

STATEMENT OF THE PHILIPPINES

Item 79 – Diplomatic Protection

Sixth Committee, 71st session of the United Nations General Assembly
Monday, 10 October 2016

Thank you, Mr. Chairman.

The question of diplomatic protection is of major importance in the relations between States, as we recognized when we last considered this subject three sessions ago. Diplomatic protection has been relevant long before nation-states even emerged, when people had begun to travel and live outside their countries of origin, and later when juridical persons had begun to operate and do business outside the countries of their incorporation.

The exercise of diplomatic protection is a discretionary, sovereign prerogative. But it is a delicate and sensitive matter, because a state invoking indirect injury can take action against another state on behalf of its national whose rights and interests may have been injured by the latter state.

There have been regrettable instances when diplomatic protection was misused, sometimes with the use of force, as a pretext for intervention in another country's domestic affairs. 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.

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, the injured person must first give the host state a chance to repair the injury through its own judicial or quasi-judicial system. Draft Article 15 codifies this rule. We believe that this provision is clear enough, but should interpretation be needed, it 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. In 2003, we enacted our dual nationality law, which could affect up to 10 million Filipinos living overseas and who have a second or third nationality. In this regard, we would be very interested in the operationalization of the definition of “predominant nationality” under draft Article 7.

The Philippines is also 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.

Draft Article 18 is very important for the Philippines because of the number of seafarers we have worldwide. We recognize that the nationality of the flag state may also exercise diplomatic protection over them. However, we believe that the prerogative is complementary and not mutually exclusive.

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? 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?

It is apparent that diplomatic protection has been one of the most fertile if not controversial areas for the development of international law.

While diplomatic protection exists under customary international law, and while the codification and progressive development of international law is an important function of the UN, the Philippines notes with appreciation the recommendation by the International Law Commission to codify and clarify such customs by elaborating a convention on the basis of the 2006 draft articles on diplomatic protection.

At the same time, we recognize that many of the principles contained in the articles on State responsibility for internationally wrongful acts, are relevant to diplomatic protection. We agree on the need for a general consensus on elaborating a convention on diplomatic protection, on the basis of the articles on State responsibility.

Thank you, Mr. Chairman.