STATEMENT BY MR. MANORANJAN BHAKTA, MEMBER OF PARLIAMENT AND MEMBER OF THE INDIAN DELEGATION, ON AGENDA ITEM 78: REPORT OF THE INTERNATIONAL LAW COMMISSION CHAPTER IV: DIPLOMATIC PROTECTION AND CHAPTER V: INTERNATIONAL LIABILITY IN CASE OF LOSS FORM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES AT THE SIXTH COMMITTEE OF THE 61ST SESSION OF THE UN GENERAL ASSEMBLY ON OCTOBER 26, 2006

Thank You Mr. Chairman

We thank the Chairman of the International Law Commission, Mr. G. Tchivounda, for his introduction of Chapters I-V and Chapter XIII of the Report of the 58th Session of the International Law Commission.

The 58th ILC Session has adopted texts for the two topics under discussion today, i.e., "Diplomatic Protection" and "International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities"

We commend the Special Rapporteur, Professor John Dugard, for his work on "Diplomatic Protection" and for advancing the agenda of the Commission in respect of one more important matter associated with the topic of the State responsibility. We also endorse the Commission's approach to this topic.

The draft articles affirm the customary rule of international law that it is the right rather than obligation, of the State to exercise diplomatic protection. Another principle of customary international law that the draft articles affirm is that the State could exercise diplomatic protection only in favour of its nationals. To address concerns regarding the status of stateless persons and refugees, draft article 8 departs from the traditional rule and allows a State to exercise diplomatic protection in respect of such persons if they are 'lawfully and habitually resident' in that State. The requirement of both lawful residence and habitual residence sets a high threshold, but we agree with the Special Rapporteur that such a higher threshold is justified in case of an exceptional measure introduced *de lege ferenda.* In this regard we also wish to reiterate that

the definition of refugee should be left to be resolved under proper law governing the matter.

Article 5 on continuous nationality is important. In case of change of nationality, the dates and periods relevant to establish continuous nationality are critical to the subject of diplomatic protection. The ILC has settled in favour of date of official presentation of the claim as "outer date" rather than the date of resolution or settlement of the claim. In the commentary the ILC had rightly rejected the ICSID Arbitral Tribunal decision in *Loewen Group Inc. Vs. United States of America,* upholding the date of settlement of the claim as the relevant date.

In case of multiple nationality, the State of predominant nationality is entitled to exercise diplomatic protection as compared to other States of nationality. This is also in line with the customary principle of international law propounded by the International Court of Justice in the *Nottebohm* case.

The Rules of diplomatic protection for a company or corporation accept the basic premise laid down by the ICJ in the *Barcelona Traction* Case, that "international law attributes the right of diplomatic protection of a corporate entity to a State under the laws of which it is incorporated and in whose territory it has registered office." In addition, the draft articles provide for another State to exercise diplomatic protection if the company is controlled by nationals of that State and has no substantial business activities in the State of incorporation; and both the seat of management and financial control are located in that State.

On Article 11, the problems of all shareholders, whether domestic or foreign, must be treated on equal footing and the interposition of the right of diplomatic claim should be aimed only to ensure a compensation which is no less prompt and adequate than the one provided to the national shareholders. Article 13, which provides for the possibility of a State exercising diplomatic protection on behalf of "other legal persons", also needs to be carefully examined as its scope is presently too wide.

The Commission has adopted the draft articles on Diplomatic Protection and submitted them to the General Assembly, recommending elaboration of a convention. We agree that the draft articles could form the basis of a binding legal instrument and could be taken up next year, along with the topic on state responsibility, as the two topics are closely linked

Mr. Chairman,

We would also like to express our deep appreciation to the Special Rapporteur, Mr. P.S. Rao, for his third Report on "The Legal Regime for the Allocation for Loss in case of Transboundary Harm arising out of Hazardous Activities". These three Reports have provided an in-depth analysis of the need for protecting the interests of the innocent victims of transboundary harm caused by hazardous activities.

We welcome the basic approach of the Commission in addressing this issue, namely, that the draft should be general and residual, with enough flexibility to States to fashion specific liability regimes for particular sectors of activity.

In our view, the scope of the topic and the triggering mechanism should be the same as that of 'prevention of transboundary harm'. Moreover, such a regime should not prejudice the regime on State responsibility under international law. The work of the Commission on allocation of loss suffered by innocent victims, involves a fine balancing act between loss allocation to the victim of transboundary harm and the settled right of the State to claim reparation under rules of State responsibility.

We also believe that in a scheme covering either liability or a regime on allocation of loss, primary liability should be of the operator, as that person is in command and control of activity and it is his duty to redress the harm caused. While States prefer civil liability regimes, which are largely sectoral in nature, depending upon the nature of activity involved, we believe that strict/absolute liability regimes are the preferred regimes for hazardous activities. Along with the operator there are a number of other actors who should share his responsibility.

Furthermore, in our view State liability is an exception and is applicable only as provided by a few conventions on Space activities and Antarctica. Although in principle 4, the multi-tiered approach to liability seems reasonable, it must be remembered that not all States authorizing lawful hazardous activities, which inter-alia may be required for reasons of socio-economic development, have the means of paying residual compensation.

The adoption of the text of the draft principles on Allocation of Loss by the Commission is welcomed and it is hoped that States would take measures to implement them at the national and international level.

Thank You Mr. Chairman.

BACK TO TABLE OF CONTENTS