Summary record of the 2728th meeting

Topic:
Diplomatic protection

Extract from the Yearbook of the International Law Commission:-

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(http://www.un.org/law/ilc/)
graph 2, which very clearly stated the responsibilities of the respondent State and the claimant State.

66. In the case of article 16, the question was whether the Calvo clause added anything new to the rule on the exhaustion of local remedies. It might not, as had been pointed out by the members who regarded article 16 as superfluous. He himself was not entirely certain. He did think, however, that that provision placed useful emphasis on the rule and made it slightly clearer. It should therefore be retained. Paragraph 2 of article 16 did not seem to add much to the content of paragraph 1 and could be abandoned. Subject to that comment, he was in favour of the inclusion of that provision in the draft articles.

67. Mr. DAOUDI said that he associated himself with the members who had thanked the Special Rapporteur for his third report, which, in addition to the wealth of information it contained, had the merit of being remarkably objective. With regard to the two options which the Special Rapporteur was proposing in the conclusion of his report, there was obviously a great temptation to choose the first, namely, not to include the Calvo clause in the draft articles, for two main reasons. In the first place, the circumstances which had led to the Latin American States to adopt the Calvo clause were no longer valid today, even if there were still some traces of it in the doctrine of those States. In the second place, States now agreed to waive the requirement, in contracts concluded with aliens, not only of the exhaustion of local remedies, but also of the application of their national law.

68. He nevertheless believed that the second option, the proposed draft article 16, was more interesting because it was more in keeping with the principles of the sovereignty of States and non-interference in their internal affairs. In paragraph 1, draft article 16 contained three variants of the Calvo clause which had been taken almost word for word from García Amador. The wording of subparagraph (a) was entirely acceptable, but that was not the case for subparagraphs (b) and (c), which provided for the possibility that an alien could waive the diplomatic protection of his State of nationality even when the host State had committed an internationally wrongful act or when there had been a denial of justice. That right belonged not to a private individual but rather to his State of nationality.

69. The second part of paragraph 1, which began with the words “Such a contractual stipulation shall not, however, affect the right of the State of nationality...”, might well replace the present text of paragraph 2, which was unnecessary and greatly attenuated the effects of the rule by making it a mere presumption, something which might give rise to a conflict of interpretation that would be left to the judge or the arbitrator to decide. Subject to those reservations, he agreed that the draft article should be referred to the Drafting Committee.

70. Mr. DUGARD (Special Rapporteur) stressed the fact that the Calvo clause had influenced the debate on diplomatic protection throughout its history and that the Commission could not put it to one side on the ground that it was a purely contractual arrangement. If the Commission decided to dismiss that clause on the grounds that it did not come within its mandate of codifying rules of international law, it might give the impression that it had not discussed that question because it raised such difficult issues. The topic was undeniably a difficult one and was highly emotional and symbolic, but it was not one the Commission could lightly dismiss for reasons of policy. He hoped that the members would bear that in mind when discussing the question at subsequent meetings.

The meeting rose at 1.05 p.m.

2728th MEETING

Friday, 31 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Montaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivas Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Ms. Xue, Mr. Yamada.


[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. KOSKENNIEMI said that the Calvo clause was no more than a very minor addition to existing law. He agreed with Mr. Brownlie that the clause dealt with a matter which did not really fall within the scope of the topic.

2. When an exception was made to a rule, it often took on considerable importance. Such an exception was contained in draft article 16, paragraph 1, in section C of the

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1 For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see Yearbook ... 2000, vol. I, 216th meeting, p. 35, para. 1.
third report of the Special Rapporteur on diplomatic protection (A/CN.4/523 and Add.1) in the phrase “an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien”. Many members had argued the need for a token nod to sovereign equality and changes in the international system. To his mind, however, the last part of paragraph 1 opened the door for intervention. After all, any contractual relationship, especially if it was of economic importance, would be regarded as being of concern to the State of nationality. To cite an example, a large corporation which contracted with a host State would probably have good relations with the embassy of its own State; if a problem arose, the corporation would surely let the embassy know informally that some involvement at the diplomatic level might be useful. The ambassador would consider that the matter was of direct concern to the State itself and warranted the type of intervention which the clause was designed to address.

3. The Calvo clause did not have merely a symbolic effect. The reference to matters of direct concern to the State left it to the ambassador to decide whether or not to take the matter up at the international level, regardless of the waiver. As the issue of “direct concern” was difficult to deal with in a definition, it would be best not to have a provision on the Calvo clause at all. The Calvo clause showed that doing something for symbolic reasons might create consequences which were the opposite of those intended.

4. Mr. FOMBA said that he was one of those who had considered it useful to study the Calvo clause, provided it was done from the standpoint of the overall question of waiver of diplomatic protection.

5. The starting point of article 16 was the internationally wrongful act, which was of direct concern to the State of nationality, even if in the person of one of its nationals. Hence there was no right to the protection of a national as such, but a right to exercise protection which the State alone enjoyed.

6. With regard to the consequences of the Calvo clause, the two situations relating to the question of waiver must be clarified. First, the State alone, and not the national, had a right of waiver. Second, the sole avenue open to the national was to try to convince the State to waive the exercise of its right, for whatever reason.

7. On the whole, he shared Mr. Pellet’s view on the text’s underlying logic and wording. He was in favour of referring paragraph 1 to the Drafting Committee, provided that only the relevant subparagraph, namely subparagraph (a), was retained, and he supported Mr. Pellet’s proposal for a new formulation of paragraph 2.

8. As to the clause’s regional character, he noted that the prevailing view of experts was well-known, and also that ICJ had accepted the idea of regional custom, but had stressed that “the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party” (Asylum case [p. 276]).

9. Last, he largely endorsed the views expressed by Mr. Daoudi and Mr. Momtaz.

10. Mr. TOMKA said that he had misgivings about article 16. It was the Commission’s task to codify rules of international law, whereas the Calvo clause was clearly a contractual provision which was construed as a valid waiver of the alien’s right to request diplomatic protection. That might cause confusion about the nature of the right concerned. There was no right to diplomatic protection under international law, something that was clear from the jurisprudence of ICJ, in particular the Barcelona Traction case. Such a right could be established only by a domestic legal system, but a State usually had the discretionary power to exercise diplomatic protection if it wished. The right to diplomatic protection at the international level related solely to a State’s right to exercise such protection, and not an individual’s right to request it. Thus, if a clause was a contractual stipulation, it could not have any implication for a State’s right. Strictly speaking, the Commission did not need to include such a provision.

11. As for the point made in paragraph 36 of the report, he did not think the issue was one in which an individual deprived a State of its right to provide diplomatic protection, but one in which States themselves waived their right to exercise diplomatic protection under certain conditions, which was clearly a different matter.

12. He was opposed to referring article 16 to the Drafting Committee. The Special Rapporteur should mention the Calvo clause in the commentary, but the clause as such should be left for encyclopedias of international law.

13. Mr. CHEE said the Special Rapporteur’s excellent report on the Calvo clause had made him realize that it was not just a doctrine of the past of no contemporary relevance.

14. In his view, the decision of the General Claims Commission (Mexico and United States) in the North American Dredging Company case had been accepted as a rule relating to the Calvo clause. The decision dwelt on the premise that the Calvo clause applied to a commercial contract concluded between a State and an alien in which the alien waived his right to seek diplomatic protection from his Government. However, the General Claims Commission had also ruled that that did not deprive the alien’s Government of the right to extend protection to its nationals “in respect of a denial of justice or other violation of international law experienced in the process of exhausting his local remedies or trying to enforce his contract” [para. 28]. The ruling of the General Claims Commission was still the law. He had no objection to retaining the Calvo clause if members decided that it was necessary and effective, but it should be borne in mind that it had been criticized by many developed States and had not been followed by States outside Latin America.

15. The point of the clause had been to prevent diplomatic intervention by the big industrial powers in Latin American States. Today such fears were unfounded in view of Article 2, paragraphs 3 and 4, of the Charter of the United Nations. In fact, the general trend in State practice
since the Second World War ran counter to the objectives of the Calvo clause. Several factors had brought about that change. First, an alien investor was protected by bilateral investment guarantee agreements. Second, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States permitted an alien investor to bring an action against a foreign State. That in itself was an improvement in terms of the right of an alien to seek protection without going so far as to secure diplomatic protection. Third, under the Multilateral Investment Guarantee Agreement, an alien investor was protected against the risk of loss arising out of political events in the host State. It was likely that those trends would continue. Reliance on foreign investment for the development of the national economy was an imperative for all States, with few exceptions. Today, most States, including the big industrial States, encouraged foreign corporations to open factories in their own territories. It was difficult to imagine that the host States, especially those in need of capital, would require an alien investor to waive the right to diplomatic protection by the investor State.

16. For all those reasons, the Calvo clause had lost importance since the Second World War. Indeed, it was not even in practice in the country where it had originated, namely Argentina. Another development which had led to its decline was the direct application of international law to State contracts, as seen in the 1977 Texaco case and the 1982 Amincoil-Kuwait Arbitration. Thus, even private contracts, if they were State contracts, were being enroached upon by public international law.

17. The Commission should consider whether it was politically wise to revive the Calvo clause, which had been subject to criticism by capital-exporting States. A doctrine that might discourage or frighten off alien investments should not be adopted.

18. Today, diplomatic intervention took place not in the area of commercial contracts but rather in the area of human rights violations. The Commission should decide whether the Calvo clause really served the interest of States, and the Latin American States in particular.

19. Mr. MANSFIELD said that section C of the third report had persuaded him that no rule on local remedies would be complete without recognition of the Calvo clause: there was simply too much history associated with the clause to ignore it. The Commission should include either an article on the subject or extensive material in the commentary explaining why a specific article was no longer necessary. Having listened to the discussion, he did not find article 16 objectionable, because it did not have much content. In particular, the article made it clear that no contractual provision entered into by an individual could prevent the State of nationality from exercising diplomatic protection on his behalf, and that the right of diplomatic protection belonged to the State, not to an individual. He therefore had no objection to referring article 16 in its entirety to the Drafting Committee, which should also address Mr. Gaja’s comment that the issues involved might be dealt with more effectively, less controversially and with less risk of misinterpretation if the article focused on the question of waiver of the right to diplomatic protection.

20. Ms. ESCARAMEIA said that, having heard the comments made by other members, she was surprised by the high degree of emotion expressed. She wondered why the Calvo clause was considered so important in the modern world for some countries to have incorporated it into their domestic law at a very high level, even that of the constitution. The international situation had changed since the nineteenth or early twentieth century. For some, diplomatic protection might be rooted in the need to protect individuals who resided in a foreign State but had no voice in the international arena. However, that was no longer the most pressing problem. The focus now was on multinational corporations with investments in a foreign country. It might seem that such corporations had a voice in the countries in which they operated and could therefore dispense with diplomatic protection, yet she understood the views of those who stressed the danger of hindering economic development and relations between States and the need for States to be able to speak on behalf of their national corporations, which, no matter how powerful, might nonetheless require diplomatic protection against a foreign Government.

21. She had therefore concluded that the Calvo clause had a value that was not merely historical and symbolic and that it remained an important issue with international implications far exceeding those of contractual stipulations under domestic law. While she understood Mr. Brownlie’s comments, she thought that he might have failed to grasp the link between contractual stipulations under domestic law, on the one hand, and international law, on the other. The topic was important, not only because it had dominated all discussion of diplomatic protection for many years but because of its continued importance in the modern world.

22. Initially, it had been difficult to grasp the meaning and internal logic of draft article 16, for recourse to international judicial settlement appeared to be barred in paragraph 1 but permitted in paragraph 2. After reading the report, she had realized that the two paragraphs referred to different circumstances and events. Nevertheless, the juxtaposition of the two paragraphs was confusing. Furthermore, the Calvo clause was most relevant to cases involving multinational corporations, yet the article spoke of “the alien” and “he or she”, which suggested the original nineteenth-century context of the mechanism.

23. As Mr. Mansfield had noted, the article did not seem very ambitious: it was limited to the exhaustion of local remedies in disputes involving contracts that contained a Calvo clause. Accordingly, it posed little real risk and could be referred to the Drafting Committee. The issues raised by Mr. Koskenniemi and Ms. Xue could be resolved through redrafting, perhaps by deleting paragraph 2 or rearranging paragraph 1. Alternatively, as Mr. Gaja and Mr. Mansfield had suggested, the Special Rapporteur could prepare a specific draft article on waivers by the State.

24. Mr. TOMKA said that he was opposed to the suggestion by Ms. Escarameia and other members that the
Drafting Committee should prepare an article on waiver before the matter had been discussed in plenary. Moreover, the Calvo clause was a contractual clause unrelated to States’ waiver of the right to offer diplomatic protection to natural or legal persons.

25. Ms. ESCARAMEIA said she had already maintained that too much substantive discussion took place in the Drafting Committee. She had not meant to suggest that the Committee should consider the issue of waiver before the matter had been discussed in plenary.

26. Mr. DUGARD (Special Rapporteur) said he had understood Mr. Gaja to suggest that the Commission should consider a draft article of which one paragraph would be on waiver by the State and a second on waiver by the individual. He agreed with Mr. Tomka that those were separate issues. Mr. Gaja had appeared to suggest that, even if the Commission decided to include something along the lines of draft article 16, it might be better placed under a general section on waiver, but that would involve redrafting article 14 and separating it from the other provisions on exceptions.

27. Mr. MANSFIELD said he agreed with the Special Rapporteur. He had chosen his words carefully, stating that the issues involved in draft article 16 could be dealt with less controversially, more accurately and with less risk of misinterpretation in the context of a draft article on waiver. He thought that the Drafting Committee could consider that matter.

28. Mr. ADDO said Mr. Tomka was right to affirm that waiver by States was unrelated to the Calvo clause. The clause, frequently incorporated into contracts between Latin American States and nationals of other States, derived from the Calvo doctrine, which held that non-nationals were entitled to no more protection than nationals. Generally speaking, the Calvo clause was unnecessary because the exhaustion of local remedies was usually a precondition for making a diplomatic claim. It was also ineffective because the individual was not competent to waive a right—that of exercising diplomatic protection—which properly belonged to the State. He therefore believed that a draft article on the Calvo clause would be superfluous and supported the first of the two options put forward by the Special Rapporteur in the conclusion of his report. While the Calvo clause was of historical value and represented an outstanding Latin American contribution to the development of international law, it was of no practical utility in the present-day law that it was the Commission’s task to codify. Thus, article 16 should not be referred to the Drafting Committee, but it should be discussed in the commentary in order to highlight its symbolic value.

29. Mr. BROWNLIE, speaking in reply to Ms. Escarameia, said that the members who did not think article 16 should be referred to the Drafting Committee were not minimizing the importance of the Calvo clause. Some, such as Mr. Koskenniemi, were afraid that harm might result from the Commission’s attempt to address that issue.

30. In the modern world, the Calvo clause was only one of a vast array of devices, including stabilization clauses and applicable law clauses, which he encountered frequently as an arbitrator and which related to the whole balance between the application of domestic law and the operation of such clauses. If there was general interest in that general topic, perhaps the Commission should consider it under a new agenda item. His position was not that the Calvo clause was unimportant; he had seen no evidence in support of the claim that it was merely a Latin American regional concept or of merely historical interest. But it was not the business of the Commission, or of similar codification bodies, to offer advisory opinions on how public international law should be applied to various devices and situations. For example, it would be very interesting to know what members thought about the application of the law of the sea, but such a discussion would not fall within its mandate.

31. He was not even certain that the Commission was empowered to deal with the issue under discussion. The Calvo clause was not a subject which had not yet been regulated by international law, nor did it require more precise formulation, for the purposes of article 15 of the Commission’s statute. It had been in existence and regulated for 150 years and was widely discussed in the literature. The problem lay not in what the law was, but in how it was applied. If the Commission was going to deal with the topic, it should do so in the broader context of devices affecting the placement of investments and inducement to investment by the host State.

32. Mr. KEMICHA noted Mr. Tomka’s point that, for the Commission, the importance of the Calvo clause lay in its relationship to the concept of waiver, as the Special Rapporteur had recognized. However, to consider waivers in the historical context of the Calvo clause was to confuse the issue. The Commission must examine not only regional customs and practices of the past but also those of the present. Ms. Escarameia had rightly observed that, in the modern world, the focus was on the protection of multinational corporations rather than of individuals. Host countries wished to attract foreign investors, and many treaties were concluded on that matter. The World Bank compiled an annual list of bilateral and multilateral agreements designed to promote and protect such investments, all of which included references to international arbitration; that fact underscored the importance of the waiver.

33. Mr. GALICKI said the Commission should differentiate between the issue of waiver in the context of the State (art. 14) and in the context of the individual (art. 16). Moreover, the inclusion of article 16 would introduce the concept of the right of the alien to request diplomatic protection in paragraph 1, thereby opening a Pandora’s box of problems. Thus far, the Commission had focused on the right of States to exercise diplomatic protection without mentioning the individual as someone who had a right to request it. The draft articles on which agreement had been reached were limited to injuries to nationals as a result of internationally wrongful acts, whereas in the Calvo clause the source of the harm was a contractual obligation, which did not fall within the scope of diplomatic protection. The
Commission should avoid mixing those two areas. With all respect for the Calvo clause and its practical application, it lay outside the scope of the topic of diplomatic protection, and article 16 should not be included in the draft on diplomatic protection.

34. Mr. PAMBÔU-TCHIVOUNDA asked Mr. Brownlie to elaborate on his comments concerning the role of the Calvo clause in arbitration: it would be useful for him to explain whether the vestiges of that clause played the same role as in the past, whether it functioned differently from the more recently developed types of stabilization mechanisms that he had encountered in working with international contracts, and what effect it had on contracts between investors and host countries.

35. Mr. BROWNLIE said that there was a whole world of arbitration, for example NAFTA, UNCITRAL and other forms of ad hoc arbitration involving instances of some waiver of the application of domestic law; otherwise there could be no arbitration. There was a constant battle on the border between domestic law and international law, including major arbitration between the United States and Canada regarding regulatory changes and the applicable range of domestic law. Even in the case of investment treaties, disputes arose concerning the proper roles of domestic and international law or the general principles of law in relation to a particular treaty or contractual clause. There was a wealth of material in that field, some of it quite old; Mr. Chee had mentioned the Aminoil-Kuwait Arbitration. The Calvo clause was only one of many techniques designed to promote investment while maintaining some of the host State’s sovereignty and prerogatives. Lately, for example, the Czech Republic had been involved in arbitration regarding the State’s right to control the national media.

36. Mr. KAMTO said that he endorsed Mr. Kabatsi’s praise of the Special Rapporteur’s knowledge and of his open-mindedness in giving the Commission a choice of two options. Latin America had contributed much to international law. However, in the case of the Calvo clause, the question was not whether a regional custom was relevant to the Commission’s work on the topic of diplomatic protection but whether the Calvo clause was, in fact, such a custom. He was inclined to agree with Mr. Brownlie that, in its present form, the clause was a contractual technique rather than a norm. He also endorsed Mr. Pellet’s comprehensive analysis of section C of the third report.

37. He feared that the Commission had lost sight of the legal perspective. The value of the Calvo clause and its importance to certain countries’ sense of national identity were interesting questions, but the Commission’s task was the codification and progressive development of international law. Once it was agreed that the clause concerned the right of the individual rather than of the State, the situation was clear; individuals could not alienate the State’s right to exercise diplomatic protection in the context of a private contract. The Commission could not codify the Calvo clause as if it were a bilateral investment treaty between States, and even if it was decided to include a draft article on waiver, the clause would have no place in such a provision. It might serve to protect weak countries which were unable to defend themselves against multinational corporations, but that was not a legal consideration. The Drafting Committee could only note that the Calvo clause was a legal technique used by natural or legal persons in private contracts but that it could not alienate the rights of States. Thus, no portion of article 16 should be referred to the Committee. Even paragraph 1 (a) was irrelevant since only the State, in the context of an investment treaty, could waive its right to exercise diplomatic protection on behalf of its nationals resident in another State.

38. Ms. XUE said that, where a Calvo clause existed, its legal implications must be made clear. Article 16 did not set out to codify the Calvo clause, but instead laid down limits to its application in international relations. The article clearly stated what had been accepted by international practice, and spelled out the implications of the clause in international law, thereby obviating the need for future international arbitrations to rely exclusively on case law. Article 16 also clarified the relationship between the rights of the individual and of the State in that area, which was that a foreign individual or company had the right to seek, and a State the right to exercise, diplomatic protection. Consequently, article 16 was not merely symbolic but also had substantive content. Moreover, though resort to the Calvo clause had been largely confined to Latin America, the problems it had sought to address had a global, not merely a regional, dimension. Accordingly, the issue should be reflected in the draft articles. In codifying the issues raised by the Calvo clause and the resulting practice, article 16 performed a valuable service.

39. The CHAIR, speaking as a member of the Commission, said that in his view the draft articles would not be impoverished as a result of deleting article 16, which encroached on areas that were not the preserve of the Commission. The Calvo clause had been a failed, albeit vaient, attempt to deal with the problems of intervention and coercion of States. It had now been superseded by the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and, for that matter, by the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. The time was long past when ineffectual gestures such as the Calvo clause could be seen as a useful means of protecting the sovereign independence of States. To revert to the matter would raise all of the questions that Mr. Koskenniemi had touched on, and more besides, as well as being of questionable propriety for the reasons set out by Mr. Brownlie.

40. Mr. KAMTO said Ms. Xue had drawn a distinction that was valid in theory yet nevertheless seemed to split hairs. Admittedly, article 16 stated that the Calvo clause was to be construed as a valid waiver of the right of the alien to request diplomatic protection, not of the right of the State to exercise it. But in practice there seemed to be no difference at the level of international legal consequences. Nowhere in State practice or jurisprudence was it stated that a request by the individual was the condition for the
exercise of diplomatic protection by the State. Even if the individual had contractually waived his right, the State still retained its right to exercise diplomatic protection. Just as there were cases in which the State refused to accord the diplomatic protection requested by its national, so, conversely, silence on the part of the individual did not prevent the State from exercising diplomatic protection.

41. Mr. KABATSI said that, as Ms. Xue had rightly pointed out, the issue under article 16 was not the Calvo clause but the implications under international law of the exercise of that contractual device. It was the injury to an individual that raised the issue of a State’s right to diplomatic protection. No question of injury arose in cases of exercise of obligations under a contract. If the contracting State had committed no wrong, but had merely complied with its obligations under the contract—including insistence that the national comply with the contract’s provisions—it was very hard to see how that fictional right of the State could in fact arise. The implication of the clause was that in such cases no right to exercise diplomatic protection arose. Article 16 threw important light on the balance between the interests of the national and of the State, and it should thus be retained.

42. Mr. Sreenivasa RAU said that the recent practice of concluding umbrella agreements giving primacy to arbitration under the foreign State’s law amounted in effect to a new form of Calvo clause. As Ms. Xue had rightly pointed out, the Calvo clause should not be seen merely in its narrow historical context, which had ceased to be of any particular importance, but in terms of its continuing significance in arbitration matters. The clause raised questions as to the nature of the State’s right, as opposed to that of the individual; as to the timing and manner of its exercise; and as to the consequences for other aliens of waiver of the right to diplomatic protection by one alien. The issue raised by the Special Rapporteur in article 16 thus clearly extended beyond the narrow confines of the Calvo clause per se, and as such merited further debate.

43. Mr. DAOUDI, noting that Mr. Brownlie had claimed that article 16 covered an arbitration or judicial procedure and thus fell outside the Commission’s mandate, said that in his view article 16 as presented by the Special Rapporteur contained provisions that went beyond the Calvo clause as reflected in Latin American practice, offering a specific variant on the rule on the exhaustion of local remedies established in article 10. What article 16 did was to pinpoint the moment at which diplomatic protection must be exercised. The purpose of the article was not, as had been asserted, to prevent an embassy from intervening on behalf of an individual or company—a function that was clearly established in article 3, paragraph 1 (b), of the Vienna Convention on Diplomatic Relations. Its purpose was to prohibit a State from exercising diplomatic protection as long as no internationally wrongful act, in the form of a denial of justice, had been committed. For that reason, he continued to favour referring article 16, with some modifications, to the Drafting Committee.

44. Mr. CHEE said that two sets of rights had been involved in the North American Dredging Company case, namely, the rights of a State under international law and the rights of individuals or corporations under internal law. The question was whether an individual could deprive a State of those rights. The case was consistent with the Mavrommatis case and with the “Vattelian fiction”. As to enforcement, the questions were whether an individual could enforce the right of a State and whether a State could enforce an individual contract under municipal law. The answer to the first of those questions seemed to be in the negative, unless the State decided to take up the claim. The North American Dredging Company case made it clear that an individual could not validly waive, through a contract, his right to diplomatic protection where there was a denial of justice. That subtle distinction should be preserved.

45. Mr. KAMTO said he was not sure that the interpretation of article 16 just given by Mr. Daooudi was borne out by paragraph 1 (b) of the article itself. Diplomatic protection could be exercised only when there was a breach of a rule of international law. The provision amounted to a statement that nothing stipulated by an alien in a contract concluded abroad prevented the State of nationality from exercising diplomatic protection. There seemed no need to spell that out. If the contractual stipulation did not breach an international obligation, there could be no reason to exercise diplomatic protection. The commentary to the provision on waiver should make it clear that, for that reason, the Commission did not regard the Calvo clause as falling within its purview.

46. Mr. DAOUDI said that his reading of article 16 stemmed from the article’s overall logic. In subparagraphs (a), (b) and (c) of paragraph 1, it enumerated certain contractual stipulations between an alien and a State derived from the work of García Amador. As that author pointed out in the excerpt cited in section C.3 of the report, the waiver of diplomatic protection as expressed in the Calvo clause could take a variety of forms. The Special Rapporteur described all the variations on the Calvo clause and then stated that the existence of such variations was a presumption in favour of exhaustion of local remedies. That was the logic of the article: it was closely bound up with the rule on the exhaustion of local remedies set out in article 10 of the draft articles. The only specific feature of article 16 was to be found in a contractual stipulation requiring the alien doing business with a State to exhaust local remedies.

47. Mr. TOMKA, referring to Mr. Brownlie’s argument that, since the Calvo clause was merely a contractual technique and not a rule of public international law, the Commission should not deal with it, said Mr. Brownlie was right to the extent that codification meant more precise formulation and systematization of international law in fields in which extensive practice, precedent and doctrine existed. On the other hand, nothing prevented the Commission from drafting a provision on the implications of something which was within the province of domestic law, if it felt the need to do so. Two examples came to mind. Article 3 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session contained a reference to internal law specifying that the characterization of an act of a State

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6 See 2725th session, footnote 9.
7 See 2712th session, footnote 13.
as an internationally wrongful act was “not affected by the characterization of the same act as lawful by internal law”. Article 46 of the 1969 Vienna Convention was another example.

48. Some members had suggested that article 16 should set forth the implications of certain situations, but the provision concentrated on three scenarios, and they were very limited. In his view, contractual stipulations, whether under domestic law, trade law or whatever, represented a res inter alia acta. If the right to exercise diplomatic protection was recognized as a right of a State under public international law, as indeed it had been, then contractual stipulations between an individual or company and a State could not have any legal implications for that right. One member of the Commission had said article 16 could be construed as a presumption in favour of the need to exhaust local remedies, which was a general condition before resorting to diplomatic protection. Would such an interpretation have any legal significance? He did not think so. The article could also be interpreted to mean that a State that entered into such contractual provisions was reaffirming its legal view that local remedies had to be exhausted.

49. On the whole, however, he was not convinced that article 16 should be included in the draft on diplomatic protection. If the Special Rapporteur thought that provisions on waiver were needed, he should propose some, but article 16 was not a suitable foundation. It did not deal with waiver by a State, and to contemplate waiver by an individual would only lead to confusion, since there was no such thing as an international human right of diplomatic protection. From the standpoint of public international law, it was for the State to decide whether or not to exercise diplomatic protection.

50. Mr. MOMTAZ said that, after what had been a thought-provoking discussion, he had come to the conclusion that the only difference between article 16 and article 10 was that article 16 related solely to certain provisions that could be contained in a contract between an individual and a State. Those provisions, or contractual stipulations, fell into the domain of domestic law, not international law. He understood Mr. Daoudi’s remark that article 16 was a variation to mean that it was merely a different way of saying the same thing, that it added nothing. Indeed, paragraph 2 summed up all of paragraph 1 as a presumption in favour of the need to exhaust local remedies, the very proposition stated in article 10. Nevertheless, he was in favour of including a provision on waiver of diplomatic protection by States, something that fell within the domain of international law, but saw no need for one on waiver by individuals, which did not.

51. Mr. CANDIOTI warmly commended the Special Rapporteur’s impeccable treatment of the issues raised in international law by the Calvo clause. His description of the Calvo clause’s history, attempts at codification, decisions of international courts and views expressed in the literature was highly authoritative. In the conclusion of section C of his report, the Special Rapporteur proposed two options, of which he personally preferred the second. Article 16, paragraph 1, would have its place in the draft on diplomatic protection once the Drafting Committee had considered it and made the necessary drafting changes.

52. Some members contended that it added little to the draft, but, as the French saying had it, what went without saying went even better when said. The provisions in article 16 gave a clearer perception of the institution of diplomatic protection and the historical weight of the Calvo clause in its development. The decision in the North American Dredging Company case could not be passed over in silence in the context of the codification of rules on diplomatic protection. It was certainly valuable to specify that a contractual stipulation in which an individual or a company waived the right to request protection from the State did not under any circumstances imply a waiver of the right of the State to exercise diplomatic protection. Article 16 was useful in characterizing the right to diplomatic protection as an exclusive and discretionary right of the State of nationality. In that sense, it complemented article 10. Again, article 16, paragraph 1, was useful as well in that it defined the entity that had the right to waive the exercise of diplomatic protection as the entity that had the right to exercise diplomatic protection in the first place. For those reasons, he agreed that article 16 should be referred to the Drafting Committee for careful consideration of the wording and of its place in the overall draft.

53. Mr. DUGARD (Special Rapporteur), summing up the discussion on section C of his third report, thanked members for a stimulating debate that now left him in some difficulty. Opinions seemed to be fairly evenly divided on whether to include article 16, reminding him of the division of views on whether or not to retain article 19 on international criminal responsibility in the draft on State responsibility. The difference, however, was that members had been in strong disagreement as to the value, purpose and substance of article 19, whereas now even members who thought the Calvo clause was not within the Commission’s remit were convinced of its importance in the history and development of diplomatic protection. Inclusion of article 16, which reflected the Calvo clause, would not, therefore, give rise to a sense of outrage—or at least such was his impression.

54. The debate had caused him to change his mind several times. He had initially leaned towards the first option, namely omitting article 16, but strong statements by Ms. Xue, Mr. Daoudi and Mr. Candiotti had swayed him in the opposite direction. In all, he had counted 10 members of the Commission in favour and 9 against inclusion of the article. Interestingly enough, the division did not run along regional lines: representatives from all regional groups could be found on both sides. The substance of the debate could be summed up in the following way: Mr. Brownlie and others had taken the view that article 16 was concerned with contractual arrangements and had no place in the draft. Other members had argued that the provision set the Calvo clause in the necessary context and ought to be included.

55. The Commission now had a number of options. Since there seemed to be very little support for article 16, paragraph 2, except insofar that its contents should be dealt with in the commentary to article 14 (b), the question was whether to refer article 16, paragraph 1, to the Drafting Committee, with the important amendments suggested
during the debate, or to omit the provision from the draft. If it was omitted, the subject would have to be dealt with extensively in the commentary, specifically to article 10 and article 14 (b). Mr. Gaja’s suggestion that an attempt be made to draft an omnibus waiver clause could not be taken up for the reasons rightly outlined by Mr. Tomka.

56. He was honestly at a loss to know how to proceed, but on balance he recommended that the Commission refer article 16, paragraph 1, to the Drafting Committee, subject to the suggestions made during the discussion. A slender majority was in favour of that course of action, though he readily conceded that it was a slender majority.

57. The CHAIR, speaking in his capacity as a member of the Commission, said that when half of the members of the Commission were opposed to referring a proposal to the Drafting Committee, it was not a compromise solution simply to go ahead and refer it. Respect for the concerns of advocates of the Calvo clause could be shown, he thought, by including the subject in a commentary.

58. Mr. TOMKA said that if article 16, paragraph 1, was to be sent to the Drafting Committee, some guidance would have to be given about the objectives of the drafting exercise, what form the article should ultimately take, and so on. Some members had said that its scope was too narrow. Should it therefore cover techniques other than contractual stipulation? Perhaps the Special Rapporteur should be allowed time to reflect on the matter, and when he introduced his working paper on the voluntary link at the next meeting, he could outline his conception of a provision reflecting the Calvo clause.

59. Mr. KAMTO endorsed that proposal and added the suggestion that consultations should be carried out with those who had opposed referring the article to the Drafting Committee with a view to achieving consensus.

60. Mr. DUGARD (Special Rapporteur) said the combined wisdom of the two previous speakers had prevailed on him to undertake consultations and seek a solution before the Commission’s next meeting. He would do so if there was no objection.

*It was so decided.*

The meeting rose at 1 p.m.

2729th MEETING

Tuesday, 4 June 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Montaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.


[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. DUGARD (Special Rapporteur), presenting the results of his reflections on the question of voluntary link, which were contained in section A.3 of his third report on diplomatic protection (A/CN.4/523 and Add.1), said that the Commission had debated the question of the voluntary link as part of its consideration of draft article 14 on exceptions to the rule on the exhaustion of local remedies. It had questioned whether the draft articles should contain a provision stating that the existence of a voluntary link between the injured alien and the host State would be a precondition for the application of the rule and, if so, where such a provision would be placed in the draft articles. Would it be a separate provision? Would it be included in article 10 or in article 14? During the debate, different opinions had been expressed about the voluntary link. Some members, such as Mr. Brownlie, considered that such a link was the rationale for the rule on the exhaustion of local remedies. Others had suggested that it was an exception to the rule, and that had been the way he had viewed it in article 14 (c). For still others, the voluntary link was a necessary connecting factor for the exercise of jurisdiction and a precondition for the application of the rule. Those differences of opinion showed how difficult it was to codify the requirement of a voluntary link. He had finally been persuaded by Mr. Brownlie that the voluntary link was essentially a rationale for the rule on the exhaustion of local remedies and that, as such, it was not suitable for codification, as was confirmed by the changing nature of State responsibility. In today’s global village, the nationals of State A were increasingly injured by the conduct of State B or its nationals without having any connection whatsoever with State B. Such developments presented serious challenges to the rules governing jurisdiction, under both private and public international law, and they raised questions about the rationale for the rule on the exhaustion of local remedies.

2. In his opinion, if the Commission wanted to codify the voluntary link, there were a number of ways of doing

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1 For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see Yearbook ... 2000, vol. I, 2617th meeting, p. 35, para. 1.