

Check against delivery

STATEMENT
by the Representative of the Russian Federation at the Sixth Committee of the
59-th session of the UN General Assembly M.Zabolotskaya
on the Report of the International Law Commission
(item 144 of the Agenda)

3 November 2004

Thank you, Mr. Chairman,

At the outset let me commend Mr. T. Melescanu, Chairman of the Commission for the excellent presentation of its Report.

1. In our view, the Commission has been successfully progressing in its work on the topic **Diplomatic protection**. The presentation of the draft Articles on first reading is quite an accomplishment. For this our thanks go first of all to Mr. John Dugard, Special Rapporteur. We support the Commission's set to complete the work on this topic within five years.

In our opinion, the scope of the draft Articles has been identified correctly. And the matters of the so called "functional protection" by international organizations, matters raised by "the clean hands doctrine", matters of delegation

of diplomatic protection, consequences of its exercise can, in our view, be easily put aside.

At the same time, there are still doubts concerning the provision on “Other legal persons” of draft Article 13, according to which the draft Articles 9 and 10 applicable to corporations are to be applied “as appropriate” to diplomatic protection of other legal persons. Given a large variety of legal persons and the practice of legal regulation of their status, we do not think this rule helps clarify the situation. Besides, there seems to be no sufficient data in this area for codification. In this regard, we would like to recall the last year’s proposal of the Russian delegation. The idea was to withdraw the issue of “other legal persons” from the draft and, at the same time, to complement it with a clause that the Articles are without prejudice to the right for diplomatic protection of legal persons that cannot be considered “corporations” by virtue of draft Article 11.

It is important that the exhaustion of local remedies rule, in accordance with Article 15, applies only to the bringing of an international claim or request for a declaratory decision and not to other diplomatic action covered by the concept of “diplomatic protection” as defined in draft Article 1.

Additional thinking should be given to Article 16 (“Exceptions to the local remedies rule”). We believe that in defining criteria for excluding the exhaustion of local remedies rule these remedies should not *a priori* be called into question. In particular, there is doubt regarding the presence of paragraph a) along with the second part of the phrase contained in paragraph c) of draft Article 16. In fact, the provision of paragraph 3 of the commentary to this draft Article doesn’t look convincing: if the fact that “the local courts are notoriously lacking in independence” is a common knowledge, why then the investor has taken such a risk of investing in this country?

A question arises whether the “threshold” of exhaustion of local remedies set forth in draft Article 16 is not too low?

It seems worthwhile to carry out additional analysis of the provisions concerning protection of shareholders. The structure of draft Article 11 seems to be

correct: according to the general rule the State of nationality of the shareholder shall not be entitled to exercise its diplomatic protection. This right arises in exceptional cases only. But aren't these exceptions formulated too vaguely, namely in paragraph a) of draft Article 11? The way this paragraph is formulated leaves an impression of enabling, for instance, shareholders who have registered a company offshore to intentionally liquidate it so as to get access to protection on the part of the state of their nationality.

And finally, draft Articles 17 and 18 are, in our opinion, not totally clear. Despite explanations given in the commentaries, in reading these Articles one has an impression that there is no clear distinction between them. Article 18, in particular, flatly goes beyond investment treaties to which, judging by the commentaries, it is devoted. A question arises: when comparing the regime of diplomatic protection with protection mechanisms provided for by other rules of international law, in what circumstances one should be guided by provisions of Article 17 and in what circumstances by provisions of Article 18?

Mr. Chairman, we hope the considerations we have outlined above will prove to be useful in finalizing draft Articles on second reading.

2. The Russian delegation welcomes the adoption on first reading of eight draft principles on the topic “**International liability for injurious consequences arising out of acts not prohibited by international law**”. We believe that the Commission has achieved a real breakthrough working on this topic. Therefore, we would like to pay a special tribute to Mr. Pemmaraju Sreenivasa Rao, the Special Rapporteur.

As is known, there is no unanimity on the number of main issues of this theme in the views of states or in doctrine. In these circumstances “guidelines” would be most appropriate form for a final document.

We share the opinion that it would be expedient to limit the work on this topic by the scope of the draft articles on the prevention of transboundary damage

arising out of hazardous activities (draft principle 1). It means, in particular, that we should consider significant damage.

We believe that the Commission was right to decide against including environmental damage outside the national jurisdiction into the scope of the principles.

We consider it justified that the Commission adopted the loss allocation model which places main liability to compensate for the damage caused on the person in command or control of the activity at the time of the incident (i.e. on “the operator”, as defined in paragraph “e” of draft principle 2). We believe this approach meets the principle “the polluter pays”, laid down not only in the international law but, for instance, in the Russian legislation.

We share the thesis on the importance of the State’s participation in loss allocation scheme. In our view, the submitted draft articles adequately, e.i. quite flexibly formulate the role of the state in ensuring that victims are not left alone to bear all the losses resulting from the damage. There is no direct reference to the liability of States in terms of compensation of a loss to the victim of transboundary damage. At the same time paragraph h) of draft principle 3 and draft principles 4-8 are focused on an obligation of the State to take necessary measures to ensure provision of a prompt and adequate compensation to the victims of transboundary damage. Such measures include negotiations, consultations and cooperation with other States, as well as national legislative measures. In this regard, the degree of participation of the State in the loss allocation scheme is quite clearly defined.

The definitions contained in draft Article 2 would need further analysis. For instance, the arguments that the notion “damage” should to include a damage to the environment per se are not fully convincing. As is known, no general approach in this respect has been reached in the course of the discussion in the Commission.

We support the Special Rapporteur and members of the Commission in their desire to continue intensively and effectively work on the topic. We believe the completion of work of the Commission on this topic and adoption of principles on

liability, alongside the adopted draft articles on prevention will be a real contribution to codification and progressive development of the international law.

3. In conclusion we would like to lend our support to the decision of the International Law Commission to include two **new topics** in its current programme of work. We believe that the topic “Expulsion of aliens” is to some extent a logical sequence of the topic “Diplomatic protection”. Consideration of this new theme would enable us to evaluate in its entirety the issue of protection of aliens. Given the proliferation of armed conflicts in all parts of the world, we had to admit with regret the importance of the topic “Effects of armed conflicts on treaties”. In our view, the consideration in the Commission of the topic ”Obligation to extradite or prosecute (aut dedere aut judicare)” would help clarify the issue if this obligation is a part of customary international law and identify its scope.

Thank you, Mr. Chairman.