Reservations formulated when notifying territorial application

Draft Guideline 1.1.4 relating to Reservations formulated when notifying territorial application lays down that a unilateral statement by which a State purports to exclude or to notify the legal effect or certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation. While draft guideline 1.1.3. deals with the scope *ratione loci* of certain reservations the present guideline deals with the time factor of the definition. It thus relates to the moment when certain: "territorial reservations" can be made.

Reservations formulated jointly

Draft Guideline 1.1.7 entitled Reservations formulated jointly lays down that the joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation. A fundamental characteristic of reservations is that they are unilateral statements and nothing prevents a number of states or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depository of a multilateral treaty in the name of a number of parties. This stipulation reinforces one of the three formal components of the definition of reservations incorporated in draft guideline 1.1. mentioned above.

The Drafting Committee has also adopted an untitled and as yet unnumbered Guideline which reads "The definition of a unilateral statement as constituting a reservation does not prejudge its permissibility or its effects in the light of the rules governing reservations". This guideline has been adopted provisionally and its title and placement within the guide to practice is to be determined at a later stage. The Commission also proposes to consider the possibility of referring both to reservations and to interpretative declarations which pose identical problems.

In its Report to the General Assembly the Commission has invited comments and observations from Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty, beyond those stipulated by the treaty itself, ought or ought not to be considered to be reservations. The Commission would appreciate receiving any information or materials relating to States practice on such unilateral statements.

IV. Nationality in Respect of Succession of States

The General Assembly by its resolution 51/160, had taken note of the completion of the preliminary study of the topic "State Succession and its impact on the nationality of natural and legal persons", and requested the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States". The Assembly had also invited governments to submit comments on the practical problems raised by Succession of States affecting nationality of legal persons. The Planning Group established at the forty ninth session of the Commission had recommended that the Commission endeavour to complete its first reading of the draft articles on the topic.

At its forty ninth session the Commission considered the Third Report of the Special Rapporteur, Mr. Vaclav Mikulka, which contained a set of draft articles together with commentaries thereto. After considering the Third Report of the Special Rapporteur the Commission adopted on first reading, a draft preamble and a set of 26 draft articles on "Nationality of Natural Persons in Relation to the Succession of States." The Commission decided to transmit the draft articles to Governments for comments and observations. Thereafter the General Assembly at its fifty-second session drew the attention of the Governments to the importance for the International Law Commission of having their views on the draft articles on the nationality of natural persons in relation to the succession of states as adopted on first reading by the Commission. By its resolution 52/156 of December 15, 1997 the General Assembly

urged Governments to submit their comments and observations to the Commission by October 1, 1998.

At its fiftieth session the Commission had before it the fourth report of the Special Rapporteur, Mr. Vaclav Mikulka, dealing with the second part of the topic of topic viz. the question of the nationality of legal persons in relation to the succession of States.[10] Whilst introducing his report the Special Rapporteur observed that a preliminary exchange of views at the present session on possible approaches to the second part of the topic would facilitate the future decision to be taken by the Commission on this question, in particular given the fact that Governments had so far not submitted any written observations in response to the request contained in General Assembly resolution 52/156. In his report, following an overview of the discussion that had taken place thus far on the issue both in the Commission and in the Sixth Committee, the Special Rapporteur had therefore raised a number of questions as regards the orientation to be given to the work on the nationality of legal persons and he suggested that they be discussed in the framework of a Working Group.

Accordingly the International Law Commission at its Fiftieth Session established a Working Group on the topic "Nationality in relation to the succession of States" under the chairmanship of Mr. Viclav Mikulka, Special Rapporteur,[11] to consider the question of the possible orientation to be given to the second part of the topic dealing with the question of the nationality of legal persons in order to facilitate the Commission's decision on this issue. The preliminary conclusions of the Working Group are set out below:

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[10] Document A/C.4/489.

[11] The Working Group was composed of: Mr. Vaclav Mikulka (Special Rapporteur, Chairman of the Working Group), Mr. Emmanuel Akwei Addo; Mr. Hussain Al-Baharna; Mr. Ian Brownlie; Mr. Enrique J.A. Candioti; Mr. Constantin P Economides; Mr. Zdzislaw Galicki; Mr. Gerhard Hafner; Mr. Robert Rosenstock and Mr. Christopher John Robert Dugard (ex officio).

The second part of the topic "Nationality in relation to the succession of States" includes the problem of the nationality of legal persons that the Commission has not yet studied. In the view of the Working Group, as the definition of the topic now stands, the issues involved in the second part are too specific and the practical need for their solution is not evident. In addition to considering the possibility of suggesting to the Commission not to undertake work on this part of the topic, the Working Group considered it useful to examine the possibility of alternative approaches, as they emerge from Part III of the Fourth report of the Special Rapporteur. It agreed that there are, in principle 'two options for enlarging the scope of the study of problems falling within the second part of the topic. They would both require a new formulation of the mandate for this part of the topic.

1. Nationality of Legal Persons in International Law

The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of State to the question of the nationality of legal persons in international law in general. As the notion of the nationality of legal person is not known to all legal systems, it would be advisable that the Commission examine also similar concepts on the basis of which the existence of a link analogous to that of nationality is usually established.

The benefits of such an approach would be in the view of the Working Group, that it would contribute to the clarification of the general concept of the nationality of legal persons in international relations. It would also enable the Commission to further consider in a more systematic manner the problems it has been confronted with when studying the topics of State responsibility, Diplomatic protection and Succession of States.

The problems that the commission could encounter, in opting for this approach, would be the fact that, due to the wide diversity of national laws in this respect, the Commission would be confronted with problems similar to those that have arisen during the consideration of the topic of Jurisdictional immunities. There would also be a certain overlap with the topic of Diplomatic Protection. Moreover, such study would lend itself to a more theoretical analysis than to the development of rules of immediate practical applicability. But above all, the enormity of such a task should not be underestimated. It would be difficult to keep the study within manageable limits.

II. Status of Legal Persons In Relation to the Succession of States

The second possibility would consist in keeping the study within the context of the succession of states, but going beyond the problem of nationality to include other questions, such as the status of legal persons (in particular rights and obligations inherent to the legal capacity of legal persons, including those determining the type of legal person etc.) and, possibly, also the conditions of operation flowing from the succession of States.

The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of a broader area of the law of the succession of States.

The problems that the Commission could encounter, in opting for this would be the fact that the Commission would be confronted with the wide diversity of national laws in this direction, it would, moreover, be difficult to establish a new delimitation of the topic.

If the work is continued, Commission has further to decide which categories of "legal persons" covered by the study, to which legal relations the study should be limited and what

could be the possible outcome of the work of the Commission on this part of the topic.

In the absence of positive comments from States, the commission may, perforce, have to conclude that States are not interested in the study of the second part of the topic. the Commission should in its report, remind the General Assembly of the desirability of obtained the reaction f States on the question asked in paragraph 5 of General Assembly resolution 52/156 of General Assembly resolution 52/156 of 15 December 1997. The Assembly should, in particular, invite States having undergone a succession of States, to indict e.g. how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which as a result of the succession of States became 'foreign" legal persons etc.

During the consideration of the Working Group's preliminary conclusions several members expressed a preference for the second option, i.e. the study of the status of legal persons in relation to the succession of States and encouraged the Special Rapporteur to examine it further in his next report concerning this part of the topic of Nationality in relation to the succession of States.

In its report to the General Assembly the Commission has emphasized the desirability of receiving comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons to assist it in its future work. It has reiterated its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its next session.

The Commission has recommended in this regard that the General Assembly invite States having undergone a succession of States, to indicate, how the nationality of legal persons was determined; what kind of treatment was granted to the legal persons which, as a result of the succession of states became "foreign legal persons".

V. Diplomatic Protection

It had been suggested that work on the subject of "Diplomatic Protection:" would complement the work of the International Law Commission on State Responsibility and would be of interest to all the Member States. The Commission at its forty ninth Session established a working Group[12] and on the recommendation of that Working Group appointed Mr. M. Bennouna Special Rapporteur for the topic Diplomatic Protection. At its fifty second session the General Assembly endorsed the decision of the Commission to include the item in its agenda.[13]

At its fiftieth session the International Law Commission considered the preliminary report of the Special Rapporteur, Mr. M. Bennouna. Introducing his report the Special Rapporteur said that, in appointing him Special Rapporteur, the Commission had recommended that he submit a preliminary report at the present session and had decided that the Commission would endevour to complete consideration on first reading by the end of the quinquennium. The preliminary report was a stepping stone to the in-depth consideration of the topic and the possible incorporate in a treaty or other instrument of what had emerged as established practice.

During the course of the Working Group's consideration of the topic, members had argued that preliminary analysis was indispensable to any comprehensive study of diplomatic protection. One member of the Commission had taken the view that the Special Rapporteur would have to consider the very notion of diplomatic protection, which was increasingly geared in modern law to the rights of the individual; because a right to diplomatic protection did exist. That member believed that

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[12] The working Group composed of Mr. M. Bennouna (Chairman); Mr. J. Crawford: Mr. N. Elaraby: Mr. R.Goco: Mr. G. Hafner: Mr. M. Herdocia Sacasa: Mr. J.Kateka: Mr. I. Lukashuk: Mr. T. Melescanu: Mr. G. Pambou-Tchivounda: Mr. B. Sepulveda: Mr. R. Rosenstock: Mr. B. Simma: and Mr. Z.Galicki (ex-officio member).

[13] See General Assembly Resolution 52/156 of 15 December 1997.

diplomatic protection was based on jurisdiction *ratione personae* over the individual. Those views had been supported by a number of other members of the Commission.

Another member had drawn attention to the complete lack of symmetry in diplomatic protection. A State whose national had been injured could exercise its diplomatic protection against the State causing the harm, but the reverse was not true: a State that had suffered harm as a result of an individual could not complain to the State of which that person was a national. He had suggested that positions of political and economic strength explained why diplomatic protection was a one-way institution. Another member had emphasized that multinational corporations were often more powerful than States.

The view had also been expressed that the fact that individuals were nowadays increasingly recognized as subjects of international law was a dimension that would necessarily have to be taken into account in the Special Rapporteur's first report. Taking the idea still further the view had been expressed that the judgment of the Permanent Court of international Justice in the *Mavromatis Palestine Concessions* case had been based on what was now an outdated theory under which the State had been regarded as "master" of its citizens. The special Rapporteur had pointed out that major developments in recent years meant that the topic had to be viewed from a new and "fresher" angle.

The Special Rapporteur had taken the view that a preliminary report should lay out the various options available. Rather than indicate the Rapporteur's concept of the topic. While he remained open-minded it did seem clear that the traditional view of diplomatic protection was no longer satisfactory, unless one was to cling to the iron-clad conservatism of which the Commission had sometimes been accused. The traditional view could be adapted to modern-day reality in a variety of ways, and a single legal construct was not necessarily the only solution. The Commission had already wrestled with the distinction between primary and secondary

rules, relating to State responsibility and the Working Group had suggested in its report that the topic be confined to secondary rules of international law, i.e. the consequences of an internationally wrongful act (by commission or omission) which had caused an indirect injury to the State usually because of injury to its nationals. The Working Group had likewise indicated that the topic would not address the specific content of the international legal obligation that had been violated.

The view was also expressed that that the "clean hands" rule and exhaustion of local remedies would mean venturing into the field of primary rules. Since the topic of State responsibility would require a similar effort, it may be necessary to consider general categories of obligations and the work on the two topics could perhaps, be coordinated.

A Committee on Diplomatic Protection of Persons and Property set up in 1996 by the International Law Association (ILA) had grappled with the same questions as the Commission was about to consider. The Special Rapporteur stated that the Chairman of the aforementioned Committee had written to him to indicate how the traditional principles of international law relating to diplomatic protection had changed in contemporary practice. Specifically, the Committee would look into what acts by a State constituted espousal; whether a State could exercise diplomatic protection even if its nationals had declined espousal; whether espousal deprived claimants of the right to pursue claims of their own accord; and whether individual claimants should be able to opt out of group or lump sum claims. Indeed, the number of questions raised came back to the basic one; what was the nature of diplomatic protection and how should it be defined?

It seemed that the Commission would have to come up with a response, and the Rapporteur envisaged two approaches. The first, would be to work out a definition and only then determine the course of future work on the topic. The second approach would be to leave the question of definition wide open at the outset and to develop it out of a

study of actual practice with a view of codification of the topic. While both approaches had their relative merits and demerits what seemed essential was to make a critical analysis of the traditional view of diplomatic protection in order to furnish criteria for evaluating contemporary practice. The Special Rapporteur was of the view that there was a constant dialectical relationship between theory and practice and that there was nothing to prevent legal experts from occasionally playing with theoretical underpinnings.

In submitting the Commission's previous report to the General Assembly, the then Chairman of the Commission had emphasized the need for preliminary evaluation of the nature of diplomatic protection, including the question whether it was a right of an individual or might be exercised only at the discretion of a State. He had added that "the question might even be raised as to whether the legal fiction on which diplomatic protection was based was still valid at the end of the twentieth century".

It might be argued that it was futile to question the existence of diplomatic protection: the principle that any harm done to a member of a group or tribe was an attack on the tribal chieftain or head was immutable. The law on the subject, it has been stated was full of fictions and would make an excellent novel if redrafted as one. Like the novel, the law transformed an aspect of reality into a different element. The legal or juridical person, for example, was one of the most celebrated of legal fictions. The International Court of Justice, in its judgment in the *Barcelona Traction case*[14] had stated that the law had recognized that the independent existence of the legal entity could not be treated as absolute and that "lifting the corporate veil" or "disregarding the legal entity" had been found justified and equitable in certain circumstances. The Court had thus exploded the fiction surrounding the concept of the corporate entity (*society anonyme*), showing that it was possible, and acceptable to get back to the underlying reality

[14] I.C.I. Reports 1970, p.39.

and that legal fictions could not be deemed to be immutable. they were invented to correspond to certain needs.

That was certainly true of the legal fiction of diplomatic protection. International law had progressed considerably since the mid-nineteenth century and the dualist approach to international law that had underpinned the notion of diplomatic protection was no longer in vogue. International norms were increasingly being aimed directly at individuals, and that was a positive development, as it gave individuals increasingly direct access to the courts to defend their rights at the international level. States and international as well as domestic courts were increasingly obliged to take account of the situation of individuals in elaborating or implementing rules of international law. There was thus greater continuity between the international and domestic legal arenas, even though each retained its own specific character.

The reasons for inventing diplomatic protection as a legal fiction-to justify the intervention of a State on behalf of its nationals - had gradually disappeared. When the veil of legal fiction was lifted, the rights of the individual were increasingly seen to be replacing the rights of the State. the 1930 Hague Convention on certain questions relating to the conflict of nationality laws had compounded the fiction of diplomatic protection by propounding the theory that the State did not bear responsibility for any individual who held dual nationality. Today, however, the fact that State were responsible at the international level for their treatment of their nationals was generally acknowledged. that was true even if an individual held dual nationality, as long as the criterion of effective nationality was met. The Iran-United States Claim Tribunal had *inter alia* indicated that the trend toward modification of the Hague Convention rule was scarcely surprising as it was consistent with the contemporaneous development of international law to accord legal protection to individuals even against the State of which they were nationals.

On what basis could foreigners claim respect for the rules of international law and obtain the protection of their own State yet deny such protection to nationals affected by the same violations of international law? The International Court of Justice had in the *Barcelona Traction* case taken a step in that direction by recognizing the possibility for all States to act on behalf of an individual whose fundamental rights had been violated it is now acknowledged that a State could act internationally to protect certain universal rights of the individual without having to prove any link of nationality.

The respect for the sovereignty of the host State which had inspired the Hague Convention of 1930 also justified the rule of exhaustion of local remedies. In its draft articles on State Responsibility the Commission had included draft article 22, on the exhaustion of such remedies, proceeding on the basis that rule was substantive and not procedural and that the violation of international obligation and the State's international responsibility came into play only on completion or rather exhaustion of the available internal procedures. The special Rapporteur therefore asked the Commission to note the effects of the dualism which sought to substantiate the idea that the application of domestic law was a matter for international procedures and that the application of international law as a matter for international ones.

Attention was drawn to the fact that the initial act could itself constitute a violation of the international obligation when, in proceedings before a national court, an individual invoked international rules, asserting his own rights under international law from the outset. It was only on completion of the internal procedures that the case was taken over by the State of nationality. At that stage the question was whether the complainant State was acting to secure respect for a right of its own or as the representative or agent of its national when it invoked the international responsibility of the host State. The main question to be discussed was a legal and practical question and not a philosophical issue. There was in principle no obstacle to arguing that, in espousing the case of its

national, a State was enforcing his right under the rules of international law addressed to him.

Taken to its extreme, the legal fiction of diplomatic protection led to the conclusion that the reparation was due to the State even if it was the damage suffered by the individual which provided the reparation measure (*Chorzow Factory case*). Increasing recognition was being given to the right of an individual to claim compensation from his national State before the domestic courts and of his right to contest the conditions of the distribution of the compensation if it was shred between several parties. Domestic case law tended to give providence to the reality of the harm suffered by the individual over the fiction of the damage to the State.

The Commission, the Special Rapporteur suggested, could start from the assumption that diplomatic protection was a discretionary power of the State to bring international proceedings, not necessarily to assert its own right but o secure observance of the international rules operating in favour of its nationals, and to invoke the international rules operating in favour of its nationals, and to invoke the international responsibility of the host State. That assumption should be debated by the Commission with a view to advancing its understanding of the legal nature of diplomatic protection. The discussion on the issue would assist the Rapporteur in preparing his report on the substance of the topic for next year. The Commission might be reluctant to rid itself of the traditional concept of diplomatic protection, but it must acknowledge that concept had been largely overtaken by recent developments in the international law on the rights of the human person and that it was the Special Rapporteur's duty to take due account of that point in his work on progressive development and codification of the law on the topic.

The fiction of diplomatic protection as the application of a right of the State had played a positive role when it had represented the only means of advancing the case of an individual in the international sphere and invoking the

international responsibility of the host State in its relations with that individual. Clearly, the situation no longer applied, and rigid maintenance of the fiction might be perceived as retrograde or even reactionary in the light of all the implications of the notion of globalization.

In sum in his preliminary report the Special Rapporteur had raised the question of the relationship between the topic of diplomatic protection and the topic of international responsibility, seeking clarification of the restriction of the Commission's investigations to secondary rules of international law. He had not meant that the Commission must choose between primary and secondary rules. Diplomatic protection certainly fell in the category of secondary rules but it thus prompted the question of the significance of secondary rules in relation to primary rules. When analyzing the underlying law (questions of nationality, the "clean hands" rule, et c.) the Commission would necessarily come to rely on the categories of primary rules in order to draw some conclusions on the question of diplomatic protection.

The Commission it was suggested might wish to consider the advisability of reconvening the Working Group on Diplomatic Protection for the purpose of assisting the Special Rapporteur in focusing on the elements to be covered in his second report.

The International Law Commission, at its Fiftieth Session *inter alia* established an open-ended Working Group, chaired by Mr. M. Bennouna, Special Rapporteur of the topic, to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission.

As regards the approach to the topic, the Working Group agreed to the following: