

Document:-  
**A/CN.4/SR.2729**

**Summary record of the 2729th meeting**

Topic:  
**Diplomatic protection**

Extract from the Yearbook of the International Law Commission:-  
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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.*

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## 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. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/514,<sup>2</sup> A/CN.4/521, sect. C, A/CN.4/523 and Add.1,<sup>3</sup> A/CN.4/L.613 and Rev.1)

[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

<sup>1</sup> 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.

<sup>2</sup> See *Yearbook ... 2001*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).

so, such as amending article 10 to read: "A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, who has a voluntary link with the responsible State before the injured national has exhausted all available local legal remedies." Alternatively, the voluntary link could be retained as an exception, along the lines suggested in draft article 14 (c). If there were objections to the term "voluntary link", it might be possible to replace subparagraph (c) by the following text: "(c) Any attempt to exhaust local remedies would cause great hardship to the injured alien [be grossly unreasonable]". The other suggestion for a provision requiring a voluntary link would be undesirable, particularly in the light of developments in the law relating to transboundary harm. Such a provision belonged more to the topic of liability.

3. His preference was not to provide expressly for a voluntary link, but to include it in the commentary to article 10 as a traditional rationale for the rule on the exhaustion of local remedies, in the commentary to article 11 with a discussion of direct injury to a State where local remedies need not be exhausted, and in the commentary to article 14 (a), in the discussion of whether local remedies offered a reasonable possibility of an effective remedy. In short, he shared Roberto Ago's view that the topic was not yet ripe for codification. Although that view had been expressed in the late 1970s, it had been confirmed by developments in environmental law.

4. Referring to the hardship cases which had been discussed in paragraph 83 of his third report and in which it was unreasonable to require an injured alien to exhaust local remedies, he pointed out that in the first case, that of transboundary environmental harm caused by pollution, radioactive fallout or man-made space objects, a number of scenarios were possible. If the injury resulted from an act which was not an internationally wrongful act, the context was not that of diplomatic protection but that of liability. If the injury resulted from an internationally wrongful act and was a direct injury, that possibility was already covered by draft article 11. Moreover, an international agreement might dispense with the need for the exhaustion of local remedies, as in the case of article XI of the Convention on International Liability for Damage Caused by Space Objects, the text of which was reproduced in paragraph 80 of the third report. Also, the courts of the responsible State might not have jurisdiction to consider cases of transboundary environmental damage originating in their territory, and that case had already been provided for by article 14 (a). In another case, a national of State A, in which the pollution had occurred, could attempt to sue the government of State B, in which the pollution had originated, in a court of State A. In most instances, the government of State B would successfully plead sovereign immunity. That situation was also covered by subparagraph (a). Last, the courts of the responsible State might, under an agreement with the injured State, provide local remedies for the nationals of the injured State for extraterritorial harm suffered. That case fell not under diplomatic protection but under the draft articles on liability. He was of the opinion that, in the case of transboundary environmental harm, there was no need for a separate provision requiring a voluntary link as a precondition for the application of the local remedies rule.

5. In the second type of situation, involving the shooting down of an aircraft outside the territory of the responsible State or an aircraft that had accidentally entered its airspace, there really was a direct injury, and State practice showed that in most cases the responsible State would not insist on the need to exhaust local remedies. That case was thus covered by draft article 11, and no separate provision was necessary. The third type of situation would involve the killing of a national of State A by a soldier from State B stationed in the territory of State A. In most circumstances, there would normally be an international treaty provision for the possibility of a claim against State B. If there was no such agreement, however, there was no real reason why the government of State A should not be required to request compensation in the courts of State B, provided that there was a reasonable prospect of an effective remedy. That situation was already covered by article 14 (a), and there was no need for a separate provision. Last, with regard to the transboundary abduction of a foreign national from his home State or a third State by agents of the responsible State, there were two possible options: either there had clearly been a violation of the territorial sovereignty of the State of nationality of the foreigner, which could give rise to a direct claim by him against the responsible State and which was already covered by draft article 11, or the injured party might have the possibility to sue in the domestic courts of the responsible State and there was no reason why he would not avail himself of that remedy. If that possibility was not available, the situation was that covered by draft article 14 (a), which required a reasonable possibility of obtaining an effective remedy. In neither case was there any need for a special provision.

6. In his opinion, the Commission should not obstruct the development of international law on the question, particularly as the practice of States continued to evolve, especially in the field of damage to the environment. He suggested that the Commission should say nothing about the voluntary link in the draft articles, but should simply refer to it in the commentary on several occasions and deal with it in the context of the topic of international liability for damage caused by activities not prohibited by international law.

7. Mr. BROWNLIE said that he was in a rather strange position because what he had said before gave the impression that he was an enormous partisan for the voluntary link. He was not. His problem was that the Special Rapporteur's reasons for not taking the voluntary link seriously were not cogent. It was not his position that the voluntary link was the rationale for the rule on the exhaustion of local remedies, and, in the textbook he had written on the subject several years ago, he had simply said that the position one adopted on the voluntary link depended on one's view of the major basis in policy for the rule on the exhaustion of local remedies. If the objective was to provide an alternative, more convenient recourse to that of proceeding on the international plane, then no condition as to a link would apply. If the rule was linked to the existence of a proper base for the exercise of national jurisdiction, then the requirement of a voluntary link such as residence made good sense. He did not, moreover, understand why the question of the rationale for the rule had nothing to do with codification. He thought that it was eminently connected with codification and even more so

with the issue of the progressive development of the law. Rationale or not, some very serious figures had supported the requirement of a voluntary link. He therefore suggested that the Special Rapporteur should take that question seriously. Even though he himself had doubts about the merits of the question of a voluntary link, he thought it should be duly taken into account.

8. Mr. DUGARD (Special Rapporteur) asked Mr. Brownlie how, in practical terms, the Commission should take the voluntary link seriously. He himself had made several suggestions. There might be others, but he would be very grateful to Mr. Brownlie for telling the Commission how, in his opinion, it could get out of the present dilemma.

9. Mr. BROWNLIE said he appreciated that the question was partly covered by draft article 11. He did think, however, that it should at least appear as an exception to the rule on the exhaustion of local remedies. He did not think that the principle of the hardships that the requirement of the exhaustion of local remedies might involve for the injured party really covered the case. It should be indicated in the commentary that the question had been set on one side.

10. The CHAIR said that he was not sure whether the Commission should set the question on one side or accept the Special Rapporteur's proposal that it could be referred to in the commentary to articles 10, 11 and 14, something that would, in his opinion, meet the requirement. He would also like to have some explanations about certain environmental issues. Was the Commission worried about the voluntary link with the State causing the pollution or, as he believed, about the link with persons injured beyond that State?

11. Mr. BROWNLIE said that if the members thought that the question of the voluntary link was a serious policy problem, it should be dealt with in the context of exceptions to the rule on the exhaustion of local remedies. In any event, when a foreign aircraft was shot down and the victims were of several nationalities, it was important to draft some guidelines on the applicability of the rule.

12. Mr. DUGARD (Special Rapporteur) said that it might be a good idea to follow Mr. Gaja's earlier suggestion that the State of nationality of the aircraft might be able to sue in such circumstances. He did think that in such a case it was very difficult to insist on compliance with the local remedies rule.

13. Mr. BROWNLIE said that his concern was that the provision should be drafted in such a way that it would be clear that the local remedies rule did not apply in such a situation. He merely pointed out that the Special Rapporteur was refusing to take a position on the legal status of the voluntary link approach.

14. The CHAIR asked whether there were specific examples of situations which would not be solvable if the voluntary link was relegated to the commentary.

15. Mr. BROWNLIE said he was not convinced that the voluntary link question was not dealt with as part of the hardship principle, which was already in the draft. It would be paradoxical, for example, if victims had to exhaust local remedies because they were efficiently organized in claimants' associations and were therefore denied the application of the hardship principle. The Commission should stop acting as though all it was doing were photographing State practice and should take a position on the underlying policies, on the understanding that it was indeed difficult to define what constituted a sufficient voluntary link.

16. Mr. PAMBOU-TCHIVOUNDA said that he supported the Special Rapporteur's conclusions.

17. Mr. Sreenivasa RAO pointed out that many factors entered into the distinction between hardship cases, where the rule on the exhaustion of local remedies could not apply, and cases where the conduct of the "claimant" State was based on other considerations and the criterion of the exhaustion of local remedies had no role to play at all. Even the distinction made by the Chair between causality and nationality was insufficient because, as was shown in cases of transboundary harm, many factors came into play in the determination of the respective shares of causality, if not responsibility, and they gave rise to problems which had not yet been discussed. He did not think that those problems could be relegated to the commentary to an article on the exhaustion of local remedies. Mr. Brownlie had been right to say that the question of the voluntary link had to be given fuller treatment and that, even as an exception to the rule on the exhaustion of local remedies, it did not only involve hardship. It should therefore be left to the Drafting Committee to find the most appropriate solution.

18. Mr. TOMKA said that he had no major problem in going along with the Special Rapporteur's conclusions, but that, in view of the comments by Mr. Brownlie, he wondered whether it would not be wiser to include a questionnaire for Governments on the topic in chapter III of the report of the Commission to the General Assembly. As the Drafting Committee would probably not deal with that question before the following session, the Commission would thus be able to have the views expressed by Governments both in the Sixth Committee and in their replies to the questionnaire.

19. Mr. MANSFIELD said that he would be satisfied with the Special Rapporteur's conclusions, but that, the more he heard in the discussion, the more he remained concerned about the point he had raised earlier about fairness and equity. It was not clear to him that the draft articles contained a hardship provision. In view of the huge discrepancies among litigation costs in different countries, the voluntary link concept was both over-inclusive and under-inclusive in the sense that a reasonable possibility of an effective remedy under article 14 (a), did not really apply in a situation where it would be unfair and unreasonable to require a person to exhaust local remedies because of the costs involved.

20. Mr. KABATSI said that the voluntary link appeared in one form or another in draft articles 10, 11 and 14. The issue might be best dealt with in the commentary to each of those articles. Treating it as an exception to the rule on the exhaustion of local remedies might not tie up all of the loose ends on that question.

21. Mr. GAJA said that there were two different scenarios—that of an insufficient link, as in the case of an aircraft accidentally shot down over a foreign country, and that of extraterritorial activity or transboundary damage. In some cases, remedies did exist, and the solution to the problem whether local remedies were to be exhausted should not discourage the trend of providing remedies in relation to transboundary harm. He would prefer to have a general text which did not state the principle of the voluntary link or provide for a clear-cut exception, but which was formulated so as to take account, from the viewpoint of an exception or precondition for the applicability of the local remedies rule, of situations where it would be unreasonable to require a private party to seek remedies before the State had been able to exercise diplomatic protection.

22. Ms. ESCARAMEIA said her position was that the voluntary link was a precondition for the rule on the exhaustion of local remedies, the role of which had arisen precisely from the fact that the persons concerned derived some kind of benefit from the activity in question. There was no reason to require a person who had no link with the State which had injured him to embark on the enormous undertaking of exhausting the local remedies of that State. She would have preferred the solution suggested by the Special Rapporteur of redrafting article 10, but, since that solution did not have much support, the Commission should redraft article 14 (a), in the light of the important comment by Mr. Mansfield on situations where local remedies were possible but it would be unfair to require that they should be exhausted; keep the exception in article 14 (c); and include a definition of the voluntary link in the relevant commentary.

23. Mr. KEMICHA said that he agreed with the Special Rapporteur's conclusions that some aspects of the question of the voluntary link related to other draft provisions, while others belonged in the commentary.

24. Mr. SIMMA said that he supported the proposal by Ms. Escarameia.

25. Mr. DUGARD (Special Rapporteur) said that the problem raised by Mr. Mansfield could be regarded as being covered by article 14 (a). There was, however, nothing to prevent the Drafting Committee from explaining that further. The Commission had previously been very much opposed to article 14 (c), but now seemed to have changed its mind as a result of wording which would not necessarily use the term "voluntary link". Mr. Tomka's proposal that Governments should be asked for their views was also acceptable.

26. The CHAIR proposed that the Drafting Committee should be requested to include more flexibility in the wording of article 14 (a), in the light of the comments

made during the debate. He also proposed that draft article 14 (c), which might also be reformulated, should be referred to the Committee. The matters discussed would be described in detail in the commentary and form the subject of a questionnaire to be addressed to States so that, at the Commission's next session, the comments made by Governments in the Sixth Committee and in their replies to the questionnaire would be available to the Drafting Committee.

27. Mr. CHEE said that he supported that proposal, as did Mr. DUGARD (Special Rapporteur), who added that this solution would enable him to deal with the question of transboundary harm in the commentary.

28. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted that proposal.

*It was so decided.*

29. The CHAIR recalled that the Commission had not yet taken a decision on draft article 16.

30. Mr. BROWNLIE said that, after thinking things over, he could only confirm the views he had expressed the week before.

31. Mr. KAMTO said that draft article 16 did not add anything to the provisions relating to the exhaustion of local remedies. Originally, the Calvo clause had been designed to prevent an investor from appealing to his State so that it would intervene improperly. For States which hosted foreign investors, the danger nowadays was that there were so many international arbitration clauses, which were a safer way for investors to protect their interests than diplomatic protection, which depended on the political interests of the State of nationality. Direct recourse to an arbitration mechanism was sometimes provided for in investment contracts or in multilateral investment treaties, as, for example, in chapter 11 of NAFTA. Such provisions had given rise to a large body of arbitration decisions, which showed that arbitral tribunals took advantage of the slightest indication of consent of the State, even in domestic legislation, to say that consent to arbitration existed. In such circumstances, the purposes which had historically been served by the Calvo clause were outdated.

32. Mr. KEMICHA said that he did not see any need for draft article 16 in the current context, particularly in the light of existing international arbitration practices.

33. Mr. RODRÍGUEZ CEDEÑO said that the solution proposed by the Special Rapporteur would reflect a well-established practice which had given rise to a great many decisions and played an important role in Latin American law. He would support any position for which the Commission opted, but he would be in favour of the one the Special Rapporteur had defended in the conclusion of his report.

34. The CHAIR pointed out that the subject of discussion was not the practice in question, but whether or not a provision to that effect had to be included in the draft articles.

35. Ms. XUE said that it would be useful to include draft article 16 because, in view of historical developments, she regarded it as a technical necessity. The Commission did not have to deal with the content of investment contracts entered into by States, but, when, in practical terms, a waiver of diplomatic protection was provided for in a contract, each of the parties had to know what effect it would have in international law and to what extent the alien was required to exhaust local remedies, since, in the event of an internationally wrongful act, the State of nationality might become involved. That clarification would also be helpful to arbitrators who had to rule in specific cases.

36. Mr. BROWNLIE said that the Calvo clause was not a principle of international law but simply a contractual technique on which the Commission did not have to decide. He pointed out that those in favour of that clause should not support draft article 16, which did not give very firm support to the Calvo clause.

37. Mr. NIEHAUS said that the codification of the Calvo clause was particularly important for the Latin American countries, since it was an integral part of the legal tradition of the majority of nations on the American continent. The proposed text made it possible to restrict the validity of the Calvo clause to disputes arising out of contracts containing that clause and to recognize that that clause created a simple presumption in favour of the exhaustion of local remedies. The proposed text also established a clear-cut distinction between the alien's right to waive diplomatic protection and the right of the State of nationality to exercise diplomatic protection on behalf of a person injured by an internationally wrongful act attributable to the contracting State or when the injury he had suffered was of direct concern to his State of nationality.

38. The CHAIR, speaking as a member of the Commission, said that so far he had heard reasons why there was nothing wrong with the text in question, but he had yet to hear a single reason why it added anything to the draft articles.

39. Mr. DAOUDI said that draft article 16 did not reflect the Calvo clause, which prohibited an alien from requesting diplomatic protection in any circumstance and was in fact only a variant of the rule on the exhaustion of local remedies. Clauses providing for direct recourse to international arbitration were not widespread and were to be found only in certain parts of the world and in certain treaties. That was why the provisions of article 16 were important. He did not know of any national investment legislation which provided for automatic acceptance of arbitration. All States considered that their law was applicable and that their courts had jurisdiction over disputes arising out of an investment contract. The inclusion in a contract of a clause which was contrary to that principle would depend on how much influence the investor could wield during the negotiations. Even in the event of recourse to arbitration, however, the problem of the exhaustion of local remedies would still exist because the host State would have to be requested to issue an enforcement order.

40. Mr. SIMMA said that, in the proposed text, only paragraph 2 had some normative content, while para-

graph 1 simply reflected a practice which existed in a particular part of the world. He questioned how that paragraph was expected to work in practice. What would happen if the Government of the State of nationality of the injured alien intervened without taking account of the waiver accepted by the alien? Would that be a matter of "bad faith" or "dirty hands"? From that point of view, the wording of article 16, paragraph 1, was not satisfactory.

41. Mr. DUGARD (Special Rapporteur) explained that he had designed paragraph 2 as a normative provision following on logically from paragraph 1. It had turned out that some members were in favour of paragraph 1 and opposed to paragraph 2, while others were in favour of both. He urged the new members to make their views clear.

42. Mr. GALICKI said that the text of article 16 should be compared with the letter and spirit of the articles on which provisional agreement had already been reached. He was opposed to the use of the expression "the right of the alien to request diplomatic protection", since the Commission had already decided that the right to exercise diplomatic protection belonged exclusively to the State. That expression reflected a new concept, which should therefore be explained. In his opinion, the question of the Calvo clause was not part of diplomatic protection, which, according to the Commission's work, could be exercised only when an internationally wrongful act had been committed. Since it was a contractual technique and not a rule of law, the Calvo clause did not belong in the draft articles. In a spirit of compromise, however, he could agree that some elements of draft article 16 could be retained, with minor changes. The second sentence of paragraph 1 could thus be included. The provision might read: "A contractual stipulation between an alien and the State in which he carries on business shall not affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State"; and the last phrase, "or when the injury to the alien is of direct concern to the State of nationality of the alien", could be added, although what was of "direct" concern in that context was not very clear. Such wording would confirm the views expressed by the Commission on diplomatic protection and establish a link with contractual provisions which might exist in some regions. If such a compromise solution was not considered useful or desirable, he would be in favour of the adoption of draft article 16 as it stood.

43. Mr. KAMTO said that, however interesting it might be, the Calvo clause was not to be codified as part of the Commission's work. If the Commission undertook to deal with contractual stipulations involving private individuals, why would it stop at the Calvo clause? Its mandate was not to decide what kind of commitment a contractual clause created for a State.

44. Ms. ESCARAMEIA said that article 16 did not really address the Calvo clause and that it was only an example of the rule on the exhaustion of local remedies stipulated in a contract. Article 10 already stated that rule. It might therefore be better for article 10 to include the idea embodied in paragraphs 1 and 2 of article 16, with

an explanation of the kind of contractual stipulations in question. The thrust of the Calvo clause might be referred to in the commentary to article 10.

45. Mr. SIMMA said that he had a problem with the logic of the second sentence of article 16, paragraph 1, because, if it was stated in the first part of that sentence that diplomatic protection was defined as the right of the State of nationality of an alien injured by an internationally wrongful act to exercise diplomatic protection on behalf of that person, how could reference be made in the second part to the right of that State to exercise diplomatic protection when the injury to the alien was of direct concern to it, since that right already existed? That was another reason for dropping article 16.

46. Mr. MOMTAZ, reiterating the position he had expressed at the preceding meeting, asked whether it really had to be stated that there was a presumption in favour of local remedies, since that was a well-established rule of customary international law and it was referred to in article 10.

47. The CHAIR, noting that there was a clear majority in favour of not including article 16, asked whether a compromise might not be to recognize that a separate article on the Calvo clause was not widely supported, but not unsupported. The idea contained in article 16, paragraph 1, would be included in the commentary, either to article 10 or to article 14.

48. Mr. DUGARD (Special Rapporteur) said that that suggestion was not acceptable on procedural grounds. It was obvious that positions within the Commission had not changed, but the Commission still had to explain its view. An indicative vote would therefore be helpful.

49. Mr. KABATSI said he agreed with the Special Rapporteur that the split in the Commission still existed, but he did not think that an indicative vote would provide any indications at all.

50. Mr. DAOUDI said he also did not think that a vote would make the situation any clearer. Would its purpose be to decide on article 16, with the proposed amendments that had been submitted, or on article 16, as submitted by the Special Rapporteur? In the latter case, an indicative vote would not provide any indications because positions were unchanged. He therefore proposed that the Special Rapporteur should submit a new version of the article to the Commission for consideration before a final decision was taken.

51. The CHAIR said that the Commission did not have to decide how article 16 should be worded, but whether it should be referred to the Drafting Committee.

52. Mr. TOMKA said he did not think that article 16, paragraph 1, which provided that no contractual stipulation in a private law contract between an individual and a State affected the independent right of the State, under public international law, to exercise diplomatic protection, was justified in the present context. Perhaps that question related to the waiver of the right to exercise diplomatic protection. Article 16, paragraph 2, was unnecessary,

since it only reaffirmed a clearly established rule of customary law.

53. Mr. MANSFIELD said that he did not see how an indicative vote would be helpful in any way. He proposed that the question should be further discussed.

54. The CHAIR said that, following an indicative vote, the Commission was not in favour of referring article 16 to the Drafting Committee, on the understanding that, as a compromise, the content of the article would be incorporated in the commentary.

*It was so decided.*

*The meeting rose at 11.55 a.m.*

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## 2730th MEETING

*Wednesday, 5 June 2002, at 10.05 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskeniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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**Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/514,<sup>2</sup> A/CN.4/521, sect. C, A/CN.4/523 and Add.1,<sup>3</sup> A/CN.4/L.613 and Rev.1)**

[Agenda item 4]

### REPORT OF THE DRAFTING COMMITTEE

1. Mr. YAMADA (Chair of the Drafting Committee), introducing the Drafting Committee's report on diplomatic protection (A/CN.4/L.613)\*, said that the Committee

\* Subsequently distributed as A/CN.4/L.613/Rev.1 (see 2732nd meeting).

<sup>1</sup> 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.

<sup>2</sup> See *Yearbook ... 2001*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).