STATEMENT BY MR. C.P. THIRUNAVUKKARASU, MEMBER OF PARLIAMENT ON AGENDA ITEM 156: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FOURTH SESSION. (DIPLOMATIC PROTECTION) IN THE SIXTH COMMITTEE OF 57TH SESSION OF THE UNGA ON OCTOBER 30, 2002

Mr. Chairman

At the outset, let me thank Mr. Robert Rosenstock Chairman of the International Law Commission for his excellent report on the work of the 54th session of the ILC.

We commend the Special Rapporteur Professor John Dugard for his thorough and scholarly work on the subject of diplomatic protection ever since his appointment as Special Rapporteur in 1999. We note the progress made in the last session wherein the Commission adopted the first seven draft articles together with commentaries on first reading. We are satisfied that the Commission was also able to consider draft articles 12 to 16 in that Session.

Mr. Chairman,

A State's entitlement to protect its subjects when injured by acts committed by another State contrary to international law, from whom they have been unable to obtain satisfaction through the ordinary channels in that State, has been recognized as one of the elementary principles of international law. This right is exercised with discretion, as each State is free to accept or refuse to exercise diplomatic protection as it sees fit.

Although the scope of diplomatic protection is well understood in international law, its codification by the Commission has been supported by all delegations. However, on earlier occasions my delegation had made known its desire that the Commission's work on the Diplomatic protection be limited to precedent and practice.

Mr. Chairman

The institution of diplomatic protection had undergone tremendous changes over the years. The development of fast modes of transportation and communications has expanded the capabilities of an individual to espouse his claim in any forum directly without being approached by his State. States are also reluctant to take up individual cases converting private claims into State claims.

In view of this, we believe that diplomatic protection should serve the interest of the nationals as far as possible and the concerns of the individuals involved should not be stretched beyond the point where it

becomes obligatory for the State of nationality to espouse the claims involved, ignoring political or other sensitivities of the State of nationality. The diplomatic protection envisaged on behalf of stateless persons and refugees (article 7), in our view, is an undesirable extension of diplomatic protection susceptible to mischief by the State of habitual residence of a refugee. For this reason the exercise of right of diplomatic protection by the State on behalf of refugees or stateless persons who have habitual residence in that State is unacceptable for my delegation. We do not agree with a watering down of the definition of refugee for this purpose either.

Mr. Chairman,

We have read with interest draft articles 10 and 11, and draft articles 12 and 13. These two sets of articles namely, 10 and 11, and 12 and 13 appear to be identical. In our view articles 12 and 13 could be eliminated without adversely affecting the economy of the draft articles as a whole and their content could be integrated in articles 10 and 11.

The Report of the Commission recorded extensively the debate that had taken place on the question of whether the principle of exhaustion of local remedies was procedural or substantive. Not withstanding the projection of three viewpoints, the debate made it clear that this principle is a part of customary international law and is central to the triggering of diplomatic protection. My delegation wishes that the principle is stated as clearly and unambiguously as possible. It is the view of my delegation that individuals should exhaust the entire range of available legal remedies. Whether an available remedy was effective or not would raise questions about standards of justice employed in the state. As long as these are in conformity with the principles of natural justice, variations involved in standards should not give rise to a questioning of their effectiveness. However, with regard to exceptions to the exhaustion of local remedy rule, the commission should act with great caution. To strike a proper balance between the rule and the exception is more important, as any tilt in the balance would undermine the domestic jurisdiction of the state where the alien is located.

With regard to the three options referred to in draft article 14, the third option could be the basis for future discussions. However, the “effective remedies” and “undue delay”, the concepts used in that article being relative concepts in respect of which no universal standards would be possible, the Rapporteur has to find some other replacement concept capable of representing unambiguous objective standards.

With regard to waiver, great caution needs to be exercised in cases of implied waivers, as it is difficult to devise any objective test for the implied waiver. With regard to draft article 15 dealing with the burden of proof, my delegation is of

the view that burden of proof as a principle of evidence is better left to the rules of procedures; it need not be elaborated in a separate article. My delegation prefers the deletion of draft article 15.

Mr. Chairman,

India believes that the commission's request for views on diplomatic protection of vessels, crews and of passengers and the shareholders interest in the light of the Barcelona traction case requires a detailed study and careful consideration of many issues covered under customary international law as well as in several sectoral conventions. We would like to handle these issues separately at an appropriate time.

Thank you Mr. Chairman.

BACK TO TABLE OF CONTENT S