STATEMENT OF THE PHILIPPINES

Item 82 – Diplomatic Protection

Monday, 21 October 2013

Thank you, Mr. Chairman.

The question of diplomatic protection has been relevant long before the emergence of nation-states. People had already begun to travel and live outside their countries of origin. Much later, at the height of the industrial revolution, companies had begun to operate and do business outside the countries of their incorporation.

The dynamics of the link between a nation-state and its natural and legal persons who live or do business outside its territorial confines, has been one of the most fertile if not controversial areas for the development of international law. In the 18th century, leading publicists led by the Swiss jurist Emer de Vattel, in his seminal work *The Law of Nations*, began to seriously consider diplomatic protection as a key subject of international law. More recently, the International Court of Justice has dealt with diplomatic protection in the leading cases of *Nottebohm* (1955) and *Barcelona Traction* (1970).

On the other hand, as history teaches, there were regrettable instances when diplomatic protection was misused, sometimes with the use of force, as a pretext for intervention in another country's domestic affairs. In modern international relations, with the use of force now outlawed by the UN Charter, diplomatic protection ranges from consular action, bilateral negotiations, political or economic pressure, or other forms of peaceful settlement of disputes.

Because a state takes action against another state on behalf of its national whose rights and interests may have been injured by the latter state, diplomatic protection has been a delicate and sensitive matter. The injury is also committed, albeit indirectly, to the former state, affecting its own political or economic interests.

Mr. Chairman, the exercise of diplomatic protection is a discretionary, sovereign prerogative. While diplomatic protection exists under customary international law, the Philippines believes that, in order to avoid the mistakes of the past, we should consider codifying and clarifying such customs through a future convention. In this regard, we reiterate our encouragement and support for the International Law Commission on its work on diplomatic protection, specifically the draft articles of 2006.

Under customary international law, there are two main requirements for the exercise of diplomatic protection, i.e., the exhaustion of local remedies and effective and continuous nationality.

First, local remedies must first be exhausted. The injured person must first give the host state a chance to repair the injury through its own judicial or quasi-judicial system, before asking the state of his nationality to take up the claim. Draft Article 15 codifies this rule. The Philippines is of the view that this provision is clear enough, but should interpretation be needed, the provision should be interpreted *in strictissimi juris*, including exceptions (c) and (d), as all exceptions to a general rule should be interpreted. Otherwise, the reputation and even independence of the judiciary may be affected, to the detriment of the fair administration of justice and the rule of law.

Second, the natural or juridical person who has been injured should, as a general rule, maintain the nationality of the espousing state from the moment of injury until at least the presentation of the claim. Here, *Nottebohm* reminds us of the importance of effective and genuine link. Specific rules are also outlined in Part II of the draft articles, including with respect to direct injury to corporate shareholders, stateless persons, refugees, and persons with dual or multiple nationalities.

The last category is particularly important for the Philippines. Ten years ago, we enacted our dual nationality law, which could affect up to 10 million Filipinos living outside the Philippines and who have a second or third or even fourth nationality. In this regard, we would be very interested in the operationalization of the definition of "predominant nationality" under draft Article 7.

We would also be very interested in the further elaboration of "direct injury" to shareholders under draft Article 12, in a manner that would capacitate their state of nationality to exercise diplomatic protection.

For both natural and legal persons, diplomatic protection may not entirely depend upon nationality. The late Professor Ian Brownlie raised the question of protected states and the criteria for statehood, in citing those cases where the right to protect may arise from a process of delegation by one sovereign to another or in other cases of representation in international relations.

Mr. Chairman, of the estimated one million seafarers worldwide, a quarter or about 250,000 are Filipinos. Draft Article 18 is, therefore, very important for my delegation. We recognize that the nationality of the flag state may also exercise diplomatic protection, however, we believe that the prerogative is complementary and not mutually exclusive.

Finally, Mr. Chairman, let me reiterate that there is no provision in the draft articles regarding the period to exercise diplomatic protection. After local remedies have been exhausted, up to when does the prerogative subsist? Time may not heal all wounds, but should we not consider the principles of prescription, estoppel or laches, without which both human relations and international relations would always be threatened by instability?

Thank you, Mr. Chairman.