

# INTERNATIONAL LAW ASSOCIATION

## TORONTO CONFERENCE (2006)

### DIPLOMATIC PROTECTION OF PERSONS AND PROPERTY

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Professor Francisco Orrego Vicuna (Chile): *Chair*  
Professor David Bederman (USA): *Co-Rapporteur*  
Professor Juliane Kokott (Germany): *Co-Rapporteur*

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Professor Richard Bilder (USA)  
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Dr Bozo Cerar (Slovenia)  
Dr Ruth Donner (Finland)  
Professor Juan Manuel de Faraminan Gilbert (Spain)  
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Judge Bernardo Sepulveda Amor (Mexico)  
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#### FINAL REPORT

##### I. Introduction.

1. The Committee was established by the Executive Council of the Association in late 1996. In proposing the creation of the Committee to the Executive Council, Professor Crawford, at the time Director of Studies, wrote:  
“The importance of the topic is now even greater with the decision of the ILC in 1995 to resume work in this field. I believe we should establish a committee on the subject, focusing on at least some of the following issues:
  - the extent of the specific obligation of States under modern international law with respect to the protection of foreign persons and property;
  - the relation between these rules and the general law of human rights;
  - the impact of bilateral and multilateral treaties for the protection of persons and property;
  - the extent of changes in the procedural law applicable to the bringing of claims relating to the protection of persons and property.”
2. Following the Executive Council’s decision to establish this Committee, the Executive Council appointed Professor Richard Bilder of the University of Wisconsin Law School, Madison, Wisconsin, to serve as chair and appointed Professor Juliane Kokott of the Faculty of Law, Heinrich-Heine University, Duesseldorf, Germany, later of the University of St Gallen School of Law, Switzerland, at present Advocate-General of the Court of Justice of the European Community, and Professor Francisco Orrego Vicuña of the Institute of International Studies, University of Chile, Santiago, Chile, to serve as co-rapporteurs. The decision to appoint two rapporteurs rather than one was based on the complexity and scope of the subject and the need to take into account a broad perspective.
3. In its First Report submitted at the ILA’s London Conference (2000), the Committee indicated that it had decided that its long-term goal should be to prepare a set of Draft Principles concerning the Diplomatic Protection of Persons and Property. To this end, the Co-Rapporteurs would take the leadership, and other members would contribute and participate, in preparing a series of studies of discrete topics — such as exhaustion of remedies, issues of dual nationality and other that the Chair and Co-Rapporteurs believed would not only be useful in themselves but would also deserve a place in any such set of Draft Principles. It was envisaged that these studies would be relatively brief, but would attempt to summarize the customary and conventional law, practice and precedents relevant to the Committee’s consideration of that topic.

4. In accordance with this program, the Co-Rapporteurs and Committee completed and included in its First Report for the London Conference (2000) an Interim Report on “The Exhaustion of Local Remedies”, prepared by Professor Juliane Kokott, and an Interim Report on “The Changing Law of Nationality of Claims”, prepared by Professor Francisco Orrego Vicuña. These two Interim Reports were discussed during the London Conference (2000) at a Working Session chaired by Judge Rosalyn Higgins, which produced a number of useful comments.
5. Following the first stage of its work, the Committee identified three discrete topics which, after circulation among and comments of Committee members, came up for discussion at the New Delhi Conference (2002). These topics are listed next with indication of their respective authors:
  - Interim Report on “Lump Sum Agreements and Diplomatic Protection”, by Professor David J. Bederman.
  - Interim Report on “The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment”, by Professor Juliane Kokott. And
  - Interim Report on “Diplomatic Protection Under the European Union Treaty”, by Professor Torsten Stein.
  - Comments in writing were also made by Lady Fox on issues concerning diplomatic protection and State immunity and by Professor Juan Manuel Faramiñán Gilbert on diplomatic and consular protection under the European Union.
6. A Working Session chaired by Professor Gerhard Hafner contributed comments of relevance that were further considered by the rapporteurs and the Committee. The Committee took the decision to finalize its work for the Toronto Conference (2006). In view that the International Law Commission (ILC) had begun drafting the articles on diplomatic protection as the work of its Special Rapporteurs Mohammed Benouna, later replaced by Professor John Dugard, progressed, the Committee decided that it would be best to end its own work on the subject not as a set of Draft Principles but as conclusions that may be considered by the ILC in its drafting.
7. Following the London Conference (2000), one of the Co-Rapporteurs of the Committee, Professor Francisco Orrego Vicuña, asked to be relieved of his duties as Co-Rapporteur due to the press of professional and academic responsibilities. The Executive Council then appointed another member of the Committee, Professor David J. Bederman (USA) to replace Professor Orrego Vicuña as Co-Rapporteur to serve along with Professor Juliane Kokott.
8. After the New Delhi Conference, Professor Richard Bilder (USA) requested to be relieved as Chair of the Committee in view of his academic work. The Committee expresses its appreciation to Professor Bilder for his fine performance and contributions. The Executive Council then appointed Professor Francisco Orrego Vicuña (Chile) to serve as Chair of the Committee.

## II. The Rights Asserted by Means of Diplomatic Protection.

9. As a starting point of its work, the Committee undertook the examination of a fundamental issue for the adequate understanding of diplomatic protection and its evolution in contemporary international law, namely the question of whose rights are asserted when bringing an international claim. Traditional rules on diplomatic protection undertaken by the State are confronted in this context with the increasing access of the individual to dispute settlement mechanisms.
10. The classic rule on the matter was well established in the *Mavrommatis Concessions case*, where the Permanent Court of International Justice ruled that by “taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law”.<sup>1</sup> The ILC initially also defined diplomatic protection in connection with the state “adopting in its own right the cause of its national”.<sup>2</sup> This reference,

<sup>1</sup> PCIJ, *Mavrommatis Palestine Concessions*, 1924, Series A. No. 2, 13.

<sup>2</sup> ILC, Draft Articles on Diplomatic Protection (First reading), Report of the Fifty-sixth Session, 2004, at 17.

however, was no longer kept at a later stage of its work.<sup>3</sup> As rightly explained by Bennouna in his capacity of first rapporteur for the International Law Commission on the subject of diplomatic protection, the former conceptual approach led to a “transformation” of the claim, which passed from the individual to the espousing state of nationality, but in so doing the role of the state became paramount and eclipsed that of the individual which was at its origin.<sup>4</sup>

11. A number of consequences followed from this legal fiction which responded to the time when the state was the single and most important subject of international law. Discretionary espousal of claims, disposition of the compensation by the state, introduction of a type of damage different from that suffered by the individual, and the influence of political power are some of those consequences.<sup>5</sup>
12. Legal contradictions accompanied this approach since its outset. First, in cases where a direct injury to the state could be established, international law provided for different rules of protection, such as measures of self-protection. The requirement of the continuity of nationality of the affected individual, that will be examined below, also involved a contradiction since it “is also illogical to consider the State as the sole holder of the international claim, yet at the same time to prevent the State from pursuing this claim because the ‘nationality’ of the underlying individual claim has changed”.<sup>6</sup> More importantly, while diplomatic protection was understood as the “procedural corollary to the legal responsibility of international law subjects”,<sup>7</sup> in many instances it does not appear to have followed the evolution that the law of state responsibility itself has experienced, particularly in respect of the operation of international mechanisms established to make states answerable to international wrongs.
13. Besides the legal issues involved in this approach, there was a clear political connotation in the use of diplomatic protection as an instrument of power by states in international relations. Reactions such as the “Calvo Clause”, aimed at the elimination of the role of diplomatic protection, were the inevitable consequence of the abuse of this form of protection in the early part of the twentieth century.
14. Legal and political issues, however, were not enough to prevent the consolidation of the classic rules on the matter nor did considerations of equity and logic have much influence on state practice for a long period of time. But this discussion also reveals that various issues appear not to have met the required standards of support by state practice and *opinio juris* so as to become a rule of customary international law.
15. It would be the very structure of international law that prompted fundamental changes in the role of diplomatic protection. As the state lost its position of exclusivity in the international legal order, and both international organizations and individuals acquired specific, albeit still limited roles of their own, new alternatives emerged for the assertion of international claims. The law of human rights, on the one hand, and that relating to the protection of foreign investments, on the other hand, have opened up a clear path for the direct access of the individual to international mechanisms for the assertion of claims, following a number of specific precedents established during the twentieth century.
16. This trend is also present in a number of other developments taking place in contemporary international law in respect of the settlement of disputes. In this new context, many times it is the right of the individual affected and no longer that of the state of nationality which is asserted. To that same extent, diplomatic protection is no longer required to intervene and, furthermore, as in

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<sup>3</sup> International Law Commission: “Diplomatic Protection”, Draft Articles adopted by the Drafting Committee on second reading, A/CN.4/L. 684, 19 May 2006.

<sup>4</sup> ILC, Preliminary Report on Diplomatic Protection, by Mohammed Bennouna, Special Rapporteur, A/CN. 4/484, 4 February 1998, at 5.

<sup>5</sup> W K Geck, ‘*Diplomatic Protection*’, in Encyclopedia of Public International Law, 1992, at 1046.

<sup>6</sup> Ibid., at 1056.

<sup>7</sup> Ibid., at 1046.

the International Centre for Settlement of Investment Disputes (ICSID), it is expressly excluded to the extent that arbitration is resorted to and complied with. This particular development is discussed further below. It will also be noted that in some respects diplomatic protection appears to be regaining its original connection with the law of state responsibility.

17. The direct standing of the individual under international law will continue to expand for a variety of purposes, particularly in terms of access to dispute settlement mechanisms. It can therefore be expected that claims will be increasingly handled outside the operation of diplomatic protection, as it has happened with issues of human rights, trade and investments. This does not mean that the role of the state has lost its significance. It will still be necessary for the state to espouse claims in the many areas where direct standing is not available, to enter into treaties and arrangements to ensure such direct access, to establish the legal framework under which individuals will operate, and to make available its own judicial and administrative remedies for nationals and foreigners alike.
18. The essence of the evolution points toward the fact that in both the scenario of diplomatic protection and in that of direct standing of the individual, it is increasingly the right of the individual that is asserted in its own merits and no longer that of the state of nationality. The state may still act as a conduit, an agent, or on behalf of the individual, but no longer substituting for his rights. This is not to say that the state may not consider that a wrong done to one of its nationals affects its own interest, but the latter will be the consequence of the rights of the individual and not of the state's own right. While the transition from a legal fiction to a different reality takes place, the interesting thought that a claim may actually have a "dual nature" and represent the interest of both the individual and the state has been discussed in the light of the comments made by members of the Committee.
19. It has been rightly explained that the conceptual evolution taking place results in a claim of the individual against the wrongdoing state because of the breach of an international obligation, being diplomatic protection a mechanism under which the individual has the right to endorse that claim in the absence of a procedure, domestic or international, that would allow him to make his claim effective.<sup>8</sup>
20. In the *La Grand* case<sup>9</sup>, the International Court of Justice (ICJ) accepted the argument that there is a duty to inform the state of nationality of certain situations affecting their nationals, so as to enable it to exercise consular or eventually diplomatic protection.<sup>10</sup>
21. Because the protection of human rights has advanced significantly in contemporary international law, the argument that this area of the law is different from that relating to diplomatic protection has also been suggested in the comments made during the Committee's work. In this context, diplomatic protection would rather be kept for the safeguard of the economic interests of the individual. While historically diplomatic protection has encompassed both the economic interests and the treatment of individuals abroad, it is quite true that the law of human rights has evolved beyond the framework of traditional diplomatic protection, following more liberal rules and allowing in particular for claims against the state of nationality.
22. But it is also true that the same path is being followed by other areas of the law typically relating to economic interests, such as the case of investments, thereby evidencing that the evolution is not so much related to the nature of the rights but to the institution of diplomatic protection as a whole. Furthermore, economic rights are also considered today to be a part of human rights, thus also justifying liberal mechanisms of protection. This does not exclude, of course, that

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<sup>8</sup> C Dominicé, '*Regard actuel sur la protection diplomatique*', Liber Amicorum Claude Raymond, 2004, 73-81, at 78.

<sup>9</sup> ICJ, *Case Concerning the Vienna Convention on Consular Relations*, (Germany v. United States of America), Order of 3 March 1999, 38 ILM 308 (1999) (*La Grand* case).

<sup>10</sup> JF Flauss, '*Vers un aggiornamento des conditions d'exercice de la protection diplomatique*', in JF Flauss (ed.) : *La Protection Diplomatique : Mutations contemporaines et pratiques nationales*, 2003, at 33.

different areas of the law might follow different rules and requirements as to their protection, which are essentially embodied in new treaty regimes, but the underlying premise is always the same; that is, the assertion of the rights of the individual in their own merit. The specific differences today characterizing the protection of human rights will be discussed further below.

23. These developments have had a profound influence on the present operation of diplomatic protection and its modalities, both from a procedural and a material point of view. This influence was discussed in detail by the Committee, first in connection with the question of the traditional requirement of the exhaustion of local remedies and next in respect of the changes that have taken place in the rules governing nationality in this context. Recent developments concerning foreign investments, the practice of lump-sum agreements and regional approaches have also been discussed by the Committee as it is reported next. This Final Report remits to the detailed examination of the literature, conventions and decisions examined in the reports prepared by professors Bederman, Kokott, Orrego Vicuña and Stein on these subjects.

### III. The Exhaustion of Local Remedies as a Pre-condition for the Exercise of Diplomatic Protection.

#### Different procedures for different areas of the law.

24. On the basis of the report prepared by Professor Juliane Kokott, the Committee has dealt with the question of the exhaustion of local remedies. Under general principles of international law, the exhaustion of local remedies has been considered a pre-condition for the exercise of diplomatic protection. Customary as well as conventional law, traditional diplomatic protection, investment disputes before arbitral tribunals and - to a large extent - human rights jurisprudence, have all dealt with the question of local remedies as a rule common to all these developments.
25. However, doubts have also been expressed as to whether these diverse procedures could and should be dealt with together. The question is indeed of particular importance since its answer will determine the scope of the rule and the extent of its application in contemporary international law.
26. Mr Mohammed Benouna, who as noted was the first special rapporteur of the ILC on the subject, defined diplomatic protection as “a formal claim made by a state in respect of an injury to one of its nationals which has not been redressed through the local remedies”.<sup>11</sup> This definition in itself involves at least four types of possible claims.
27. The first type relates to traditional diplomatic protection. In exercising diplomatic protection a state espouses a claim of its national against another state for a violation of the minimum standard concerning the treatment of aliens under international law. Despite the fact that a variety of specialized treaty-based dispute settlement procedures have evolved and individuals have gained an unprecedented standing in international law, diplomatic protection, in its traditional form, is still of relevance today.
28. Several recent decisions such as the *Breard*<sup>12</sup> and *La Grand*<sup>13</sup> cases before the ICJ support this proposition. Broad views of diplomatic protection have also been advanced in the Application of Croatia in the *Genocide Convention* case,<sup>14</sup> where the obligation to pay that was claimed referred to violations of its own right and as a *parens patriae* for its citizens, including reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the violations of international law.

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<sup>11</sup> ILC, Report of the Forty-Ninth Session (1997), U.N. Doc. A/CN.4/L. 548, para.9.

<sup>12</sup> ICJ, *Case Concerning the Vienna Convention on Consular Relations*, (Paraguay v. United States of America), Order of 9 April 1998, 37 ILM 810 (1998) (*Breard* case).

<sup>13</sup> *La Grand* case, cit.

<sup>14</sup> ICJ, Press Communiqué 99/41, September 16, 1999.

29. A second type of claim is found in the context of investment treaty arbitration. While this will be examined separately in this Report, it should be noted at the outset that the mere fact that the source of law might have changed from customary to conventional law does not change its character. However, some treaty arrangements, notably ICSID, have gone further as they give individuals and corporations direct access to the dispute settlement mechanisms and may also waive the local remedies rule. In this case it is no longer appropriate to speak of diplomatic protection insofar as there is no claim made by a state.
30. A third category of claims encompasses bodies such as the United Nations Compensation Commission (UNCC) and the Iran-United States Claims Tribunal (IUSCT). Both bodies have in common that they were set up following a rather massive international wrong leading to a great number of claims, including claims by individuals and corporations. The main features of these mechanisms are also discussed in connection with other aspects of this Report.
31. The fourth kind of claim results from the relationship between mechanisms for the protection of human rights and diplomatic protection, having the first deeply influenced the latter. The two concepts are interrelated historically in that they pursue similar aims. The development of human rights protection has, however, led to significant differences among the two.
32. Human rights conventions normally provide for state and individual complaints. Individual applications do not match the requirement of a claim "made by a State". State complaints do comply with that criterion and as far as they concern violations of an individual's rights and not a pattern of human rights violations, they could at first glance be subsumed under the notion of diplomatic protection. However, there remains a basic difference in respect of traditional diplomatic protection in that the claimant state will not need to assert a right of its own or prove a specific interest. The difference between diplomatic protection and human rights procedures will be thus kept present in the relevant sections of this Report.

#### The rationale of the rule.

33. On the basis of these considerations, the Committee has next considered the rationale for the rule on exhaustion of local remedies. The rule aims at offering states the opportunity to rectify the behaviour of their organs within their own legal systems and thereby to do justice to the claimant. This reason is emphasized in general international law as well as in human rights law.
34. Various aspects must be highlighted in this connection. First, one of the rule's objectives is to protect the interest of respondent states in preserving their sovereignty. Second, there may be practical reasons for the operation of the rule: the investigative machinery found in the host state might be better equipped to determine the existence of an international wrong; the resort to local courts might be less expensive both for the host state and for the alien; it will generally be less time-consuming; it prevents the tying up of significant numbers of what are very often poorly staffed governments departments and serves the minimization of international disharmony. The rationale of the rule plays an important part in determining its scope and limits.
35. A closely related question is whether the rule of exhaustion of local remedies is of a substantive or a procedural nature. While this question was dealt with in depth by the ILC in the drafting work leading to present Article 44 of the Articles on State Responsibility, it was finally differed to the work of the ILC on diplomatic protection. The Committee has looked at the issue from the perspective of diplomatic protection. In this context, the dispute about this nature is not a purely theoretical one as it touches significantly on time-limits for bringing the claim, limitation for actions, forfeiture and the calculation of interests for late payment and other issues.
36. While various schools of thought agree on the fact that the rule of exhaustion of local remedies has procedural aspects, they differ on the extent of this feature. A purely procedural view will assert that the rule does not go beyond being a practical rule designed as a device for the implementation of state responsibility. A substantive theory, on the contrary, focuses on a material or substantive corollary as it assumes that it is not the original act or omission which creates the violation of international law, but that such violation arises only if a subsequent court decision upholds the claim. The breach of the international obligation accordingly results from a

whole series of successive acts of state conduct. A consequence of this other view is that the non-exhaustion of local remedies by the individual excludes the wrongfulness and thereby the existence of an international offence.

37. Yet other intermediary theories believe that the rule concerns the origin of state responsibility in cases where the breach of the international obligation derives exclusively from the action of judicial organs which have failed in their duty to provide an individual with the internationally required judicial protection against injuries sustained in breach of purely internal law.
38. If the nature of the rule is looked upon from the perspective of diplomatic protection, it will be realized that its procedural character is inextricably linked to the substance of the breach. It can hardly be conceded, for example, that in cases of obvious violations of the minimum standard of international law, as the killing of an individual, the initial infringement of those fundamental rights should not yet be characterized as unlawful in itself. It follows that the rule is of a procedural character but that the initial action of a state organ already represents the unlawfulness. The rule of the exhaustion of local remedies only precludes immediate recourse to diplomatic protection.
39. In situations where diplomatic protection is sought solely for violation of rights granted by the internal legal order, there is a potential violation of a substantive international right, the right to due process, but only when domestic remedies are ineffective or remain unsuccessful. However, in any case, independently of the school of thought one might follow, the state's right is dependent on the individual's recourse to domestic proceedings. If the individual decides not to take action, according to all theories, diplomatic protection is bound to fail.

#### The operation of the rule.

40. The Committee has also considered the state of the discussion on the question of a need for a territorial connection in respect of the application of the rule of diplomatic protection. The ILC concluded in the context of state responsibility that such connection is not established in either international practice or decisions. It follows that in practical cases, such as an aircraft accident outside state territory or transboundary abductions, it is best to rely on reasonable criteria associated to effectiveness and availability. It was thus concluded that the criterion of a territorial link is neither truly established nor is this additional element necessary for the adequate application of the rule.
41. Similarly, the Committee concluded that the question of involvement of a state enterprise did not pose a significant obstacle to the operation of the rule since the distinction between *acta jure imperii* and *acta jure gestionis* is today generally accepted. To this extent, state practice tends to support the rule that where activities *de jure imperii* give rise to a dispute they may be referred immediately to direct diplomatic negotiation between the two states involved, but when the dispute concerns activities *de jure gestionis* the rule should be applied to prevent disruptions in inter-state relations.
42. The actual operation of the rule poses some additional questions. Starting from the definition of the ILC to the effect that local remedies mean the remedies which are open to natural or juridical persons under the internal law of the state, the Committee did not believe it appropriate to consider the possibility of exhaustion of local remedies before courts other than those of the host state. It was thus agreed that local remedies are normally those of the state whose acts will be eventually subject to an international claim, an approach also retained by the ILC in its articles on diplomatic protection.<sup>15</sup>
43. In accordance with the rationale of the rule, the essential criterion for determining the procedural devices which have to be exhausted is the efficacy and sufficiency of the remedy in question in order to obtain adequate reparation, a matter that normally has to be determined by the law on state responsibility. A first approach attempts to enumerate the remedies that need to be

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<sup>15</sup> ILC Draft Articles cit., Article 14.

exhausted in an exemplary manner or exhaustively, as was the case of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which called upon a claimant to employ “all administrative, arbitral, or judicial remedies” available to him.<sup>16</sup> A second approach is evidenced in human rights law, where in order to specify the remedies which have to be exhausted the jurisprudence has introduced the notions of “adequate” or “effective” remedy.

44. The Committee was of the view that since each such approach has its merits and also poses difficulties, it was best to follow a combination of both. Remedies that have crystallized as such should be enumerated while also leaving enough room for a case by case approach which would take into account the circumstances of the case, the interests of the parties in the light of the rationale and the context of the internal legal system referred to by the rule.
45. A usual enumeration will include both administrative and judicial remedies and would not distinguish between remedies of an ordinary or extraordinary nature, as the ILC has recently done.<sup>17</sup> To the extent that they offer a prospect for redress, they have to be exhausted. However, there might be a heavier burden of proof on the defending state in the event that the internal order considers a remedy as extraordinary.
46. If various remedies are available to redress the same violation, the question arises whether the individual has to make use of all of them in order to comply with the local remedies rule. In the *Ambatielos Claim*, the Commission held that an alien had to use the alternative remedy if he was prevented from using one way of redress.<sup>18</sup> According to the Strasbourg organs, as a rule, it is sufficient if the claimant pursues one of various remedies to the highest instance, if those proceedings provide for an exhaustive examination of the legal and factual issues of the case.<sup>19</sup>
47. The Committee has also agreed that the notion of exhaustion deals with the question as to what extent the local remedies have to be pursued, regarding, in particular, the substance of the claim and the procedural means available within the internal legal system. A vivid description of the underlying idea is given in the ILC commentary on former Article 22 of the Articles on state responsibility to the effect that “The claimant must show that he wants to win the case”.<sup>20</sup> It follows that the mere reference of a case to a court or tribunal is not sufficient. The individual is under an obligation to make use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals.
48. This effort refers to both questions of substance and procedure. In respect to the first, as a rule the alien has to find the appropriate formulation in terms of the relevant municipal law, because although municipal systems may recognize as wrongful a particular act, they may not regard such act for the purpose of redress through their courts as a violation of international law. More demanding standards have been set in a regional context, as is the case with the European Court of Human Rights, but this is because domestic and international human rights standards are essentially similar in that context and the international obligations breached must be explicitly invoked before domestic courts.<sup>21</sup>

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<sup>16</sup> Draft Convention on International Responsibility prepared by Professors LB Sohn and RR Baxter for the Harvard Law School, 1961, in F. V. Garcia-Amador, *The Changing Law of International Claims*, 1984, Vol. II, at 858, Art. 22.

<sup>17</sup> ILC, Draft Articles cit., Article 14.

<sup>18</sup> *Ambatielos Claim*, (Arbitral Tribunal) 12 RIAA., 83, at 118, 120 (1956).

<sup>19</sup> J Frowein and W Peukert, ‘*Europäische Menschenrechts Konvention: Emrk-kommentar*’, Art. 26 m. n. 23 (1996).

<sup>20</sup> ILC, Report of the Twenty-Ninth Session, Doc. A/32/10, [1977-II/2] YBILC 31, U.N. Doc. A/CN.4/SER.A/1977/Add. 1 (Part 2), at 47.

<sup>21</sup> *Ahmed Sadik*, 20 Eur. Ct. H.R. Rep., Judg. & Dec. 1638, 1654 para. 33 (1996-V).

49. In respect of procedure, as stated in the *Ambatielos* case, “the non-utilization of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant’s case before the municipal courts”.<sup>22</sup> This, the Committee believes, is the most reasonable approach.

#### Limits of the application of the rule.

50. The question of the limits to the obligation to exhaust local remedies was also considered in the Committee’s work. International human rights conventions have in many cases provided for such limits. Excessively prolonged procedures or to require mechanical attempts at formal procedures, has not met with the favour of international practice and decisions. The “futility rule”, encompassing many exceptional circumstances of legal and factual nature, all of which make it unreasonable to expect the alien to exhaust local remedies, has been established to set the limit to such effort and requirement. The ILC’s articles on diplomatic protection also lay down the main limits and exceptions to the local remedies rule.<sup>23</sup>
51. The lack of adequate remedy provides a first significant ground to this effect. If it can be established that the legal system does not provide for an appropriate remedy to redress the violation incurred, be it that no adequate system of judicial protection exists at all, that no adequate remedy exists for the specific violation or that for other legal or factual reasons an abstractly existing remedy is not available to the individual in the specific circumstances of the case, the alien is not then expected to exhaust the local remedies. Mere doubts about the effectiveness of local remedies, however, do not absolve the author from pursuing such remedies.
52. The exception of “unreasonably prolonged proceedings” is another ground for a limit accepted under international law. This exception has been introduced in various international instruments, in particular human rights law. The exception also takes into account the interest of the individual not to waste time and money in exhausting unsatisfactory remedies. Delays can be due to a variety of reasons, for instance to an overburdened or ineffective judicial system or to an unwillingness of the competent authorities to resolve a particular case. The question of what time-lapse justifies the exemption depends on the aspect of reasonableness in the particular circumstances of the case.
53. Factual reasons can also provide a ground for the application of the futility rule, particularly in case of physical danger to the applicant in the country where he would have to pursue the remedy. This can be due to a “general atmosphere of hostility” towards the nationals of other countries. Most of the criteria developed in human rights jurisprudence to this effect can appropriately be transferred to the general rules and standards governing diplomatic protection.

#### The issue of waiver.

54. The question of waiver of the local remedies rule leading to its derogation by consent has also been examined by the Committee. Such agreed derogation can take different forms: the agreement can be based on international law, whether a bilateral or a multilateral treaty, or be governed by the internal law of the host state; the agreement can occur before or after the dispute arises, it can be express or implied. Waivers to the rule of the exhaustion of local remedies are a factor in international investment law, as evidenced by Article 26 of the ICSID Convention. It has to be taken into account, however, that ICSID also permits individuals to assert their rights without mediation through the state.
55. Implied waivers are normally difficult to establish. The ICJ held in the *ELSI* case that such an “important principle of customary international law” as the exhaustion rule could not be held to have been “tacitly dispensed with, in the absence of any words making clear an intention to do

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<sup>22</sup> *Ambatielos Claim*, cit, at 120.

<sup>23</sup> ILC, Draft Articles cit., Article 16 (Article 15 in Second reading).

so”.<sup>24</sup> It follows from this ruling that in general international law, in absence of an express waiver, prima facie the rule of local remedies applies unless interpretation proves that the parties agreed to the contrary. In some proceedings the non-exhaustion of local remedies has simply not been invoked before international tribunals, which could nevertheless be understood as an implied waiver.

56. Disputes on the question of waiver have also been addressed under the terms of “forfeiture” or “estoppel”. In the case of estoppel the parties have not agreed to waive the rule and therefore the rule would generally apply, but in the instant case the principle of “good faith” prevents its application. Like in the *Heathrow Airport User Charges Arbitration* a state can be estopped from invoking the non-exhaustion of local remedies due to its “words and conduct” in the context of the proceedings, which are deemed to be inconsistent with the raising of the plea.<sup>25</sup> As held in *ELSI* the mere silence of the host or respondent state with regard to the exhaustion as the basis for estoppel poses “obvious difficulties in constructing estoppel from the mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges”. It is no doubt reasonable to allow a tacit waiver only where such intention can be inferred from the agreement.
57. In the field of human rights, supervisory bodies have taken the view that forfeiture takes place if the objection of non-exhaustion is not being raised at the appropriate time in the international proceedings,<sup>26</sup> but in the absence of such guidelines this approach cannot be transferred to diplomatic protection without further elaboration.
58. The question of the waiver of diplomatic protection also has a close connection with the operation of the Calvo Clause, that required foreigners to waive diplomatic protection and resort only to local courts. The validity of this waiver has not been upheld by early international decisions as the individual could not dispose of the rights of his state of nationality. But the question arises whether this could be done today in the light of the predominant right of the individual noted above.
59. At a point, the ILC’s work on diplomatic protection considered the proposal by Special Rapporteur John Dugard to the effect that a contract where the alien and the state agree on the exclusive character of local remedies, not resorting to international claims or relying only on national treatment, “shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection”. This, however, did not involve the waiver in case of an injury caused by an international wrong or when the injury is of direct concern to the state of nationality.<sup>27</sup> Ultimately, however, the Commission did not retain the discussion of this question and provided only for an additional exception to the local remedies rule in the opposite situation, that is when the allegedly responsible state has waived the exhaustion of local remedies, not specifying whether this could be done also tacitly.<sup>28</sup>

#### The burden of proof.

60. The Committee has also considered the question of the burden of proof in connection with diplomatic protection. In general international law, the consideration of the exhaustion rule depends on whether or not the host state invokes non-compliance of this requirement. If it does, in accordance with the principle *onus probandi actori incumbit*, it is up to the claimant to prove

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<sup>24</sup> ICJ, *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, ICJ Reports 1989, at 42, para. 50.

<sup>25</sup> *Arbitration Concerning Heathrow Airport User Charges* (United States - United Kingdom), 102 ILR.216, 285, para. 6.33 (1996).

<sup>26</sup> *De Wilde, Ooms and Versyp v. Belgium*, 12 Eur. Ct. H.R. (Ser. A), at 30 et seq. para. 53 et seq. (1971).

<sup>27</sup> ILC, Third Report on Diplomatic Protection by Mr John Dugard, Special Rapporteur, Doc. A/CN.4/523/Add. 1, 16 April 2002, Article 16.

<sup>28</sup> ILC, Draft Articles cit., Article 16 (Article 15 Second reading).

that either he exhausted the available remedies or that he was dispensed from it, while the host state has to demonstrate that further remedies existed which were not used.

61. The situation is somewhat different in the field of human rights. The applicant has to give some indication as to the exhaustion of remedies in the application - human rights conventions normally stipulate that an application is considered in substance by the relevant supervisory organ only if the latter is satisfied that the local remedies have been exhausted the way the convention requires. The European Court of Human Rights has explained in the *Selmouni* judgment that the Convention provides for a distribution of the burden of proof.<sup>29</sup> It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one and offered reasonable prospect of success. However, once the burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case. This approach, however, does not appear suitable for transfer *in toto* to diplomatic protection as the initial burden of proof depends on the existence of specific rules of procedure.
62. The conclusions the Committee reached on this subject will be summarized at the end of this Report.

#### IV. The Law Governing the Nationality of Claims: New Approaches and Challenges.

63. This other subject is also central to the consideration of diplomatic protection in contemporary international law. It has been considered by the Committee in the light of the Report on the matter prepared by Professor Francisco Orrego Vicuña and has taken into account the interesting work advanced by the ILC on this subject.

##### Traditional meaning and increasing flexibility.

64. The requirement that claims may be brought by a state on condition that the affected person possesses its nationality, has been well established under international law.<sup>30</sup> As held by the ICJ in the *Nottebohm* case,<sup>31</sup> this link has to be both genuine and effective. Notwithstanding the significance of this link, the very needs of the evolving legal order have led to changes in the rule to the extent that not always a link of nationality is today required to espouse an international claim. Departures from the rule agreed by treaty had allowed in a number of cases to sponsor claims of persons who did not have the nationality of the claimant State.<sup>32</sup> It has been also noted that since the claiming State had discretion as to the distribution of compensation, it could make payments to persons who did not meet the requirement of nationality.<sup>33</sup> Claims on behalf of non-nationals have not been unknown in the practice of international law.<sup>34</sup>
65. Two other situations need to be considered in this context. The first is the case of claims made on behalf of nationals of the defendant state. International practice that began with the *I'm*

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<sup>29</sup> *Selmouni v. France*, Application no. 25803/94, Judgment of 28 July 1999, <http://www.dhcour.coe.fr/>, p. 26 para. 76.

<sup>30</sup> See the Revised Draft prepared by F. V. Garcia-Amador on State Responsibility for the International Law Commission, 1961, in F. V. Garcia-Amador: *The Changing Law of International Claims*, 1984, Vol. II, at 795, Art. 23.

<sup>31</sup> ICJ, *Nottebohm*, ICJ Reports 1955, at 23.

<sup>32</sup> Oppenheim's International Law, Vol. 1, 1992, at 513.

<sup>33</sup> *Ibid.*, at 513.

<sup>34</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, where the Court stated that there are "important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality", at 181.

*Alone*,<sup>35</sup> confirms that the state has done so in a number of occasions, thus evidencing that it will not necessarily substitute its interest for that of the protected individual and may act only on its behalf. It is then the right of the individuals and not that of the claiming state that is enforced, with the additional consequence that the latter will be deprived of its discretion as to the handling of compensation and of its surrogate capacity. So too, under the rules of the United Nations Compensation Commission (UNCC), a government may submit claims on behalf of its nationals and “at its discretion, of other persons resident in its territory”<sup>36</sup>, who can of course be nationals of other state. Trusteeship arrangements are also used to extend protection to persons who are not in a position to have their claims submitted by a Government.

66. The second situation that must be considered is that not always the espousal of the state of nationality is required to submit a claim. Also under the Rules of the UNCC, a corporation whose State of incorporation has failed to submit a claim on its behalf, may itself make a claim to the Commission. Special forms of protection have also been recognized in the case of stateless persons,<sup>37</sup> and special rules have also been provided under the Convention on the Nationality of Women<sup>38</sup> for situations of change of nationality because of marriage as in respect of military service in cases of double nationality.<sup>39</sup> The International Law Commission has also endorsed the exercise of diplomatic protection in the case of stateless persons lawfully and habitually resident in the state so undertaking, just as it has done in respect of refugees, with the exception that in the latter case such protection cannot be exercised in respect of the state of nationality of the refugee.<sup>40</sup>
67. The practice examined by the Committee evidences that the link of nationality has lost to an extent its rigor in the context of international claims. Moreover, to the extent that the intervention of the state is reduced or eliminated as a requirement for submission of international claims, the link of nationality will lose somewhat its relevance. This is particularly so in the field of human rights and related humanitarian concerns, where as noted direct access by the individual to international procedures is not only increasingly available but can also be exercised against his own state of nationality. While these trends cannot be taken to mean that the traditional requirements have been overturned, they certainly point towards a situation of greater flexibility and adaptation to changing needs.

#### Continuance and its limits.

68. A second well established rule in respect of diplomatic protection is that of continuance of nationality. The protected person had to have the nationality of the protecting state both at the time of the injury and at the date of the official presentation of the claim, some times being it required also at the time the claim had been adjudicated.<sup>41</sup> The criteria relating to the presentation of the claim has, however, been favoured by state practice and it is retained in the ILC draft articles.<sup>42</sup>
69. Under the traditional approach to diplomatic protection envisaging the state substituting its rights for those of the individual, the requirement of continuance of nationality lacked legal logic. If the rights of the individual were no longer upheld after suffering the injury, and only those of the State prevailed thereafter, there was an inherent contradiction in requiring that the individual's nationality should continue.

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<sup>35</sup> *I'm Alone*, RIAA, iii, at 1609.

<sup>36</sup> UNCC, Provisional Rules for Claims Procedure, 1992, Art. 5, 1. a.

<sup>37</sup> Convention relating to the Status of Stateless Persons, and comments in Restatement of the Law Third, The Foreign Relations Law of the United States, Vol. 1, at 218.

<sup>38</sup> Convention on the Nationality of Women, T. S. No. 875 (1934).

<sup>39</sup> Protocol relating to military obligations in certain cases of Double Nationality, 1930, T. S. No. 913.

<sup>40</sup> ILC, Draft Articles cit., Article 8.

<sup>41</sup> Garcia-Amador, Revised Draft cit., Art. 23; Sohn and Baxter, Draft Convention cit., Art. 23. 7.

<sup>42</sup> ILC, Draft Articles cit., Article 5.

70. The important question today is whether the rule is justified in the context of the new approach to diplomatic protection, where it is increasingly the right of the individual and not that of the state acting on its behalf the one that is upheld and enforced. While in the view of some scholars there are strong reasons to favour the continuance of nationality,<sup>43</sup> the opposite conclusion may be justified. In fact, if the right of the individual is affected the relevant critical date is that of the wrong, and the situation should not change simply because there has been a change of nationality intervening thereafter; the wrong follows in this perspective the affected individual.
71. The need for stability and certainty might be ensured if the affected individual is given a choice that it could be either the state of nationality at the time of the critical date or that of a later nationality that could espouse his claim, since in both cases the state will be acting on behalf of the individual. It has also been suggested that only the “new” home state should be able to bring a claim but not the previous one.<sup>44</sup>
72. These alternatives were already hinted at by the Sohn and Baxter Draft Convention of 1961 when stating that “[a] State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to that injury”.<sup>45</sup> Also the ILC draft articles endorsed in first reading diplomatic protection in respect of individuals who were not its nationals at the time of the injury and have lost their former nationality, with the caveat that such a change must be made *bona fide* and not be the consequence of nationality shopping for the purpose of the claim.<sup>46</sup> The second reading of these Articles defined with greater precision the conditions for the exercise of diplomatic protection in this case, particularly in requiring that the change of nationality has taken place for reasons unrelated to the bringing of the claim.<sup>47</sup>
73. The retention of the rule of continuance of nationality does not seem to find any longer justification in the light of the changing role of nationality as a requirement of diplomatic protection. There is here a need to revise or at any rate to adjust the operation of the rule to this new reality, a situation that becomes still more evident in the context of the transfer of rights and claims that will be discussed next. There may be situations, however, where a rule of continuous nationality may have to be respected, especially in instances involving an ostensible claimant’s abuse of right, misuse of entitlements or privileges of nationality, or fraud.
74. As a consequence of the rule set out above, also the continuance of nationality has been generally required in respect of the transferability or assignability of claims. To this end, transfer of claims could only be done between persons having the same nationality of the espousing state. This has been the approach to questions such as succession on death, assignment, insurance subrogation and other.<sup>48</sup>
75. However, again here the question of whether this rule is justified in the light of a new approach to diplomatic protection and the enforcement of claims must be asked. If the right of the individual prevails, it would seem enough that the right to a claim be established at a critical date and changes of nationality intervening thereafter in the context of transfers or assignment should not be a bar to bringing a claim at some point in time.
76. To some extent this situation was recognized in claims to property beneficially owned by one person, the nominal title to which is vested in another person of a different nationality; it was usually the nationality of the former that prevailed for the purposes of claims.<sup>49</sup> The question is

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<sup>43</sup> Comments by Lady Fox, at 2; Comments by Bederman, at 1-2.

<sup>44</sup> Comments by Stein, at 2.

<sup>45</sup> Sohn and Baxter, Draft Convention cit., Art. 23. 6.

<sup>46</sup> ILC, Draft Articles cit., Article 5.

<sup>47</sup> ILC, Draft Articles (Second reading), cit, Article 5.

<sup>48</sup> Oppenheim's International Law, cit, at 514.

<sup>49</sup> Ibid., at 514.

still more relevant in the insurance business, where the rights of the insured may pass to the insurer by way of subrogation.<sup>50</sup> The continuance of nationality is probably not any longer justified in the light of global market of insurance, in which insured and insurer will often have different nationalities. Investment insurance, such as that available under OPIC or MIGA, is also based on subrogation of rights.<sup>51</sup>

77. The globalization of financial and service markets will probably require such a departure from the traditional scope of the rule. In fact, the application of the rule in the context of globally structured financial markets where shares, bonds and other instruments change hands, and consequently nationality, constantly and speedily, can only be regarded as an anachronism that could amount in given instances to deprive legitimate owners and investors of protection on the part of states of nationality.<sup>52</sup> This objective must be balanced with the concerns expressed in paragraph 73 above about certain forms of claimant misconduct.
78. To the extent that the requirement of continuance of nationality might be moderated in this context, it might be appropriate to ensure that transfer of claims be made *bona fide* so as to prevent that a claim be transferred to a national of a stronger state in order to strengthen diplomatic protection, a concern that has been often expressed.<sup>53</sup>

#### Issues of dual nationality.

79. The Committee has also considered in its work the question of dual nationality. The traditional rules in the matter have been well explained in Articles 4 and 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.<sup>54</sup> These various situations have been aptly summarized in the following manner: (i) a state should not be allowed to present a claim on behalf of a national when such person is also a national of the respondent state and with which it is more closely connected; (ii) this claim should not be presented even where the national in question is more closely connected with the claimant state; (iii) if the national of the claimant state is also a national of a third state -not being the respondent- and is more closely connected with that state, the claim should not be allowed either; and (iv) if in this last situation the national is more closely connected with the claimant state than with the third State in question, then the claim could be brought against the respondent.<sup>55</sup>
80. It has been shown above that in a number of cases diplomatic protection has been exercised in respect of nationals of the defendant state or in respect of other non-nationals. The possibility that a state might accept by treaty the obligation to provide to all persons within its jurisdiction, regardless of nationality, a standard of protection required by that treaty has also been envisaged, a situation in which the issues of nationality will again lose significance, as happens often in treaties of economic integration or trade liberalization.<sup>56</sup> This practice appears to be suggesting that also the rule on double nationality is experiencing important changes.
81. In (iii) and (iv) above the issue concerns a dual nationality involving a third state. Here again the rules explained rely on the effectiveness of the nationality link, based on which criteria they point to different answers. However, if flexibility of the rule or departure from it is allowed in cases involving the dual nationality of the respondent state, with every more reason this should be the case of dual nationality involving third states. The joint action by two states of nationality in respect of a third state has also been suggested as an alternative when both are willing to extend

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<sup>50</sup> Ibid., at 514.

<sup>51</sup> Restatement cit., at 227.

<sup>52</sup> ICSID, *Fedax. N. V. v. Republic of Venezuela*, July 11, 1997, ILM, Vol. 37, 1998, at 1378.

<sup>53</sup> Encyclopedia cit., at 1056.

<sup>54</sup> For a discussion of these provisions, see Encyclopedia cit., at 1050.

<sup>55</sup> Oppenheim's International Law, cit., at 516-517.

<sup>56</sup> Comments by Lady Fox, at 2.

their diplomatic protection to the affected individual,<sup>57</sup> and this approach has been retained by the International Law Commission.<sup>58</sup>

82. Two trends seem to emerge from the above discussion. The first is that the traditional rules of the 1930 Convention are being applied with a greater degree of flexibility, which will become particularly marked in connection with the approach to diplomatic protection relying on the rights of the individual as the prevailing element.
83. The second trend is that in this context, like in other matters pertaining to nationality, effectiveness offers an important guiding tool, particularly for decisions of tribunals. Criteria to evaluate effectiveness will depend on the circumstances of each case, where residence, family ties, property, taxation and many other elements will determine the “stronger social bond of attachment”.<sup>59</sup> The ILC has retained the concept of “predominant” nationality in respect of claims concerning dual nationals.<sup>60</sup> It will be noted below that in the context of dual nationality the question of a plea to sovereign immunity has attained considerable importance.

#### Corporate nationality.

84. One of the most important questions the Committee has examined is that concerning the rules on nationality of corporations in connection with the exercise of diplomatic protection. Besides the obvious situation of a corporation incorporated under the laws of the claimant state and being the majority of its shareholders nationals of that state, in which case the entitlement to its diplomatic protection will not be questioned,<sup>61</sup> in every other conceivable situation there will probably be difficulties with the traditional requirements of nationality. Traditional criteria applied to determine corporate nationality, such as domicile, siège social or principal place of management and control, does not always provide an adequate answer in the present global society. Questions of effectiveness of the connection will also arise in this context, particularly when a corporation having the nationality of the state of incorporation is owned by non-nationals of that state.
85. One of the most problematic aspects of the matter was that submitted to the ICJ in the *Barcelona Traction* case,<sup>62</sup> as to the right of a state to protect shareholders of its nationality in a foreign corporation affected by measures of a third state. While the *dictum* of the Court was in the negative and the right to diplomatic protection was recognized only in respect of the state of incorporation, criticism of this decision and subsequent practice evidence that the question was not really settled at the time.
86. As to the practice, it should be noted first that the Court itself recognized that a state may protect its shareholders in a foreign corporation when they have their rights as such directly infringed, independently from damage inflicted upon the company.<sup>63</sup> Also the Court considered cases in which shareholders may be protected by their state of nationality if the foreign company has ceased to exist or when the state of incorporation lacks the capacity to take action on its behalf, but did not find such situations applicable in the light of the facts of the case.<sup>64</sup>
87. Recent practice is still more eloquent in the matter. In the *ELSI* case,<sup>65</sup> the ICJ upheld the possibility that shareholders of a foreign company could be protected by their state of nationality against the state of incorporation. It is also interesting to note that in a number of treaties and

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<sup>57</sup> Comments by Kokott, at 2-3, with reference to C.Warbrick: ‘*Protection of Nationals Abroad*’, Current Legal Problems, ICLQ, Vol. 37, 1988, p. 1003, 1006.

<sup>58</sup> ILC, Draft Articles cit., Article 6.

<sup>59</sup> See generally the 1965 Resolution of the Institut de Droit International, Annuaire, Vol. 51-II, 1965, at 260.

<sup>60</sup> ILC, Draft Articles cit., Article 7.

<sup>61</sup> Oppenheim's International Law, cit., at 517-51.

<sup>62</sup> ICJ, *Barcelona Traction*, ICJ Reports 1970, at 4.

<sup>63</sup> Oppenheim's International Law, cit., at 520.

<sup>64</sup> Ibid., at 519.

<sup>65</sup> *ELSI* case cit.

claims arrangements provision has been made for protection of shareholders in affected partnerships or companies. The percentage of participation required to have that interested protected has also been constantly decreasing, as evidenced by the decisions of the IUSCT and the rules governing the claims made in the UNCC.

88. The UNCC rules have also included arrangements of interest in respect of corporate claims. Corporations whose claims are not submitted by the state of incorporation may submit anyhow their claims directly together with an explanation. Also, if the governments concerned agree, one government may submit claims in respect of joint ventures on behalf of the nationals, corporations or other entities of other governments.<sup>66</sup> Most importantly, it is provided that shareholders of a corporation which is barred from making a claim because of its nationality, may claim for the losses with respect to that corporation.<sup>67</sup> An elaborate mechanism allowing for claims of non-nationals who are the real owners of the interest is that embodied in Decision 123 (2001) of the UNCC.
89. The control of a company is also reflected in the ICSID Convention for the purpose of foreign investments dispute settlement. In terms of its Article 25 (2) (b) a juridical person which has the nationality of the state party to the dispute may be a party to the proceedings if, because of foreign control, the parties have agreed that the juridical person should be treated as a national of another contracting party.<sup>68</sup> The practice under bilateral investment treaties is, however, broader as these treaties often recognize as a protected interest many kinds of investment, including investment in assets, shares and other forms of participation. On this basis, foreign shareholders in a locally incorporated company have been allowed to claim even in the absence of agreement between the parties under the ICSID rule mentioned above. In the context of broadly drafted treaties, claims by minority shareholders have also been admitted, including questions relating to shareholders agreements between investors of different nationalities.
90. Even if a number of these arrangements are done by treaty or special agreement, the aggregate of the practice evidences quite forcefully that the criteria of the *Barcelona Traction* no longer prevail and that shareholders are increasingly entitled to protection or action on their own merit. This trend is also strengthened by the fact noted that increasingly the right of the affected individual prevails today over that of the state in the context of diplomatic protection.
91. Contemporary practice is also reflected in the work of the ILC concerning the protection of shareholders. While to an extent the general approach laid down in *Barcelona Traction* is retained, there is the significant difference that protection of shareholders is permissible even if the company has the nationality of the state allegedly causing the injury if “incorporation under the law of the latter State was required by it as a precondition for doing business there”,<sup>69</sup> thus also evidencing that the traditional approaches embodied in the Calvo Clause are no longer favoured. It will be seen further below, that this matter has also been of significant interest in connection with the protection of foreign investments.
92. The conclusions arising from the discussion of nationality of claims will be also summarized at the end of this Report.

#### V. The Practice of Lump-Sum Settlement Agreements.

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<sup>66</sup> Provisional Rules cit., Art. 5. 1. b.

<sup>67</sup> UNCC, Decision of the Governing Council on Business Losses of Individuals, S/AC. 26/1991/4, 23 October 1991, para. f.

<sup>68</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 UNTS 159, Art. 25. 2. b.

<sup>69</sup> ILC, Draft Articles cit., Article 11.

93. Once the Committee considered both the question of exhaustion of local remedies and nationality of claims, it undertook the task of examining the meaning of practice in this respect, as evidenced both in conventions and diplomatic work. To this end, on the basis of the report prepared by Professor David Bederman, the Committee examined first the place of lump sum agreements as a source of state practice in the international law of diplomatic protection so as to assess to what extent the trends outlined above have in fact been reflected in current practice.
94. In spite that lump sum agreements had become, after World War II, the paramount means for settling international claims, it is surprising that in the first thirty years following the war, they received only scant notice by scholars and dubious recognition by jurists. Indeed, even though by 1970 they numbered well over 100, with no significantly diminishing use of them in sight, the ICJ, in its holding that year in the *Barcelona Traction*, paid them little attention in the belief that far from reflecting, much less creating, international law, lump sum agreements were *sui generis*, prescribing no more than a *lex specialis*. This very approach of dismissing the significance of lump sum agreements is also found in respect of the IUSCT and the UNCC, considering that these important developments merely reflect again *lex specialis* unconnected to the main stream of international law.
95. In their 1975 treatise,<sup>70</sup> Professors Lillich and Weston sought to fill the gap in scholarly attention to lump sum agreements, demonstrating that the ICJ was incorrect in its approach to these agreements, and that they should be treated in the same manner as any other international prescription. This jurisprudential significance, however, has not been always recognized as evidenced, for example, in *Banco Nacional de Cuba v. Chase Manhattan Bank*,<sup>71</sup> where lump sum agreements were basically considered a kind of negotiated compromise that could not reflect the material rules of international law on the matter. Similarly, in *Sedco* the IUSCT found much state practice arising from lump sum agreements of questionable evidentiary value in that they reflected settlements negotiated between states and foreign companies.<sup>72</sup> Non judicial considerations were thus held to be lacking evidentiary value of custom accepted as law.
96. The precise settlement amounts for lump sum claims do reflect of course a process of negotiation and conciliation and to that extent they should only be taken as a cautious guide to state practice. But the jurisprudential significance of lump sum settlements lies not in their discount of the face value of claims, but, rather, in the substantive rules they articulate for such matters as claimant eligibility, attribution of state conduct, the nature of compensable claims, and the general standard and modalities of prompt, adequate and effective compensation. This significance has been accepted by international arbitral institutions relying on lump sum agreements as evidence of state practice in relation to precise rules for international claims practice.
97. The rules that this practice has come to confirm can be summarized in the following main aspects.
- Distribution of compensation.
98. Claims practice arising from lump sum agreements is consistent with the rule that the distribution of the negotiated compensation falls within the exclusive jurisdiction of the claimant state. This apparent broad discretion, which of course extends to matters other than claimant eligibility, is not absolute, however, and may be qualified by various conditions set out in the agreements themselves or the general rules governing nationality of claimant's eligibility.
- Requirements of nationality.
99. Lump sum agreements reiterate almost unanimously the traditional international law rule that only nationals of the claimant state are entitled to benefit from diplomatic protection, and hence to share in the distribution of the lump sum. In respect of limited categories of claimants the

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<sup>70</sup> R B Lillich & B H Weston, *International Claims: Their Settlement by Lump Sum Agreements* (1975).

<sup>71</sup> *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981).

<sup>72</sup> *Sedco*, 10 Iran-USCTR. 180 (1986-I).

agreements have authorized different results. However, beyond the somewhat vague requirement of the *Nottebohm Case* that a person must have some “genuine connection” with a claimant state, agreements have generally left the claimant states free to determine, in accordance with their own nationality laws, who they shall consider to be their nationals when distributing a lump sum, a point on which claimant states have adopted a fairly restrictive attitude toward the determination of nationality.

- Continuance of nationality.

100. Modern settlement agreements entered after 1975 appear less favourably disposed to the traditional eligibility requirement of continuous nationality. This was heretofore thought to be a rule of customary international law, stipulating that a claim be continuously owned from the date of the grievance to the date of state-espousal or final settlement of the claim. The great majority of such agreements, to the extent they address the time-of-nationality issue at all, require claimant state nationality only on the date of claim accrual, sometimes only on the date of signature or entry into force of the settlement agreement. In contrast, the vast majority of the pre-1975 settlement agreements favoured the continuous nationality rule.

101. Occasionally, however, state practice has insisted on the continuance of nationality rule in spite of the broader terms of an agreement. Yet, as Lillich and Weston foresaw, when many decades have past since the date of the grievance, to require the continuance of nationality will only work against other meritorious claims, particularly those of heirs that may have a different nationality at a later point in time. Simply requiring proof of nationality on the date of claim accrual would seem the best way to serve “the ends of justice.”<sup>73</sup>

- Dual nationality.

102. While most agreements expressly declare “individuals” or “natural” or “physical” persons who are claimant state nationals to be eligible for lump sum protection, traditionally states have been reluctant to take up the claims of individuals who, though possessing claimant state nationality, possess also the nationality of a foreign country, especially the nationality of the respondent state. However, just a handful of these agreements address the issue explicitly, and even then only to depart from the traditional approach to this matter, relying on criteria such as domicile or dominant and effective nationality. The IUSCT, beginning with the *Esphahanian* case,<sup>74</sup> has upheld the dominant and effective nationality approach rather than simply excluding claims of dual nationals, including to that end the consideration of all relevant factors, such as habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.

103. Except for the case of isolated agreements, both international and domestic practice confirms that dual nationality is less and less likely to be equated *ipso facto* with ineligibility. Whether an individual, having one eligible nationality and one of a third country, must satisfy the dominant and effective test is a novel question for international tribunals. The IUSCT seems to have assumed that its specific grant of jurisdiction required that it make such a determination. Some publicists, however, might suggest that the dominant and effective nationality test only really works, in an evidentiary sense, when the two opposing nationalities are those of the states parties to the arbitration.

- Partnerships.

104. Most modern settlement agreements explicitly allow for the eligibility of partnerships, thus reflecting the trend toward one important corporate form of doing business abroad. The eligibility of partnerships, however, had previously been an irksome question in international claims practice and until recently there had been little chance for the development of consistent

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<sup>73</sup> See generally Kerley, ‘*Nationality of Claims - A Vista*’, 63 Proceedings of the American Society of International Law 35, at 36-37 (1969).

<sup>74</sup> *Esphahanian and Bank Tejarat*, 2 Iran-USCTR 157 (1983-I).

doctrine. The issue was, and still is, whether a claim can be brought for that share of a partnership or joint venture controlled by non-eligible individuals.

105. There are, analytically, three possible solutions to the puzzle. The claims of partnerships can be barred if even a single interest-holder holds an ineligible nationality. At the other extreme, a partnership or joint venture could be allowed to claim for the entire property of the entity, even for those interests held by ineligible nationals. Finally, a compromise solution would be to disaggregate the interests of the partnership, allowing the entity to bring a claim only for those interests held by stakeholders with an eligible nationality. This final, *pro rata*, solution was adopted by the IUSCT.

106. Even though lump sum agreements are relatively silent as to partnership claims, the national claims commission practice is to treat both partners and partnerships as eligible if they meet nationality requirements, to allow claims by individual partners according to their proportional partnership share, or occasionally to assimilate the partnership to corporate status and to apply the relevant test for corporate nationality.

- Corporate nationality.

107. Nearly all settlement agreements contain some provision authorizing claims by corporations. While some agreements do not elaborate on the meaning of the nationality requirement other agreements are more detailed and may be seen to divide into four distinct approaches to the corporate nationality requirement. Under the first -- and most traditional -- approach, a corporation is a national of the state of its incorporation. Under the second approach corporate nationality is determined by looking to the *siège* or headquarters of the claimant corporation. Under the third approach, the criterion of control or predominant link is relied upon without reference to place of incorporation or *siège social*. And under the fourth approach, a hybrid test is utilized, requiring both incorporation and direct or indirect ownership by nationals of a given percentage of shares of stock or other beneficial interest in the corporation.

- Shareholders.

108. Although the position taken by the ICJ in the *Barcelona Traction* case continues to render the current posture of customary international law relative to stockholder claims somewhat confusing, lump sum practice is uniform in protecting such claimants. This is done either explicitly or implicitly, by way of referring to settling claims for “property and interests in property”, “property, rights and interests”, “property, rights, interests and claims”, “property, rights, causes of action and interests”, “property and financial claims”, “property and creditor rights”, or “any property claims” adversely affected by the respondent state.

109. United States practice, however, has not permitted stockholders to maintain claims in corporations which are eligible claimants as U.S. nationals, in the understanding that claims are owned by the corporation like any other of its assets and not by its stockholders. When the claim has arisen in favour of a foreign corporation the claim of proportional interest by United States stockholders has been admitted. Additionally, indirect as well as direct stockholder claims are either explicitly or implicitly protected under agreements.

110. It should also be noted that claims practice also treats beneficiaries of trusteeships similarly to shareholders in corporations, thus allowing for proportional recovery of interests in the trusteeship.

111. It is thus possible to conclude on this point, that lump sum agreements appear generally unaffected by the *Barcelona* decision, except perhaps in what appears to be a continued palpable hesitation relative to indirect stockholder claims. This, however, has been specifically addressed by treaties and practice relating to foreign investments, as will be discussed further below.

- Other claimants.

112. Most settlement agreements provide, explicitly or implicitly, for successor and surrogate claimants. Strict nationality requirements are on occasions imposed, but it may reasonably be

assumed that, in general, successor and surrogate claimants under current practice are or are not eligible to share in the lump sum distribution to the same extent or subject to the same nationality and other requirements as original claimants.

113. Also explicitly or implicitly settlement agreements allow claims by a state *qua* state, only very exceptionally excluding the state to claim on behalf of its own interest. Of course, disallowing claimant states to bring claims on their own behalf and, instead, requiring them to seek satisfaction through a separate agreement or fund leaves a greater lump sum from which claimant state nationals may seek relief.

114. The practice outlined, particularly in the period following 1975, is strongly suggestive of some changes in the doctrinal rules associated with claimant eligibility and diplomatic protection. While the harsh effects of the continuous nationality rule have been moderated somewhat, the rule in its general form retains much force. A rule of dominant and effective nationality has been advanced for dual national claims. Partnership claims now appear to be disaggregated, allowing individual partners to make claims if they are otherwise of an eligible nationality. The eligibility standards for corporations and their shareholders appear to have been relaxed substantially, and so the substantive holding in *Barcelona Traction* may now well be cast in doubt at least as reflected in lump sum agreements and foreign investment law. Lastly, these agreements have slightly refined some aspects of practice regarding beneficial ownership of claims.

#### VI. The Protection of Foreign Investments and Diplomatic Protection.

115. The Committee, on the basis of another report by Professor Juliane Kokott, considered next the question of the role of diplomatic protection in respect of the safeguard of property rights in the light of investments made in a foreign country. In this context, the Committee has examined how diplomatic protection has to respond to the demands by private investors and host states with regard to the protection of foreign investments, particularly in view of the fact that in a globalized economy states are at least *de facto* joined by transnational corporations as players on the international stage, insisting on their rights and unwilling to resort to traditional state – to – state procedures. Issues of dispute settlement are paramount to this examination.

116. According to a commonly accepted definition, the term “foreign investment” means “[t]he transfer of funds or materials from one country [...] to another country [...] to be used in the conduct of an enterprise in that country in return for a direct or indirect participation in the earnings of the enterprise.”<sup>75</sup> The investor expects the foreign state to observe its internationally binding obligations. On the other hand, however, the investor is concerned that his property might be jeopardized by risks like confiscation or expropriation without adequate compensation.<sup>76</sup> The need for protection is more pressing for both sides in cases of unstable economic and political conditions in the host state: for the investor to ensure a stable environment as a necessary precondition for its investment and for the host state in order to attract foreign investors and to establish ways to maintain control over incoming investment and the use of its resources according to its domestic policies.

#### State contracts and Bilateral Investment Treaties.

117. Avoiding the uncertainties of customary international law, contractual commitments often promise additional protection and have proven to be the most favoured means of protection of foreign investments. In order to design the agreement according to the needs of the individual investor, a “State Contract” might appear as the tool an investor would favour. Such a state contract would be concluded between the host state and the investor. Whether this contract can be regarded as an agreement under public international law, is a highly disputed question and it is uncertain that the agreement can be regarded as such even if the host state has explicitly declared to be bound under international law. After all, one of the parties is not a state but only a

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<sup>75</sup> S A Riesenfeld, *Encyclopedia cit.*, Vol. 2, 435 (1995). For an extensive discussion of the term “investment” see C H. Schreuer, *The ICSID Convention: A Commentary* (2001), Art. 25, paras. 80 – 110

<sup>76</sup> Geck, *Encyclopedia cit.*, at 1045.

private corporation. It follows, in one view, that it would appear that a breach of the contractual obligations, committed by the host state, cannot result in international responsibility. This view, however, is not generally shared and the role of international law in respect of state contracts has gained sustained recognition.

118. The uncertainty still surrounding state contracts has resulted in an increasing demand for an additional safeguard that clearly is subject to public international law: namely, an investment treaty that serves as a framework for investments, involving both the home and the host state. This explains the rapidly growing network of bilateral investment treaties (BITs) currently numbering over 2000.<sup>77</sup> Despite this extraordinarily high number of treaties and some unavoidable differences among them, there is remarkable uniformity. One of the reasons for the similarities is the fact that the treaties are negotiated on the basis of model drafts prepared by the home states and those drafts are themselves typically based on some common sources.
119. The focus of the BITs is clearly on the rights of the investor and the duties of the host state. That means that they usually do not deal with either the home state's or the investor's obligations, thus being mainly concerned with their scope of application, the admission of investments, the treatment afforded and dispute settlement procedures. The provisions on treatment of investments have acquired particular significance, above all those dealing with fair and equitable treatment, non-discrimination and most-favoured nation treatment. The issue of expropriation is always dealt with under this kind of treaty, usually requiring payment of prompt, adequate and effective compensation in case of expropriation. It is not difficult to note that these issues are related to the traditional field of application of diplomatic protection in the safeguard of property rights, which has to this extent become strengthened and separate in scope from those matters closely associated to the protection of human rights.

#### Dispute Settlement under BITs.

120. In the context of diplomatic protection, special attention should be given to the dispute settlement procedures. Generally, two parallel procedures co-exist, both of which are established as alternatives to the jurisdiction of the host state's national courts. The first of these alternative procedures applies in the event of disputes between the investor and the host state concerning the relevant investment, usually opening the way to either *ad hoc* arbitration or arbitration under the International Center for Settlement of Investment Disputes (ICSID).
121. The second alternative dispute resolution procedure is the one that shows the closest connection to diplomatic protection, although it is certainly different from its traditional concept. The BITs open the way to a dispute resolution between the contracting states in the event of disputes regarding the interpretation or application of the provisions of the relevant BIT. In this case, the investor – state dispute resolution does not stand alone, but is rather accompanied by the BITs' provision of treaty rights that the home state can exercise against the host state in order to enforce the provisions of the BIT, thereby assisting the investor. The existence of the state-to-state procedure ensures that the host state will abide by the BIT requirements.
122. The most significant difference with the traditional role of diplomatic protection is that under the BIT regime, the contracting states have waived their right to exercise diplomatic protection and replaced it by an alternative dispute resolution system, unless the host state fails to comply with the arbitration award or in some other specific circumstances.
123. The arbitration procedure is certainly to the advantage of both the investor and the host state, compared to the exercise of diplomatic protection, since it excludes the uncertainties of the latter resulting from its discretionary nature, and avoid the ensuing politicized atmosphere. A significant advantage of the BIT scheme is the fact that the investor "obtains direct access to an international remedy", and such remedies are also independent of government negotiations as is the case with lump sum agreements.

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<sup>77</sup> K J Vandeveld, 'The Economics of Bilateral Investment Treaties', 41 Harvard International Law Journal, 469 (2000).

124. By the same token, the state-to-state arbitration procedures provided by the BITs also differ from “classic” diplomatic protection. At first sight, they may resemble diplomatic protection as the home state takes action with the intention of supporting the investor by exercising its own rights under the BIT. However, the home state is limited to the right to submit the case to the arbitration body and is obliged to agree to the final and binding arbitration award. Compared to the means established under customary international law to exercise diplomatic protection, this is a rather limited set of options for the home state. Further actions, however, may be initiated by the home state in case the host state disregards the arbitration. These limitations probably explain why the state-to-state dispute settlement procedures have been invoked in just one occasion and it was not pursued.<sup>78</sup>

#### The limited role of diplomatic protection.

125. The main reason why the role of diplomatic protection has been dwindling in respect of foreign investments is that its exercise is still left to the discretion of the investor’s home state and the investor cannot predict whether the home state will be willing to use it or to what extent. This problem is particularly acute for investors from smaller countries that can many times hardly rely on their home states because of the latter’s concern for the political or economic consequences of an open dispute with a stronger host state.

126. Another reason for the rapid development of BITs to the detriment of diplomatic protection can be found in the *Barcelona Traction* decision. Despite the fact that a damage done to the company will undoubtedly affect the company’s shareholders, the Court nonetheless held that diplomatic protection of foreign shareholders could only be exercised by the state of incorporation, excluding the state of nationality if different and excluding the investors themselves. A consequence of this holding is that “in the absence of bilateral or multilateral investment protection treaties shareholders are unprotected by international law.”<sup>79</sup> This lack of protection becomes still more evident if the foreign-owned company has the nationality of the host state. Although this was the situation in the *ELSI* case, the Court allowed the United States as state of nationality to bring the case in the light of a treaty on friendship, commerce and navigation that was allegedly breached by the host state. A possible explanation for that departure from *Barcelona Traction* is that in *ELSI* the right in question was the shareholders’ “direct right” to manage their investment, rather than an issue concerning a right of the company.

127. As a result of the above shortcomings of diplomatic protection, the existing network of BITs includes shares and many other interests in the scope of their application, as well as the foreign investors’ direct access to international arbitration. From the investors’ perspective, this is certainly a more effective way to protect their interests than relying on diplomatic protection. As noted above, lump-sum agreements remained relatively unaffected by the *Barcelona Traction* decision. The outcome of this evolution is that today the BIT system better reflects modern international law and its increasing recognition of individual rights than does traditional diplomatic protection.

#### Multilateral approaches to investment protection.

128. There is also the view that a multilateral approach to the protection of foreign investments could, in contrast to the patchwork style BIT network, facilitate the development of a more coherent policy in respect of international investment. Important developments concerning multilateral arrangements in this matter have indeed come to the fore. ICSID and the Multilateral Investment Guarantee Agency (MIGA), established in 1985 with the intention of encouraging the flow of investments by issuing guarantees against non-commercial risks, are a part of this trend towards multilateral approaches.

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<sup>78</sup> *Lucchetti S. A. v. Peru*, ICSID Case ARB/03/4, Award of 7 February 2005.

<sup>79</sup> A K Masa’deh, ‘*International Rules for Investment and Investors: Light at the end of the Tunnel?*’, European Business Law Review, Vol. 11, 157 (2000), at 160.

129. The WTO-based TRIMS agreement of 1994, although limited to the regulation of some performance requirements, is also a relevant example of the trend in question.<sup>80</sup> More important in this context is the 1994 Energy Charter Treaty.<sup>81</sup> Though this is only a sectoral treaty, limited to the energy sector, it was “the first major multilateral investment treaty imposing obligations on governments with respect to the treatment of foreign investment which is directly enforceable by private companies.”<sup>82</sup> The treaty includes a set of dispute resolution provisions that comprises, similarly to BITs, rules for arbitration between the investor and a contracting party and between contracting parties.
130. The multilateral approach has also been taken farther so as to provide a comprehensive framework of protection and not just one covering certain sectors, like the ECT, or restricted matters, such as MIGA. This is what the OECD had in mind when it launched negotiations for a Multilateral Agreement on Investment (MAI) in 1995. However, as it turned out, it was impossible to reach a successful conclusion to the MAI negotiations.
131. There was first a structural difference between the network of BITs and the multilateral approach, insofar the BITs are concluded between developed countries on one side and developing countries on the other side, while a multilateral treaty, in contrast, would predominantly cover investments between developed countries. Developed countries did not appear to be willing to apply among themselves stringent standards of protection as those required from developing countries, in the belief that the former do not face the kind of problems occasionally found by the latter, such as restrictions on the free transfer of capital or other restrictive measures.
132. In addition, the debate was burdened by issues such as the protection of the environment, the notion of sustainable development and minimum social and labour standards. The definition of investment was also under discussion and there was a debate as to whether portfolio investments should be included – with the necessary consequence of allowing restrictions on the free transfer of capital under certain extraordinary circumstances. This issue, interestingly enough, has never been a serious problem within the BIT network that includes all kind of investment. In the end, the OECD lost the public debate on the MAI to the nongovernmental organizations (NGOs) opposing the MAI, who applied considerable pressure against the member states.
133. The broader forum provided by the WTO, that includes the participation of both developing and developed countries, might be more promising for advancing a multilateral approach to foreign investments, even though restricted to trade related matters. The November 2001 WTO Ministerial Conference endorsed the idea of further WTO based negotiations, recognizing “the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment [...]”<sup>83</sup>
134. Since the MAI is, despite its fate, the most comprehensive attempt to codify the law of protection of foreign investments undertaken so far, its dispute resolution regime deserves some special attention. This regime also comprises both state-to-state and investor-state procedures. The debate on investor-state arbitration was heavily influenced by the NAFTA *Ethyl* case,<sup>84</sup> where the question of free trade under the NAFTA versus the state powers to ban certain activity on environmental grounds came to the fore. NGOs and other interests expressed their concern about companies suing governments under the MAI with the result of obstructing domestic environmental regulations. Another concern related to the fact that investments could be

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<sup>80</sup> “Agreement on Trade-Related Investment Measures” of April 15, 1994, 48 UKTS, Cm 3264 (1996), 1994 O.J. (L 336) 100.

<sup>81</sup> “The Energy Charter Treaty”, December 17, 1994, 33 ILM 381 (1995).

<sup>82</sup> T W Wälde, ‘*International Investment under the 1994 Energy Charter Treaty*’, 29 *Journal of World Trade* Vol. 5, 5 (1995), at 6.

<sup>83</sup> WTO, Ministerial Conference in Doha (Qatar), 9 – 14 November 2001, Ministerial Declaration, para. 20, WT/MIN(01)/DEC/W/1 (14 November 2001).

<sup>84</sup> *Ethyl Corporation v. Canada*, Decision on Jurisdiction, 24 June 1998.

channelled through subsidiaries incorporated in different states, each of them eventually being entitled to commence proceedings against the host state, which would thus end-up facing a number of different arbitrations.

135. The MAI's state-to-state procedure followed closely the BIT regime, requiring an effort to settle disputes via consultations before the aggrieved party can initiate any arbitration process and dealing with disputes "about the interpretation or application of the Agreement." In addition, the MAI does not allow extensive "forum shopping" in case of more than one applicable agreement: choosing one agreement for arbitration means waiving the right to submit the matter for decision under other agreements.
136. The investor-state procedure requires not only the existence of a dispute concerning the alleged breach of an obligation by the home state, but also that this breach causes an actual loss or damage to the investor or its investment. This procedure also requires first an attempt to settle the dispute by negotiation or consultation. The concern about large scale or abusive litigation, however, coupled with the automatic unconditional consent each contracting party had to give to international arbitration, resulted in growing opposition to the initiative and ultimately contributed to its failure.
137. Whenever the host state fails to comply with or abide by an arbitration award in the MAI, the home state would no longer be prevented from initiating a state-to-state procedure. The MAI also envisaged a detailed procedure for the case that the host state again refuses to comply with the arbitration award favouring the home state in this scenario, calling first to attempt to settle the dispute by means of consultation and next, in case of failure, allowing the aggrieved state to take measures in response, following notification of the other party and the "Parties Group". The home state would then be free to enact responsive measures, like a suspension of the application to the other party of obligations under the MAI, with the exception of the provisions on general treatment and expropriation that cannot be suspended. All countermeasures must be proportionate and are subject to review by the Parties Group or by the arbitration tribunal.
138. At first look, this procedure comes close to the exercise of diplomatic protection as the home state exercises its rights with the aim of assisting its investor. However, attention should be drawn to a remarkable difference between diplomatic protection under the MAI regime and under the BITs. While both regimes only allow the exercise of diplomatic protection in the event of a host state not complying with arbitration awards, the difference lies in the way this exercise is regulated. The BITs leave open the question of how the home states react to non-compliance, while MAI creates a framework and allows responsive steps only within the limits of that frame, which significantly includes supervision under the arrangement.

#### Options and trends.

139. On the basis of the above considerations, the Committee could reach a conclusion on the relation between diplomatic protection and the rules governing the protection of foreign investments. Although there is no room for the view that one excludes the other, the result might well appear disappointing from the perspective of those that would want to see diplomatic protection playing a strong role in today's law of foreign investment. As noted, diplomatic protection does not play a major role among the available means of dispute resolution as direct access of investors to international arbitration bodies is the favoured alternative. This standing under international law evidently circumvents diplomatic protection.
140. This diminished role could be corrected to some extent if a change of the rules governing diplomatic protection is undertaken with the aim of meeting the demands of investors, but this option does not seem to be realistic because it neglects the existence of a network of bilateral agreements, accompanied by multilateral agreements. It follows that a second option appears to be more realistic: to accept that, in the context of foreign investment, the traditional law of diplomatic protection has been to a large extent replaced by a number of treaty-based dispute settlement procedures.
141. Diplomatic protection will always be available in case there is no direct international standing of the individual to claim, or in case the outcome is not complied with, or, as it is also not unknown

today, the dispute ends-up in the host state affecting the human rights of the individual investor or of corporate officials, particularly by due process violations and discrimination. Both mechanisms will be thus supplementary.

## VII. Diplomatic Protection in the EU: Emerging Issues for European and International Law.

142. On the basis of a report prepared by Professor Torsten Stein, the Committee also considered the particular case of developments concerning diplomatic protection under the European Union Treaty. A written contribution by Professor Juan Manuel Faramiñán Gilbert also helped the Committee in the consideration of this question. Article 20 of the European Community Treaty, incorporated as Article 8c by the Treaty on the European Union (Maastricht Treaty) interestingly provides that:

“Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.”

143. The member states have agreed to this effect on “Guidelines for the Protection of Non-Represented EC Nationals by EC Missions in Third Countries”, provisionally applied as of 1 July 1993 and adopted in final form by Decision 95/553.<sup>85</sup> The interpretation given to Article 20, however, in a way rendered “international negotiations with third States” unnecessary and member states seem to have understood that protection is limited exclusively to “consular protection“, particularly to assistance in cases of death, serious accident or illness, arrest or detention, violent crime, and to the relief and repatriation of distressed citizens.

### Differences of interpretation.

144. Some authors argue that Decision 95/553 is incompatible with primary Community Law, insofar member states were not free to preclude considerable portions of consular functions from the protection envisaged and to restrict the reduced protection to citizens of the European Union, thereby apparently excluding juridical persons.<sup>86</sup> It is all the more doubtful whether Decision 95/553 meets the purpose of Article 20 in precluding diplomatic protection, as opposed to consular protection, at all. This Article was intended to be one of the first steps towards a “genuine” citizenship of the Union which would replace the nationality of the member states after the completion of a real Union. At a time, there was also the idea to establish common standing diplomatic missions of several EU member states under alternating direction, an idea that did not materialize.

145. Since the terms used in the different language versions of Article 20 allow both for an interpretation including diplomatic and consular protection or a more restrictive interpretation concerning only consular assistance, the object and purpose of the Article become relevant for the establishment of its true meaning. The requirement to “start the international negotiations required to secure this protection” is not normally associated with consular protection and rather reflects a connection with the exercise of diplomatic protection.

146. While it is possible to consider the “Guidelines” and Decision no. 95/553 as establishing “the necessary rules among Member States”, the fact is that neither the member states nor the Union have so far started negotiations with any third State. Member states have only notified the third states in question by verbal note according to Article 8 of the Vienna Convention on Consular Relations through the diplomatic mission of the respective Council Presidency of their decision to co-operate in extending consular protection and assistance to all those nationals of other member states in

<sup>85</sup> Decisión 95/553/EC, Oficial Journal No. L 314, December 28, 1995, 73.

<sup>86</sup> W. Obwexer, *Das Recht der Unionsbürger auf diplomatischen und konsularischen Schutz*, *ecolex* 1996, 323.

countries where their home state does not have an accessible diplomatic or consular mission. Third states apparently did not raise any objections against this notification.

147. It may well be, however, that diplomatic protection by one EU member state for a national of another does not, in practice, pose a real problem, in view that the exercise of diplomatic protection does not necessarily presuppose the exchange of diplomatic missions, as long as the states concerned have recognised each other. The decision to exercise diplomatic protection will in most if not all cases be taken by the government or the foreign office, and not by the respective diplomatic mission.
148. It must also be noted that Article 20 of the EC Treaty contains a civil right, the content of which as well as its respect and application in a given case might be decided upon by the European Community Court of Justice. The jurisdiction of the Court in respect of diplomatic protection is not precluded under Article 46 on matters of the common foreign and security policy, as in any event individual human rights are involved in this protection.

#### Implications for third states.

149. The agreement of member states in the context of the European Union to exercise diplomatic protection to the extent envisaged in Article 20 of the EC Treaty, will be of course a particular instance where the discretion characterizing diplomatic protection under international law will have been qualified or conditioned by the terms of this agreement. The question whether a member state can go beyond the so far agreed consular protection and grant true diplomatic protection when a national of another member state so requests, and the third state involved does not raise objections, is a completely different problem. Acting for another state without authority or mandate from that state would not be admissible under general international law, but for EU member states that mandate could be implied in Article 20 of the EC Treaty and come to replace the agreement normally required under international law.
150. From the point of view of third states, the crucial question is whether or not they would have to accept the exercise of protection by one EU member state for the nationals of all others even in the absence of an express or ad-hoc agreement to this effect. While, as noted, no third state has raised objections in respect of the notifications made by the Council Presidency with regard to cooperation in the field of consular assistance, the situation could be different with respect to diplomatic protection.
151. As discussed above, a state can extend diplomatic protection only to persons who are its nationals, and although the “citizenship of the Union” is not a nationality it is imparted through the nationality of a member state. This may well respond also to the trend discussed about new flexibility in international law as to the requirements of nationality. In this context, diplomatic protection may some day become a competence of the community, as it has already happened in the protection of ships flying the flag of a member state, where the duty of diplomatic protection through the Commission has been assumed.
152. Community practice shows that the Commission frequently contacts governments of third states in order to protect certain rights of Union citizens, particularly in respect of human rights. However, the fact that Article 20 of the EC Treaty refers to the “international negotiations required to secure this protection”, can be interpreted in such a way as to admit that it cannot be materialized without the agreement of third states. As a consequence, more state practice in this respect is needed before the emergence of a new rule can be ascertained.

#### Claims for protection.

153. From the point of view of a Union citizen, the question arises whether and to what extent he or she can claim protection in the sense of Article 20 of the EC Treaty from any member state of the Union. Ress rightly stated in 1990 that the EC Treaty does not provide a claim for diplomatic protection,<sup>87</sup> but this was done in the context of claims against the Community itself or against one of its member states. Article 20 of the EC Treaty, in the interpretation noted, could now

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<sup>87</sup> G. Ress, *Diplomatischer Schutz*, *Ergänzbare Lexikon, Völkerrecht*, 1990.

provide the legal basis for a claim for protection against third states, be that protection consular or diplomatic. That claim, however, could only be espoused on the same conditions as those applying to the nationals of that state, thus prompting a considerable qualification of its operation. Additional difficulties stem from the fact that several member states could be eventually in the position to exercise that protection, thus raising the need to provide for some arrangement that will avoid “protection shopping”.

154. By introducing Article 20 into the EC Treaty, member states have entered unstable ground, eventually in an effort to assert a state-like status of the Union which does not yet match reality. In that case, the more pragmatic approach of the foreign offices, namely to restrict co-operation to every day needs of consular assistance and to let some air out of Article 20, may be wise.

#### VIII. New Approaches to Diplomatic Protection.

155. The Committee came lastly to consider the long-term perspective and the evolution that may be expected in this subject.

156. While the historic legal fiction underlying diplomatic protection might no longer always be necessary or justified, the key question is which is the alternative solution to the traditional requirements of diplomatic protection.<sup>88</sup> The existing system has the advantage of an orderly administration of claims by the state of nationality, including the handling of multiple claims, the availability of diplomatic channels for negotiations and settlement, and the intervention of that state in the implementation of legal rules.<sup>89</sup> The disadvantages noted are also quite evident, particularly in terms of the political elements intervening in the governmental decision to espouse or not to espouse a claim, and the discretionary nature that this decision traditionally has had, but which to some extent is also under reconsideration as will be noted below.

157. The option of abolishing diplomatic protection as a mechanism under international law, while justified in the context of specific treaty regimes, does not seem to be generally a reasonable one at the present time, since it would leave many individuals unprotected or left to their own action.

#### A residuary role for diplomatic protection.

158. A residuary role for diplomatic protection seems more adequate to the extent that this mechanism might only intervene when there are no international procedures directly available to the affected individual. It should be noted, however, that even if direct access is available, diplomatic protection could still intervene in order to ensure the enforcement of an award, or to secure compliance with a decision favouring that individual. There is still the possibility of a parallel operation in which a state may espouse a claim at the same time that the individual pursues direct remedies,<sup>90</sup> particularly when a wrongful measure in respect of which direct mechanisms are available concurrently violates other rights, such as human rights or due process.

159. There are also other trends that need to be noted as supplementing the traditional scope of diplomatic protection. It was noted above that joint diplomatic protection is a feature of the ILC's articles on this subject. These articles also allow for the exercise of diplomatic protection in respect of ship's crews by both their state of individual nationality and by that of nationality of the ship.<sup>91</sup> The question of the EEC approach discussed above is also connected to this trend as is also the exercise of functional diplomatic protection by international organizations, none of which is precluded at present.

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<sup>88</sup> Comments by Lady Fox, at 2.

<sup>89</sup> Comments by Lady Fox, at 1.

<sup>90</sup> Comments by Lady Fox, at 1.

<sup>91</sup> ILC, Draft Articles cit., Article 19 (Article 18 Second reading).

Discretion and the prevention of arbitrariness.

160. One other aspect that the Committee has considered in the context of alternative options is how to ensure that the element of discretion in the governmental decision to espouse a claim is to the appropriate extent subject to legal scrutiny. On many occasions a government will simply refuse to accept the individual's request to have a claim espoused and no remedies will be available to this effect.
161. It is at this point that the evolution of international law in conjunction with domestic legal developments has become most promising, so as to ensure that the exercise of discretion does not result in an arbitrary refusal. An interesting historical solution to this problem is found in the Chilean legislation of the nineteenth century, where the request for diplomatic protection would be sent by the Ministry of Foreign Affairs to the Advocate General (Fiscal) of the Supreme Court for a legal opinion that was binding on the government.<sup>92</sup>
162. The Committee considered in this context the question whether a solution of this sort might be adopted as an obligation under international law in the context of due process. The Swiss Federal Council and other courts have ruled that while diplomatic protection is a discretionary government act, the individual has the right to invoke in his favour the prohibition of arbitrariness in the light of constitutionally guaranteed rights.<sup>93</sup> More promising yet is the approach followed by Spanish courts when holding that the government has discretion in granting diplomatic protection, but allowing for compensation of the individual in case of unjustified refusal in the light of the administrative obligation to compensate damage ensuing from the malfunctioning of a government service.<sup>94</sup> So too, decisions of German courts have held that refusal of diplomatic protection might be reviewed under administrative or constitutional procedures, including the question of compensation for damage.<sup>95</sup>

Anticipating the internationalisation of diplomatic protection: A new discussion.

163. Thus far, diplomatic protection has been used more as a tool to accommodate bilateral relations between states than as a tool to enforce observance of international obligations of a state in respect of certain fundamental values of the international community. However, the trend to introduce flexibility in the heretofore strict requirement of the link of nationality, seems to evidence that international law is moving slowly towards the latter function and to permit diplomatic protection as a procedure for protection of breaches of international law of common concern to the whole international community.
164. The ILC articles on diplomatic protection have introduced some flexibility in the traditional and rather stringent rules governing diplomatic protection, thus indicating that not only current practice is noted but also that the progressive development of the law is present to a limited extent in its work.
165. A promising proposal of the Special Rapporteur John Dugard was, however, rejected. This proposal envisaged to make it a legal duty in international law for a state of nationality to exercise diplomatic protection in respect of an injured national whose injury resulted from "a grave breach of a *jus cogens* norm attributable to another State",<sup>96</sup> where no remedy was

<sup>92</sup> F Orrego Vicuña: 'Report on Chile', E Lauterpacht and J G Collier: Individual Rights and the State in Foreign Affairs, 1977, 123-186, at 139-140.

<sup>93</sup> L Condorelli, 'L'évolution du champ d'application de la protection diplomatique', in Flauss, op. cit., 3-28, at 14-15; L Caflisch, 'La pratique Suisse de la protection diplomatique', in Flauss, op. cit., 73-86, at 76.

<sup>94</sup> J A Pastor Ridruejo, 'La pratique espagnole de la protection diplomatique', in Flauss, op. cit., 109-114, at 111.

<sup>95</sup> G Ress, 'La pratique allemande de la protection diplomatique', in Flauss, op. cit., 121-151, at 134-135.

<sup>96</sup> ILC, First Report on Diplomatic Protection by Mr John Dugard, Special Rapporteur, A/CN.4/506, March 7, 2000, Article 4. See also the comment by Italy to Article 2 of the Draft Articles, A/CN.4/561/Add.2, 12 April 2006.

available from an international tribunal and the interests of the national state were not seriously endangered. This proposal was rejected by the ILC because of “going beyond the permissible limits of progressive development of the law”.<sup>97</sup> This is understandable in view of the limited mandate of the ILC in respect of the codification of international law, but probably the proposal would have ultimately failed because of the fact that it entailed a severe restriction on the state’s discretion to exercise protection and that *jus cogens* has proven to be a rather elusive concept allowing for much speculation.

166. Nonetheless, from a long-term perspective, there are situations in which the broader approach is bound to happen sooner or later. This question has already been posed in respect of the exhaustion of local remedies in conjunction with a plea of sovereign immunity. One such situation is where no access to justice in national courts is available to the individual by reason of the absence of local remedies to exhaust in the alleged wrongdoer state and barring of suit against such state by a plea of state immunity in the courts of other states, the traditional discretionary espousal of the claim does not seem to be any longer justified as there would be no recourse in national courts available to the injured individual.

167. Another situation is where the absence of local remedies to exhaust because of state immunity and the operation of the dual nationality rule, leaves the injured individual unable to seek diplomatic protection. This situation happened in fact in *Adsani v. UK*<sup>98</sup>, where the European Court of Human Rights confirmed the UK courts’ right to apply state immunity to bar Adsani’s claim and the UK government exercised no diplomatic protection on account of Adsani’s dual nationality.

168. It has been suggested that a better solution would be to impose, in cases relating to violation of economic or human rights where a plea of state immunity bars civil proceedings against the violating state and regardless of any circumstances of dual nationality, an obligation in international law relating to diplomatic protection. Such an obligation would not necessarily amount to a requirement for actual resort to measures of diplomatic protection but a lesser commitment to conduct a *bona fide* investigation as to whether diplomatic protection should be exercised.

169. Such a commitment would seem to be recognised by the German Federal Constitutional Court,<sup>99</sup> and has recently been recognised in English law. In *Abbasi*,<sup>100</sup> an application was made on behalf of a British national detained by the United States authorities at Guantanamo for judicial review seeking exercise of diplomatic protection by the UK government on his behalf. The English Court of Appeal held an individual to have no right under English law to enforce the taking of diplomatic representations by the state of nationality but that the conduct of the UK Government gave rise to on the part of such an individual a legitimate expectation of protection. That expectation amounted to an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf.

170. In the end, the question is whether, just as the ILC has allowed for diplomatic protection in favour of stateless persons and refugees, this might also be extended so as to allow any state to exercise diplomatic protection in respect of an injured individual whose injury results from a violation of a fundamental international obligation where no effective remedy is available from either the defendant state or the state of nationality. To extend the right of diplomatic protection to all states in such circumstances would be related to the enforcement of obligations *erga omnes*.

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<sup>97</sup> ILC, Report of the Fifty-Sixth Session, 2004, at 28.

<sup>98</sup> *Adsani v. UK* (ECHR Application 35753/97, Admissibility March 1, 2000; Judgement November 21, 2001).

<sup>99</sup> *Rudolph Hess*, Case number 2 BVR4 19/80, 90 ILR 386.

<sup>100</sup> *R (on application of Abbasi) v. Sec of Foreign and Commonwealth Affairs and Sec of Home Office* [2002] EWCA Civ 1598 CA 6 Nov 2002.

171. In such a situation, no duty to exercise protection would be imposed on such third states but should a third state see fit to espouse an injured individuals' claim for violation of such an international obligation, the defendant state would be barred from rejecting such exercise for lack of a link of nationality as in the past.

172. This approach would undoubtedly alter the traditional character of diplomatic protection extending it beyond a tool solely available to an aggrieved state of nationality, and would bring diplomatic protection closer to the enforcement of rights in which 'all States have a legal interest in their observance'. In turn, this would bring the concept closer to the meaning of Article 40 of the Articles on State Responsibility, which establishes a category of breach entailing state responsibility described as "a serious breach by a State of an obligation arising under a peremptory norm of general international law" and which "involves a gross or systematic failure by the responsible State to fulfil the obligation". To that extent, diplomatic protection would also be a consequence additional to those envisaged in Article 41 in respect of a serious breach. It must also be kept in mind that at first diplomatic protection was discussed by the ILC as a part of the law of state responsibility.<sup>101</sup>

#### Perfecting diplomatic protection in the light of new needs.

173. While in the long-term such approach might become justified, at present there is still the question of how to define *jus cogens* and obligations *erga omnes* in a manner that will not result in an open-ended concept. There is also the natural reluctance to allow for a kind of *action popularis* where any state could take a case of breach of certain fundamental obligations to the ICJ or other international courts and tribunals, a question that also an open-ended system of diplomatic protection raises. The problem does not seem to lie in the concept itself but rather in the potential abuse that could ensue.

174. In the light of this reality, and given the restricted role that diplomatic protection has at present as evidenced by the more efficient procedures under human rights and investment conventions, the most likely evolution in the immediate future will result in the availability of more effective remedies by means of the perfection of those specialized procedures rather than in diplomatic protection. It is also quite likely that other specialized systems of protection of rights will join those available at present.

175. On this approach, while diplomatic protection remains a residuary and last resort procedure, there is still much ground to perfect the institution and make it more flexible and responsive to the needs of the individual in the broad international community. To this end, the Committee summarizes its conclusions concerning the perfection of diplomatic protection as follows:

#### IX. Summary of the Committee's Conclusions.

##### Exhaustion of local remedies.

1. Under general principles of international law the exhaustion of local remedies is a procedural precondition for the exercise of diplomatic protection.
2. Local remedies means the remedies which are open to natural or juridical persons under the internal law of the state against which diplomatic protection is sought.
  - 2.1. Local refers to the internal legal order of the host state,
  - 2.2. The term remedy normally encompasses both administrative and judicial procedures, as well as other adequate and effective procedural devices.
3. Exhaustion presupposes that the alleged victim:
  - 3.1. pursues the claim through the instances which the domestic legal order of the host state provides,
  - 3.2. presents the claim at least in substance before those instances, and
  - 3.3. resorts to those means of procedure which in the same court which are essential to establish the claim.

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<sup>101</sup> ILC, Report 2004 cit., at 22.

4. As a general rule, the claimant is exempt from exhaustion of local remedies if under general principles governing the observance of the rule of law the process does not meet the necessary conditions to ensure this requirement in the wrongdoing state, in particular where:
  - 4.1. for whatever reason, there is no effective remedy capable of redressing the violation available to him,
  - 4.2. the claimant is factually prevented from access to existing remedies,
  - 4.3. a firmly established jurisprudence offers ex ante no chance of a change in the matter concerned,
  - 4.4. the respondent Government waived the exhaustion of local remedies,
  - 4.5. the respondent Government forfeited its right to the exhaustion of local remedies.
5. The exhaustion of local remedies rule can be waived expressly or tacitly. Tacit waiver requires a clear demonstration of intent.
6. The host state is estopped from invoking the non-exhaustion of local remedies, if:
  - 6.1. a time-limit set for invoking the plea has passed without the plea having been made,
  - 6.2. in the light of the words and conduct or for any other reason the raising of the plea does not meet essential requirements of good faith.
7. In respect of the burden of proof:
  - 7.1. The claimant has the burden of proving that local remedies were exhausted, or that he was exempted from so doing.
  - 7.2. The host state has to prove that further remedies existed which were not exhausted.

#### Nationality of claims.

1. The right of the individual affected by a wrong should be asserted and enforced by means of diplomatic protection as the prevalent interest. A parallel right of the state of nationality can also be asserted and enforced in this context but it should not be substituted for the individual's own right.
2. The discretion exercised by a government in refusing to espouse a claim on behalf of the individual should be subject to judicial review in the context of due process and the prevention of arbitrariness, subject to constitutional requirements of the state of nationality.
  - 2.1. The obligation of the government in undertaking such a review is not necessarily to enforce the taking of diplomatic representations but to ensure that the government of nationality considers the position of the particular individual and the extent to which such action might be taken.
  - 2.2. Judicial review may consider the question of eventual compensation of the individual by the state refusing to espouse the claim in the light of constitutional or administrative rights.
3. Direct access by the individual to international claims settlement arrangements and dispute settlement procedures is to be encouraged as giving expression to the assertion of his own rights.
4. In the context of such arrangements, the submission of claims by the state of nationality may be dispensed with.
5. When direct access by the individual to international claim procedures is not available, diplomatic protection should be exercised in a residual manner. The availability of such procedures excludes diplomatic protection, except for the enforcement of decisions or parallel violation of due process by the host state.
6. The link of nationality to the claimant state must be genuine and effective, and in case of concurrent nationalities, predominant. Stateless persons and refugees are entitled to diplomatic protection by the state of residence.
7. In exceptional circumstances, claims may be brought on behalf of non-nationals, of nationals of the defendant state or under trusteeship arrangements.
  - 7.1. Such exceptional circumstances are particularly related to humanitarian concerns or where the individual would have no other alternative to claim for his rights.
  - 7.2. Where a claimant has the dual nationality of the defendant state and of the state in whose national court a plea of immunity is raised by the defendant state, the raising of such a plea in the absence of local remedies to exhaust shall be treated as such exceptional circumstances, particularly in situations of humanitarian concern.
8. Continuance of nationality may be dispensed with in the context of global financial and service markets and operations related thereto or other special circumstances. In such context the wrong follows the individual in spite of changes of nationality and so does his entitlement to claim. Continuous nationality may still be required in situations involving potential claimant misconduct.
9. Transferability of claims should be facilitated so as to comply with the standard set out under 8 above.

10. Only the state of the latest nationality should be able to bring a claim under the rule set out in 8 above. This claim shall not be made against the former state of nationality. It is a requirement that changes of nationality and transferability of claims be made *bona fide*.

11. In cases of dual nationality the effectiveness or predominance of the link should prevail over other considerations, allowing if justified for claims against the state of which the individual is also a national. This is without prejudice to the question of claims on behalf of non-nationals or claims against nationals of the defendant state explained above.

12. Shareholders of a foreign company may be protected by the state of their nationality if their rights have been directly infringed, as well as in other special circumstances where they would otherwise be deprived of protection.

13. Shareholders of a foreign company may also be protected by the state of their nationality for wrongs affecting such company if the state of nationality of the company is unable or unwilling to exercise such protection or is the defendant state.

14. Control of a foreign company by shareholders of a different nationality, may entitle the state of nationality of such shareholders to exercise diplomatic protection on their behalf or otherwise to consider the company as having its nationality.

15. If a company or partnership is prevented from claiming because of its nationality, shareholders or partners not so affected may claim in proportion to their interest in such company, including indirect or minority interest, or otherwise be entitled to diplomatic protection by the state of their nationality, particularly if incorporation in the host state has been required by that state as a condition of conducting business there.

June 23, 2006.