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Summary record of the 2762nd meeting

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on behalf of an entity which, or an individual who, had suffered injury as the result of an internationally wrongful act must have a genuine link with the victim of that act. In the case of a natural person, the most obvious link was that of nationality. For corporate entities, it was also important for there to be a genuine link between the State seeking to exercise diplomatic protection and the victim. The Commission referred to that as nationality, but could also call it something else. The problem was the link between the State trying to exercise diplomatic protection and the victim of the internationally wrongful act. For that reason, he endorsed a flexible formulation such as the one proposed by Mr. Brownlie. The usual wording used to designate that link was “State of nationality”, the State with which, in accordance with its municipal law, the corporation had established a genuine link, whether by virtue of incorporation of the corporation, the establishment of its *siège social* or any other way consistent with international law. In a case in which several States claimed that they had that genuine link, it would be necessary to consider which genuine link took precedence. The Commission could not allow for all the scenarios that might arise. It must remain flexible and produce a wide range of criteria which could then be identified case by case.

The meeting rose at 1 p.m.

2762nd MEETING

Friday, 23 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,² A/CN.4/L.631)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. YAMADA, following up on the discussion on draft article 17, paragraph 2, on the definition of the State

¹ For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

² Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of nationality of a corporation, thanked Mr. Economides, Mr. Brownlie and Mr. Melescanu for introducing the element of a genuine, effective or appropriate link. He recognized that the current trend in international private law was to focus more on the domicile of a corporation than on its nationality as an element indicating its link with a State. However, as Mr. Brownlie had pointed out, the main question in the field of international private law was the applicable law, not the nationality of the corporation.

2. For the purpose of diplomatic protection, however, the Commission must spell out a clear rule of international law which set out criteria for the nationality of corporations. Article 1, paragraph 1, as provisionally adopted by the Commission at its fifty-fourth session, in 2002,³ stipulated the basic principle that it was the State of nationality which was entitled to exercise diplomatic protection both for natural persons and for legal persons. Accordingly, regardless of whether municipal law recognized the nationality of a corporation or not, a rule of international law must be written that defined such nationality.

3. The question was therefore whether draft article 17, paragraph 2, which the Special Rapporteur in his fourth report (A/CN.4/530 and Add.1) had based on *Barcelona Traction* and which set out both “incorporation” and “registered office” as criteria, adequately reflected customary law, or whether there was a legal vacuum which must be filled with a view to the progressive development of international law.

4. While he recognized the rationale for relying on the element of a link between the corporation and the State, whether it was “genuine”, “effective” or “appropriate”, he hesitated to consider it an independent, alternative element. When the Commission had defined the State of nationality of natural persons in article 3, adopted in 2002, it had not introduced the link concept. The Commission should follow the same approach for the nationality of corporations, since introducing the link element would cause complications. For instance, Microsoft, an American corporation incorporated in the State of Washington and with its registered office in Redmond, Washington, earned 27 per cent of its revenue from activities outside the United States and had very close links with 58 other States and territories. Again, the Hong Kong and Shanghai Banking Corporation (HSBC), a British corporation with its headquarters in London, still had its *de facto* headquarters in Hong Kong and, together with Chartered Bank, had even functioned as a central bank of Hong Kong until Hong Kong reverted back to China. It maintained 9,500 offices in 80 States and territories on every continent. All those States could be said to have an appropriate link with Microsoft and HSBC. Furthermore, it was most likely that a corporation would suffer injury as a result of an internationally wrongful act of the State with which it had the closest link and in the territory of that State. If that State was deemed to be the State of nationality of the corporation because of that link, the regime of diplomatic protection ceased to function. He had a problem with Mr. Brownlie’s formulation referring to “an appropriate link”, while the formulation proposed by Mr. Economides relied on municipal law, which did not always recognize the nationality of corporations. Mr.

³ See footnote 1 above.

Melescanu's formulation also brought in the link element as an alternative criterion and he had cited the case of a Swiss corporation with majority Romanian shareholders. He understood why Mr. Melescanu would not want the Swiss Government to exercise diplomatic protection in that case, but assumed that what Mr. Melescanu had had in mind was a case where injury had occurred in Romania. He wondered what his position would be if the injury had been caused in Japan. In any case, if the Commission decided to introduce a link element as an alternative criterion, it would have to address the question of multiple nationality and formulate a new article dealing with that situation.

5. He had no problem with draft article 19. He took it that the Special Rapporteur had formulated that article separately from draft article 18 because, unlike article 18, it dealt with a situation that was not an exception to draft article 17, paragraph 1. He had difficulty visualizing a case where the corporation was not injured and the shareholders were injured directly, but article 19 appeared to assume that case. Since the question of diplomatic protection of the corporation did not arise in that case, article 19 was not an exception to article 17. Article 18, subparagraph (b), also envisaged a situation where the question of the diplomatic protection of the corporation did not arise. For example, if Sony Corporation of Japan suffered an injury in Japan as a result of a wrongful act of the Japanese Government, that fell outside the scope of the diplomatic protection of legal persons as defined in article 1. It could therefore not be an exception to article 17. That left the question of the diplomatic protection of Sony's foreign shareholders. If that were to be dealt with, it would be more appropriate to move article 18, subparagraph (b), to article 19.

6. Turning to draft article 20, he had no problem with the substance of the first sentence, although its formulation would have to be brought into line with the final formulation of article 17, paragraph 2. However, the proviso in square brackets seemed to contradict article 18, subparagraph (a). According to subparagraph (a), the State of nationality of the corporation was no longer entitled to exercise diplomatic protection when the corporation had ceased to exist, whereas according to the proviso in article 20, the State of nationality was still eligible to exercise diplomatic protection on behalf of the defunct corporation. That proviso should therefore be deleted.

7. Mr. CHEE said that he could support draft article 17, paragraph 1. He also endorsed article 17, paragraph 2, which was consistent with *Barcelona Traction*. He recalled that ICJ had not viewed the "genuine link" as an alternative criterion for determining the State of nationality of a corporation, but as an element additional to the two criteria of incorporation and registered office.

8. With regard to draft article 18, he could accept the wording chosen by the Special Rapporteur for subparagraph (a), which was consistent with the customary formulation used by the Court, although he would have preferred it to speak of the corporation going bankrupt rather than of it ceasing to exist. As to subparagraph (b), he believed that shareholders in both the subsidiaries and the parent company should be protected from injury caused by the internationally wrongful act of a State.

9. He endorsed article 19 as drafted by the Special Rapporteur because, as the latter had pointed out, it was a savings clause that provided an additional source of law to ensure that shareholders' rights and interests were protected by their State of nationality. He also endorsed article 20 as it stood, although, like Mr. Brownlie, he would prefer to replace the criterion of the date of official presentation of the claim by the date on which a judgement was awarded, which seemed more appropriate in the case of legal persons.

10. Finally, he recommended that draft articles 17 to 20 should be referred to the Drafting Committee.

11. Mr. BROWNIE, commenting on Mr. Yamada's argument as illustrated by the example of Sony Corporation, said that, if the Commission focused exclusively on one or the other of the two criteria given in article 17, paragraph 2, namely, incorporation or registered office, rather than attaching the same importance to the link element, it might overly restrict the incidence of nationality. Moreover, if it insisted that both those criteria should be met, that would exclude many cases and restrict the possibilities for a State to exercise diplomatic protection on behalf of a corporation. There was no easy answer, for it was impossible to list criteria in advance. That was why he had suggested the idea of "appropriate link", which made it possible to envisage other situations where the exercise of diplomatic protection would be permissible.

12. He did not agree with Mr. Chee's comment that the choice of the two criteria mentioned in article 17, paragraph 2, was justified by *Barcelona Traction*. In that case, ICJ had not decided on the nationality of the Canadian corporation because it had had to do so.

13. Mr. YAMADA, replying to Mr. Brownlie, recognized that he had been referring to an extreme case and acknowledged the need to strike a balance between the two extremes.

14. Mr. CHEE said that he was not at all eager to merge the two criteria of State of incorporation and State of registered office and had no objection to their being treated separately. He recalled that draft article 17 established a general rule concerning the link between a State and a corporation.

15. Mr. MELESCANU explained that, in his proposal, "link" was not an additional criterion, but simply an element to be taken into account when examining other criteria. He did not understand the concern aroused by the example he had cited of a Swiss company whose majority shareholders were Romanian, and he feared that, by dwelling on the idea of the nationality of a corporation, the Commission might find itself adopting a decision that brutally contradicted the provisions adopted on the diplomatic protection of natural persons.

16. Mr. ECONOMIDES said that the savings clause in draft article 19 did not resolve the question of the right of the State of nationality of the shareholders to protect the latter's own rights in that it excluded the question to which it referred from the scope of codification. It would be better to deal with that question either in a separate provision or as an exception to article 19.

17. Mr. DAOUDI joined in congratulating the Special Rapporteur on his fourth report. He agreed with the view expressed by Mr. Kamto in 2002 that it was international law that stipulated the rule of nationality and municipal law that governed the attribution of nationality. The “genuine link” criterion could indeed restrict the scope of diplomatic protection and leave many corporations unprotected, unless the national State of the shareholders was allowed to protect them or the corporation when the link of nationality was not established. Draft article 18 guaranteed that right in the event of two exceptions taken from *Barcelona Traction*, whereas draft article 19 indicated that that was a proper right of the shareholders, not the corporation. That left a number of corporations without diplomatic protection. Some members wanted to give the State of nationality of the shareholders the right to exercise diplomatic protection on behalf of the corporation, but the amendments proposed to draft article 17, paragraph 2, did not do that. It was therefore preferable to clarify that point before referring the paragraph to the Drafting Committee.

18. With regard to draft article 18, he had no objection to providing for an exception in the two situations specifically cited by the Special Rapporteur in two separate articles, but he agreed with the Special Rapporteur about competing claims by States for the exercise of protection. Draft article 19 posed no problem since it codified the most common situation, that of an individual shareholder whose subjective right had been harmed, which corresponded to the general rules set forth in the part of the draft articles devoted to the diplomatic protection of natural persons. With regard to draft article 20, he felt that the draft articles should not accord more favourable treatment in the matter of continuous nationality to legal persons than to natural persons. He therefore supported its referral to the Drafting Committee.

19. Mr. RODRÍGUEZ CEDEÑO, referring to draft article 17, paragraph 2, said that the concept of the State of nationality of a corporation should be construed fairly broadly, even if that meant departing from the *Barcelona Traction* judgment. The criteria for determining nationality should be sought in municipal law, but in some cases that could give rise to the problem of multiple nationality. It must therefore be made clear that there could be only one State that had the right to exercise diplomatic protection as the State of nationality of the corporation, even though there might be many claims relating in one way or another to a single case. That solution might be difficult to translate into a rule, but it could be explained in the commentary. The pre-eminence of the State that was deemed to be the State of nationality should be based on a genuine link with the corporation, but with a fairly broad interpretation of that link and bearing in mind, as Mr. Brownlie had recalled, that ICJ had not gone to the heart of the matter because the issue of the nationality of a corporation had not come up in the *Barcelona Traction* case. Perhaps a working group should look into all those questions before draft article 17 was referred to the Drafting Committee.

20. Draft article 19 could be viewed as yet another exception to the rule in article 17—one which related to direct injury suffered by shareholders and which could

be included in article 18. That provision was acceptable, but its scope should be defined, and a clear-cut distinction must therefore be drawn between the infringement of the rights of shareholders owing to injury suffered by the corporation and the direct infringement of the rights conferred on shareholders by statutory rules and company law, of which examples were given in the *Barcelona Traction* judgment (para. 47). The commentary might be the place to explain that problem as well. As to the matter of which legal order would be called on to decide on those rights of shareholders, it must be the municipal law of the State in which the corporation was incorporated, including when the corporation was incorporated in the wrongdoing State, in which case the Special Rapporteur believed that the general principles of the law could be invoked.

21. Mr. ADDO said that draft articles 19 and 20 were acceptable as long as the words in square brackets at the end of article 20 were deleted.

22. Ms. ESCARAMEIA said that the informal proposal by Mr. Gaja on draft article 17 had the merit of solving at least two problems for those who did not want to expand the diplomatic protection of corporations: the connection with municipal law and the States whose municipal law did not assign nationality to corporations. Since the positions of members of the Commission were deeply split over draft article 17, paragraph 2, however, a working group should perhaps be asked to deal with that provision. Draft article 18, on the other hand, could now be referred to the Drafting Committee.

23. Draft article 19 raised one problem of form and several of substance. The problem of form concerned its relationship to other provisions. Draft article 19 was explicitly presented as an exception to articles 17 and 18, although in reality it was an exception on the same level as those in article 18. The Special Rapporteur dealt with that exception separately because he was extremely faithful to the *Barcelona Traction* decision and because the exception related to a slightly different situation, one that could even be dealt with in the part of the draft on natural persons. It would be preferable to transpose it to article 18, however, or at least to reconsider the relationship between the three provisions.

24. On the substance of draft article 19, the Special Rapporteur was right not to enunciate the content of the direct rights of shareholders, but it should nevertheless be explained in the commentary that it was for the laws of the State in which the corporation was incorporated to determine the content of those rights. As to which legal system was to determine that there had been a violation of the rights of shareholders, the Special Rapporteur was again right in saying that it should be the State of incorporation there as well, although, referring to the *ELSI* case, he also considered the possibility of invoking the general principles of law in certain cases. The Commission should give some thought to that possibility because some national systems might not define very clearly what constituted a violation of those direct rights, and it might therefore be useful to refer to general principles of law taken from several common systems of law. Sometimes companies incorporated under the law of a given State but, for certain aspects such as dispute settlement, decided to adopt the law of another State or international law. It should perhaps

be stated in the commentary that, if the injury to the direct rights of the shareholders related to those aspects, it was system of law chosen by the founding shareholders that should apply. With the inclusion of those clarifications in the commentary, article 19 could be referred to the Drafting Committee.

25. For draft article 20 on the continuous nationality of corporations, the Special Rapporteur applied the same criteria as for continuous nationality of natural persons, while adapting them to take account of the fact that corporate persons changed nationality much less easily than natural persons. That approach might cause problems, however, if, in relation to draft article 17, paragraph 2, the strict rule of incorporation was abandoned in favour of an appropriate link, which might result in the designation of the State of nationality of the shareholders or of a majority of them as the State of nationality of the corporation. Shares were traded frequently and majorities changed, however, hence the need for caution in respect of the criteria for determining the nationality of corporations. The proviso set out in square brackets in article 20 was justified by the “grey area in time” which the Special Rapporteur mentioned in paragraph 104 of his report, and during which both the State of nationality of the corporation and the State of nationality of the shareholders could bring claims. Article 20 should thus be referred to the Drafting Committee with the square brackets around the final part deleted and with the necessary clarifications given in the commentary.

26. Mr. GALICKI, referring to draft article 17, paragraph 2, said there was agreement on the rule that the State of nationality of a corporation was the State in which the corporation was incorporated. He therefore proposed that the disputed part of the provision, which introduced the criterion of registered office, should be replaced by the phrase “or which, in another way, recognizes the acquisition of its nationality by that corporation”, which was similar to the wording proposed by Mr. Brownlie. The text proposed by the Special Rapporteur for draft article 19 was entirely acceptable. Draft article 20, on the other hand, raised first of all a problem of language. If nationality was considered to be the decisive factor, then the phrases “a corporation which was incorporated under its laws” and “the State of incorporation of the defunct company” should be replaced by the words “a corporation which has its nationality” and “the State of nationality of the defunct company”, respectively. But article 20 also posed a problem of substance owing to the fact that, as had been pointed out, the proviso in square brackets might be at variance with draft article 18, subparagraph (a). In respect of a single situation, namely, when a corporation “ceases to exist as a result of the injury”, subparagraph (a) stipulated that the State of nationality of the shareholders could exercise diplomatic protection, thereby automatically excluding the State of incorporation, since there could not be multiple nationality, yet the second part of article 20 stated that the State of incorporation could continue to present a claim in respect of the corporation. One way of removing that contradiction might be to divide article 20 into two paragraphs, the second to consist of the bracketed part of the text, from which the words “provided that” would be deleted, and to add the words “with the exception provided in article 20, paragraph 2”

at the end of draft article 18, subparagraph (a), after the word “incorporation”. Of course, the right accorded to the State of incorporation in paragraph 2 would prevail over the right granted to the State of the nationality of the shareholders in draft article 18, subparagraph (a).

27. Mr. FOMBA said that draft article 19 raised, *inter alia*, the question of the distinction between rights and interests and the procedural consequences of that distinction, as well as the more fundamental question whether there was always a very clear-cut distinction between the rights of a corporation and the rights of the shareholders. There was room for doubt in that regard if reference was made to paragraphs 88 and 91 of the report of the Special Rapporteur, as well as to paragraph 89, which indicated that, even in the *ELSI* case, ICJ had failed to expound on the rules of customary international law on the rights of the shareholders to organize, control and manage a company. Did such rules really exist, and were they not primarily rules of municipal law? In paragraph 90 of his report, the Special Rapporteur indicated that the proposed text left unanswered the questions of the content of the shareholders’ rights and of the applicable legal order. On the first question, starting from the observation that the *Barcelona Traction* decision mentioned only the most obvious rights of shareholders by way of illustration, the Special Rapporteur took the view that it was for the courts to determine, in each individual case, the limits of such rights. On the second question, paragraph 92 of the report contained intellectually stimulating arguments, but raised questions that were difficult to resolve in practice.

28. The main question raised in draft article 20 was that of the situation of practice with regard to the admissibility, establishment and application of the principle of the continuous nationality of corporations. It was the answer to that question that should be given consideration and that must determine the course to be followed. There were two possibilities. The first was that, by its nature, content and functioning, nationality was the same for both natural and legal persons and was equally important in both cases, so that parallels could be drawn and identical solutions found; the second was that no such parallels existed and a cautious and clear-sighted approach had to be taken in establishing the same rule for the two categories. Contrary to what the Special Rapporteur stated in paragraph 103 of his report, the issue was thus much more one of logic than one of equity. Article 20 appeared to be based on an analogy in relation to the sociological and legal issues underlying the nationality of natural and legal persons, but only a more in-depth analysis of practice would show whether that was really true.

29. In conclusion, he believed that the proposals made by the Special Rapporteur in draft articles 19 and 20 were not without theoretical and practical importance, but that they should be examined more closely and carefully, taking into account the conclusions to be reached by the Commission on the questions raised during the discussion and, if necessary, within the framework of a working group.

30. Mr. AL-BAHARNA noted that, in his fourth report, the Special Rapporteur dealt extensively with the *Barcelona Traction* decision and the underlying principles. In that decision, ICJ had distinguished between two entities, the company and the shareholders. Establishing a close

and permanent connection between the company and, in the case in question, Canada, the Court had expounded the principle that the right of diplomatic protection in respect of a corporation might be exercised by the State under the laws of which the corporation was incorporated and in the territory of which it had its registered office. While rejecting the applicability of the *Nottebohm* principle, the Court had nevertheless accepted that in two exceptional situations, diplomatic protection could be exercised by the State of nationality of shareholders, although it had declined to recognize the existence of a secondary right of diplomatic protection, even when the State of incorporation declined to exercise that right. The Special Rapporteur recognized that the Court's decision had been subjected to criticism and that it might be necessary to depart from it and to formulate a rule that accorded more fully with the realities of foreign investment and encouraged foreign investors to turn to the procedures of diplomatic protection rather than to the protection of bilateral arrangements. He also recalled that, in the decision, the Court had not been codifying international law, but settling a dispute. Nevertheless, in paragraph 27 of his report, the Special Rapporteur characterized the *Barcelona Traction* decision as an accurate statement of the law on the diplomatic protection of corporations, a contradiction which led him to provide seven options for the Commission in relation to the nationality of corporations and the formulation of rules on the diplomatic protection of companies and/or shareholders.

31. In his view, option 1 (the State of incorporation) was the best one because it was the safest one in that it adopted the rule expounded in *Barcelona Traction*, whereas option 4 (the State of economic control), which some members seemed to support, had disadvantages, as explained in paragraphs 32 to 36 of the report. He therefore endorsed the text proposed by the Special Rapporteur for draft article 17, paragraph 2, the phrase in square brackets being retained—and the square brackets thus being deleted—with the word “and”. The criterion of registered office was perhaps superfluous, since registration was the natural consequence of incorporation, but, for the sake of consistency with the wording used by ICJ, it should be maintained.

32. With regard to draft article 18, he proposed that the word “place” in subparagraph (a) should be replaced by the word “State”. Draft article 19 was acceptable, as was draft article 20, subject to removal of the square brackets at the end. He was open to a more flexible definition of the link between corporations and their State of nationality that went beyond *Barcelona Traction*, but the proposals by Mr. Brownlie and Mr. Gaja were not helpful. Mr. Brownlie's proposal was very wide, whereas a definition must be precise and succinct.

33. Mr. GAJA read out his proposal for a new text for draft article 17:

“A State according to whose law a corporation was formed and in which it has its registered office is entitled to exercise diplomatic protection as the State of nationality in respect of an injury to the corporation.”

34. The proposal aimed to take into account the concerns expressed about the fact that some States might not

have any rules on the nationality of corporations. Another purpose was to establish a rule for the sole purpose of diplomatic protection and not to superimpose new criteria of nationality on those used by member States.

35. Mr. PELLET said that Mr. Gaja's proposal did not meet his concerns at all. Mr. Brownlie's proposal was more conducive to a compromise, as were those of Mr. Economides and Mr. Melescanu.

36. The CHAIR invited the Special Rapporteur to sum up the debate on draft article 17.

37. Mr. DUGARD (Special Rapporteur) pointed out that draft article 17, paragraph 1, reaffirmed the basic principle of *Barcelona Traction*. Most of the members had endorsed it; the discussion on the subject had dealt with drafting questions. He therefore recommended that it should be referred to the Drafting Committee.

38. As far as draft article 17, paragraph 2, was concerned, however, the debate had taken a new turn, and it had now been suggested that criteria other than State of incorporation, registered office and *siège social* should be adopted. Some of the proposals, such as Mr. Gaja's, were cautious. That was also the case with Mr. Brownlie's, which he interpreted as making criteria more flexible so as to cover the *siège social*, but not including a reference to the State of nationality of the shareholders. The proposals by Mr. Economides and Mr. Melescanu were more radical and implied lifting the corporate veil in order to identify the State with which the corporation was most closely connected and which thus established the locus of the economic control of the corporation. That approach would be difficult to reconcile with *Barcelona Traction*; it would be in line with the *Nottebohm* case, which emphasized the principle of the link with the State. As the Commission had not followed the *Nottebohm* test in draft article 3 with regard to natural persons, however, it might be illogical to do so for legal persons.

39. The other problem which had been raised related to dual protection, or situations where both the State of incorporation and the State of the *siège social* exercised diplomatic protection for the same corporation, a notion which had been supported by several judges in the *Barcelona Traction* case. In any event, there would not be a multiplicity of States able to act, contrary to what might be the case if the Commission were to recognize the State of nationality of the shareholders, and, as had been noted by Judge Jessup, whom he had cited in paragraph 104 of the report, “the Respondent can eliminate one claimant by showing that a full settlement has been reached with the other” [p. 200]. In its judgment in *Barcelona Traction*, however, ICJ had clearly been hostile to the notion of dual protection or of a secondary right to protection in respect of the corporation and shareholders, a point which had been made in paragraph 88 of the judgment, which stated that “where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim”. That might be interpreted to mean that there were several national States which alone might make a claim, or that only one State might make such a claim.

40. To pursue its work on paragraph 2, the Commission could either continue the debate in plenary, which he did not recommend, or refer the paragraph to the Drafting Committee or a working group on the subject. Many members had supported the underlying idea in paragraph 2, if not necessarily as formulated, namely a provision which emphasized formal links between the corporation and the State exercising diplomatic protection. However, if many members supported the proposal to include the notion of genuine link, notably by establishing the place of the economic control of the corporation, then the issue should be examined in a working group. He thought that it would be useful to take a vote on whether the matter should be referred to the Drafting Committee or to a working group.

41. Following a vote on whether draft article 17, paragraph 2, should be referred to the Drafting Committee or whether a working group should be set up to consider the matter in depth, the CHAIR said that, since a slight majority was in favour of the second option, the matter would be considered by an open-ended working group, which the Special Rapporteur would chair.

It was so decided.

42. Mr. DUGARD (Special Rapporteur) said that, in the light of Mr. Gaja's proposal that the two paragraphs should be merged, it might be wise to withhold a final decision on draft article 17, paragraph 1, until the working group had reached a decision. He urged the members of the Commission to attend the working group to avoid reopening the debate on the entire issue later in plenary.

43. Mr. KAMTO said that it would be preferable for the working group to focus exclusively on paragraph 2, even if it meant that the Drafting Committee would consider later whether or not the two paragraphs should be merged. The concept of nationality was at the heart of diplomatic protection, as was clearly shown in paragraph 1, which adopted the wording used in *Barcelona Traction*. He therefore hoped that the Commission would not lose sight of that fundamental idea, which absolutely must be included in the draft article.

44. The CHAIR confirmed that the working group would focus on draft article 17, paragraph 2.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/529, sect. D, A/CN.4/531⁴)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

45. Mr. Sreenivasa RAO (Special Rapporteur), introducing his first report on the legal regime for allocation of loss in case of transboundary harm arising out of haz-

ardous activities (A/CN.4/531), said that the report was divided into three parts, which he would consider one by one.

46. Part I of the report summarized the work of the Commission on the question of international liability and, in particular, the work of the two previous special rapporteurs on the topic, Mr. Quentin-Baxter and Mr. Barboza. The draft articles prepared in by the Working Group of the Commission at its forty-eighth session, in 1996, had dealt, *inter alia*, with a regime of negotiated liability aimed at reaching an equitable settlement on the basis of "the principle that the victim of harm should not be left to bear the entire loss".⁵

47. In the course of the Commission's work, differences of opinion had arisen on four important aspects of the issue that remained unresolved, the first of which was the linkage between prevention and liability in the approach adopted by Mr. Quentin-Baxter and Mr. Barboza. However, that question had been resolved by a decision of the Commission at its forty-ninth session to deal with the two topics separately.⁶ As a consequence, the Commission had been able to adopt, at its fifty-third session, in 2001, the draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities.⁷ The other three issues had been (a) State liability and the role of strict liability as the basis for creating an international regime; (b) the scope of activities and the criteria for delimiting "transboundary damage"; and (c) the threshold of damage.

48. First, it had been felt that the emphasis placed on State liability was misplaced. It had been feared that, in the absence of established scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, the suggested approach could amount to absolute liability for non-prohibited activities, which would be unacceptable to States (para. 18 of the report). It had also been felt appropriate not to place undue emphasis on strict or absolute liability at the international level, where States adopted a more pragmatic approach to compensation, without relying upon any one consistent concept of liability.

49. The two previous special rapporteurs had been careful to limit the scope of activities, placing the emphasis on the physical consequences of transboundary activities. To that end, while it had decided not to draw up a list of activities to which the draft articles would apply, the Commission had set clear delimiting criteria, excluding from the scope of the articles, *inter alia*, harm caused to the global commons and leaving that issue for possible subsequent examination on the basis of a separate mandate from the General Assembly. He referred to that matter in paragraph 28 of his report.

50. With regard to the threshold of damage triggering the obligations imposed by the regime of prevention, the Commission had considered that the threshold should be "significant" harm. Given that there was a wide consensus in favour of fixing such a threshold under any model

⁵ *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 102 (art. 21).

⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 168 (a).

⁷ *Yearbook ... 2001*, vol. II (Part Two), para. 97, pp. 146–148.

⁴ See footnote 2 above.

of allocation of loss in case of injury arising from hazardous activities, the report recommended accepting the same threshold of “significant harm” for triggering the obligation to compensate. As the Special Rapporteur stated in paragraph 37 of his report, the Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law set up at the Commission’s fifty-fourth session, in 2002, to settle the direction of the work remaining on the subject of international liability had recommended that the Commission should limit the scope of the topic to the same activities as were covered by the regime of prevention, but that it should also concentrate on harm caused for a variety of reasons, but not involving State responsibility; that it should deal with the topic of allocation of loss among different actors involved in the hazardous activities; and that it should include within the scope of the topic loss to persons, property (including the elements of State patrimony and national heritage), and the environment within national jurisdiction.⁸

51. Finally, part I of the report noted three broad policy considerations which had been the basis for consideration of the topic of international liability, namely: (a) that each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (b) that the protection of such rights and interests required the adoption of measures of prevention and, if injury occurred, measures of reparation; and (c) that, insofar as was consistent with the two preceding principles, the innocent victim should not be left to bear his or her loss or injury unaided (paras. 43–46). The draft articles adopted in 2001⁹ already addressed the first objective and, partially, the second. The challenge now facing the Commission was to address the remaining elements of the policy, namely, encouraging States to conclude international agreements and adopt legislation and implementing mechanisms for prompt and effective remedial measures, including compensation in case of significant transboundary harm.

52. While there was general support for the proposition that any regime of liability and compensation should aim at ensuring that the innocent victim was not left to bear the loss resulting from transboundary harm arising from hazardous activity, it was nevertheless acknowledged that full and complete compensation might not be possible in every case, for a variety of reasons. At the same time, any regime for allocation of loss should be intended to provide incentives for all those concerned with the hazardous operations to take preventive or protective measures in order to avoid damage; to compensate damage caused to any victim; and to serve an economic function, by internalizing costs.

53. In accordance with the recommendations of members of the Commission and States in the General Assembly, section A of part I of the report began with a review of sectoral and regional treaties and other instruments providing for sharing of risk and costs of economic loss resulting from any transboundary harm (paras. 47–113). Those included the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,

of 1993, which had not yet been ratified, but which, as a model, offered important pointers for the Commission’s work, particularly on the definition of damage; the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal; and instruments establishing the liability regimes governing damage from oil pollution and nuclear activities and the liability regime governing outer space activities.

54. New instruments were being negotiated, particularly in the European context. Other international and regional instruments in force providing for the creation of liability and compensation regimes included the Convention on Biological Diversity and its Cartagena Protocol on Biosafety and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, to cite only a few.

55. Those instruments, some of which were not yet in force or had not been widely ratified, nevertheless had a number of common features, addressed in section B of part II of the report (paras. 114–121), namely:

(a) That State liability was an exception, accepted only in the case of outer space activities;

(b) That liability in the case of damage which was not nominal or negligible but more than appreciable or demonstrable was channelled through a single entity and, in the case of stationary operations, to the operator of the installation. However, other possibilities existed. For instance, in the case of ships, the owner, not the operator, bore liability. The real underlying principle did not seem to be that the “operator” was always liable, but that it was the party with the most effective control of the risk at the time of the accident who was made primarily liable;

(c) The liability of the person in control of the activity was strict, but limited, in the case of hazardous or dangerous activities. That was justified as a necessary reflection of the “polluter pays” principle, which, however, could in certain cases be replaced by the principle of equitable sharing of risk, with a large element of State subsidy;

(d) Where the obligation to compensate was based on strict liability, it was also usual to limit the liability to amounts that would be generally insurable. Under most of the schemes, the operator was obliged to obtain insurance and other suitable financial securities in order to take advantage of the scheme. The scheme of limited liability was, of course, open to criticism as not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits were set too low, it could even become a licence to pollute. Furthermore, the system might not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury;

(e) Most liability regimes concerning dangerous activities provided for additional funding sources to meet claims of damages. States took a share in the allocation of loss. The other shares, however, were allocated to a common pool of funds created by contributions either from operators of the same type of dangerous activities or from

⁸ *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 448.

⁹ See footnote 7 above.

entities for whose direct benefit the dangerous or hazardous activity was carried out;

(f) Strict liability had been recognized in a number of countries around the world belonging to all the legal systems. It was arguably a general principle of international law or, in any case, could be considered as a measure of progressive development of international law. In the case of activities which were not dangerous but still carried the risk of causing significant harm, there was perhaps a better case for liability to be linked to fault or negligence;

(g) On its own merits, fault-based liability might perhaps better serve the interests of the innocent victims and should be retained as an option for liability. It was not unusual in such cases to give the victim an opportunity to have recourse to liberal rules of evidence and inference. By reversing the burden of proof, the operator might be required to prove that he had taken all the care expected of a reasonable and prudent person, proportional to the risk of the operation.

56. Section C of part II of the report (paras. 122–149) addressed a few important questions concerning the regimes of civil liability, which were rooted in the development of the law in each State and its application by their domestic jurisdictions, which varied considerably from State to State, depending upon the system of law prevailing.

57. Thus, the question of the causal link between the damage caused and the activity alleged to have given rise to it and the related issues concerning foreseeability, proximity or direct loss were not treated uniformly. It was to be noted that there was no support for providing for liability for damage to the environment *per se*. Furthermore, in the case of damage to the environment or natural resources, there was agreement to recognize a right of compensation or reimbursement for costs incurred by way of reasonable or, in some cases, “approved” or “authorized” preventive or responsive measures of reinstatement (para. 131). The “reasonableness” criterion was defined to include those measures found in the law of the competent court to be appropriate, proportionate and cost-effective.

58. An analysis of the civil liability regime showed that the legal issues involved were complex and could be resolved only in the context of the merits of a specific case. The outcome would also depend on the jurisdiction in which the case was instituted and the applicable law. While it was possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, it was, in his view, not possible to draw any general conclusions on the system of civil liability. Such an exercise, if it was considered desirable, would properly belong to forums concerned with the harmonization and progressive development of private international law.

59. It was against that background that, in part III of the report (paras. 150–153), he put forward a few submissions for consideration. While the schemes examined had common elements, each was tailor-made for its own context. It did not follow that in every case the best solution was to negotiate a liability convention, still less one based on any particular set of elements. The duty could equally well be discharged, if considered appropriate, by allowing the plaintiff to sue in the most favourable jurisdiction or

by negotiating an *ad hoc* settlement. It was best to give States sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss that the Commission might wish to endorse should be both general and residual.

60. Having regard to the earlier work of the Commission on the topic, in paragraph 153 of his report, he put forward various submissions with a view to developing that model. If those recommendations were generally acceptable, they could provide a basis for formulating more precise draft articles on the topic of international liability, with a view to the Commission’s fully discharging its mandate. Members might also like to comment on the type of instrument that would be suitable and the manner in which the Commission could best discharge its mandate. One possibility would be to draft a few articles and to recommend that they should be adopted as a protocol to the draft framework convention on the regime of prevention. However, he would go along with any suggestions that met with the approval of most members.

The meeting rose at 1 p.m.

2763rd MEETING

Tuesday, 27 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA said she hoped that the viability of the entire project would not again be at issue, in view of

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).