of confusion and insecurity in international economic relations. It was therefore gratifying that the Special Rapporteur, supported by most of the Commission, had favoured the same approach. The statement of principle in draft article 17, paragraph 1, was thus appropriate. As for paragraph 2, his delegation would favour the deletion of the text currently in square brackets.

50. With regard to draft article 18, which prompted the question whether the de jure or the de facto status of a corporation should be decisive in formulating the exception from the general rule, his delegation shared the Court's opinion in the *Barcelona Traction* case that the company's status in law was alone relevant and not its economic condition or the possibility of its being practically defunct. His delegation therefore supported the basic idea of draft article 18 (a). It would, however, be hesitant about stating that draft article 18 (b) reflected the current status of customary international law. Even the Court had not explicitly taken a stand on the question whether or not there was an exception to the general rule that would enable a State of nationality of shareholders to exercise diplomatic protection on behalf of those shareholders in situations in which the State of nationality of the corporation was responsible for the alleged injury to the corporation: indeed, the Court had been divided on the issue. His delegation noted with interest, however, the opinion of the Special Rapporteur and of many scholars and several States that the Court's reference to "equity" in relation to the exception to the rule might be considered to be an implicit recognition of that exception by the Court. Moreover, the exception had been recognized in several arbitral decisions.

51. Lastly, referring to paragraphs 440 to 443 of the report, he said that, since its first annual session in 1949, the Commission had, in accordance with article 1 of its Statute, dealt with many topics of international law and with special assignments from the General Assembly, examining particular legal questions. In most cases, its final report on a given topic contained a set of draft articles accompanied by extensive commentaries, which had frequently served as the legal basis for the elaboration of international conventions. The Commission's role in the process of the codification and progressive development of international law was of incalculable importance. His delegation therefore fully endorsed the Commission's conclusion, contained in paragraph 443, that the new regulations on page limits for reports of subsidiary bodies, contained in the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services" (A/57/289), should not apply to the documentation of the Commission.

The meeting rose at 4.40 p.m.