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**Summary record of the 2775th meeting**

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## 2775th MEETING

Tuesday, 15 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### Cooperation with other bodies (continued)\*

[Agenda item 11]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIR welcomed the President of the International Court of Justice and invited him to address the Commission. Judge Shi Jiuyong had himself served on the Commission from 1987 to 1993 and was thus familiar with the Commission's work.
2. Mr. SHI (President of the International Court of Justice) said the Court was most appreciative of the fact that exchanges of views with the Commission had become customary, and it was a particular pleasure for him to return to the very room where he had sat as a member of the Commission between 1987 and 1993, and as Chair in 1990.
3. The Court was the principal judicial organ of the United Nations, with the function of deciding disputes between States in accordance with international law, whereas the Commission was charged with the codification and progressive development of international law. The link between the two spoke for itself. Both contributed to the strengthening of international law. There was, moreover, interaction between the two bodies at every level. Some Commission members appeared regularly before the Court as counsel or agents of parties, bringing to bear not only their advocacy skills but also their valuable knowledge of the Commission's work, which in turn nourished the Court's deliberations. More important still was the fact that, since the election to the Court of Sir Benegal Rau in 1952, members of the Commission had regularly been elected to sit as judges of the Court. Two had been elected in October 2002, with the result that, of the current 15 Judges, 7 were former members of the Commission. Furthermore, several members of the Commission had served as judges *ad hoc* in cases before the Court.
4. The close relationship between the two was completed by the profound respect and consideration shown by each for the other's work. While the Commission systematically referred to the judgements of the Court in its codification enterprise, the Court had similar recourse to the Commission's work to determine the content of the law or interpret various rules of international law. If the Commission's work was only a subsidiary means of determining international law, according to Article 38 of the Statute of the International Court of Justice, its very high quality had undoubtedly made it one of the most reliable, and relied upon, of those subsidiary means.
5. The first occasion on which the Court had referred to the Commission's work was in its judgments on the *North Sea Continental Shelf* case in 1969, when it had had recourse to the Commission's discussions on the question of delimitation between adjacent States to determine the status of the principle of equidistance embodied in article 6 of the 1958 Convention on the continental shelf. The Commission's work on the law of the sea had subsequently been used by the Court on several occasions, in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case and the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case.
6. The Commission's work had also been useful to the Court in many other areas. In the *Kasikili/Sedudu Island* case, and more recently in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court had used the Commission's work to interpret various provisions of the 1969 Vienna Convention. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court had used the Commission's work to confirm the customary status of the principle of the prohibition of the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations. Article 12 of the 1978 Vienna Convention had similarly been found by the Court to be customary, notably on the basis of the commentary on article 12 of the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-sixth session,<sup>1</sup> in the *Gabčíkovo-Nagymaros Project* case. And, in the *Marine Delimitation and Territorial Questions between Qatar and Bahrain* case, the Commission's work had been used to confirm the definition of arbitration.
7. It was in the domain of State responsibility, more than any other, that the potential complementarity between the work of the Court and of the Commission had best been illustrated. The Commission's codification of the rules of State responsibility had been an invaluable guide to the Court when it had dealt with complex issues such as that in the *Gabčíkovo-Nagymaros Project* case. The Court had referred extensively to the draft articles on State responsibility adopted by the Commission on first reading<sup>2</sup> and to the accompanying commentary to interpret the notion of the state of necessity, to distinguish between a wrongful act itself and acts of a preparatory character, and to determine the conditions for lawful resort to countermeasures.

<sup>1</sup> *Yearbook ... 1974*, vol. II (Part One), p. 197, para. 2 of the commentary.

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), chap. III, sect. D, pp. 58–65.

\* Resumed from the 2764th meeting.

In doing so, it had not simply taken note of the Commission's work but had, in its turn, reinforced the value of the draft articles by declaring some of the principles contained therein as being of a customary nature; and it had done so some four years before the adoption of the draft on second reading<sup>3</sup> or before the General Assembly took note of the draft articles.<sup>4</sup> The recognition of the status of the draft articles had been further confirmed two years later in the advisory opinion in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, when the Court had declared that the principle of attribution to the State of the conduct of its organs, reflected in the then article 6 (subsequently article 4) of the draft articles, possessed a customary character.

8. There had been important changes at the Court over the past year. Three new members had been elected—Judge Tomka from Slovakia, Judge Simma from Germany and Judge Owada from Japan—and the first two had been members of the Commission. Judge Koroma and he himself had been re-elected.

9. Since Judge Guillaume had addressed the Commission at the previous session, the Court had rendered a final judgment in three cases and ordered provisional measures in two others. The total number of 24 cases on the Court's docket remained the same, however, since three new cases had been filed with the Court over the past 10 months, a sure sign of its vitality and the trust placed in it by States.

10. The Court had handed down judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. In 1994, Cameroon had seized the Court of a legal dispute with Nigeria in respect of sovereignty over the Bakassi peninsula. It had subsequently widened the scope of its application, requesting the Court to determine the land boundary between the two States from Lake Chad to the sea and to delimit their respective maritime areas. It had also claimed reparation from Nigeria on account of damage suffered as a result of the occupation of Bakassi and Lake Chad and of various border incidents. Nigeria had responded by raising eight preliminary objections on the grounds of lack of jurisdiction and inadmissibility, which the Court had addressed in a judgment of 11 June 1998. Nigeria had gone on to submit a request for interpretation of that judgment (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*), on which the Court had ruled on 25 March 1999. Nigeria had then submitted counterclaims and Equatorial Guinea an application for permission to intervene, whose admissibility the Court had had to address.

11. The Court had held that treaties concluded during the colonial period, whose validity it confirmed, had fixed the boundary between Cameroon and Nigeria. In consequence, it had decided that, pursuant to the Agreement between Great Britain and Germany respecting (1) the Settlement of the Frontier between Nigeria and the Cameroons, from Yola to the Sea, and (2) the Regulation of

Navigation on the Cross River,<sup>5</sup> sovereignty over Bakassi lay with Cameroon. It had also determined the boundary in the Lake Chad area in accordance with the exchange of notes between the United Kingdom and France respecting the boundary between the British and French spheres of the Cameroons Mandated Territory<sup>6</sup> and rejected Nigeria's claims in that area. The Court had also defined the precise line of the approximately 1,500-kilometre land boundary between the two States in 17 other disputed sectors. It had gone on to determine the maritime boundary between the two States, taking into account the interests of third parties, including those of Equatorial Guinea, which had intervened in the oral proceedings. The Court had begun by affirming the validity of the Second Declaration of Yaoundé<sup>7</sup> and the Maroua Declaration,<sup>8</sup> whereby, in 1971 and 1975, the Heads of State of Cameroon and Nigeria had agreed on the maritime boundary separating the territorial seas of the two States. With regard to the maritime boundaries farther out to sea, the Court had adopted as the delimitation the equidistance line between Cameroon and Nigeria, which appeared to produce equitable results as between the two States. Finally, it had held that each State was under an obligation expeditiously and unconditionally to withdraw its administration and military and police forces from areas falling within the sovereignty of the other.

12. In December 2002, the Court had concluded the proceedings between Indonesia and Malaysia in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*. In its judgment, the Court had found that article IV of the 1891 Convention between Great Britain and the Netherlands Defining Boundaries in Borneo<sup>9</sup> for the purpose of defining the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which were under British protection did not establish any allocation line between the parties in the area of the islands, and that none of the parties had obtained title over the islands by succession. The Court had therefore relied on effectivities claimed by the parties and found that sovereignty over Pulau Ligitan and Pulau Sipadan lay with Malaysia.

13. The Court's most recent judgment had been in the case of the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*). The Court had recalled, first, that under Article 61 of its Statute, a revision could be requested by a party only upon discovery of a new fact, namely a fact that had existed at the time the judgment had been given but had been unknown to the Court and to the party claiming revision. The Court had determined that a fact that

<sup>5</sup> London, 11 March 1913 (Treaty Series No. 13 (1913) (London, H. M. Stationery Office), p. 231).

<sup>6</sup> London, 9 January 1931 (*ibid.*, No. 34 (1931) (London, H. M. Stationery Office), p. 1).

<sup>7</sup> ICJ, *Application Instituting Proceedings* of 29 March 1994, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* case, annex 7.

<sup>8</sup> United Nations, *Treaty Series*, vol. 1237, no. 19976, p. 319.

<sup>9</sup> London, 20 June 1891 (*British and Foreign State Papers, 1890–1891*, vol. 83 (London, H. M. Stationery Office, 1897), p. 42).

<sup>3</sup> See 2751st meeting, footnote 3.

<sup>4</sup> General Assembly resolution 56/83 of 12 December 2001, para. 3.

occurred several years after a judgment had been given was not “new” within the meaning of Article 61. The admission of the Federal Republic of Yugoslavia to the United Nations<sup>10</sup> had occurred in November 2000, well after the 1996 judgment. The Court had accordingly found the application of the Federal Republic of Yugoslavia inadmissible.

14. The Court had also handed down orders for the indication of provisional measures in two cases filed over the past year. In the case concerning *Avena and Other Mexican Nationals*, Mexico had initiated proceedings against the United States regarding alleged violations of articles 5 and 36 of the Vienna Convention on Consular Relations, with respect to 54 Mexican nationals who had been sentenced to death in certain states of the United States. On 5 February 2003, the Court had indicated to the United States that it must “take all measures necessary” [pp. 91–92] to ensure that three Mexican nationals, for whom it found that the condition of urgency had been met, were not executed, pending a final judgment of the Court. It had also stated that the United States Government should inform it of all measures taken in implementation of that order and decided to remain seized of the matters forming the subject of the order until it had rendered its final judgment.

15. In the case concerning *Certain Criminal Proceedings in France*, Republic of the Congo had filed an application instituting proceedings against France seeking an annulment of the investigation and prosecution measures taken by the French judicial authorities further to a complaint concerning crimes against humanity and torture allegedly committed in Congo against individuals having Congolese nationality, filed by various human rights associations against the President, the Minister of the Interior and other individuals, including the Inspector-General of the Congolese armed forces and the Commander of the Presidential Guard. On 17 June 2003, the Court had found that the circumstances were not such as to require the exercise of its power under Article 41 of its Statute to indicate a provisional measure and rejected Congo’s request. In its application, Congo had indicated that it proposed to found the jurisdiction of the Court, pursuant to article 38, paragraph 5, of the Rules of the Court, “on the consent of the French Republic, which will certainly be given” [p. 103]. It had therefore been only France’s consent, on 8 April 2003, to the Court’s jurisdiction to entertain the application that had made it possible to open the proceedings. The case was exceptional in that it was the first time since the adoption of article 38, paragraph 5, in 1978 that a State had accepted, without prior special agreement, the invitation of another State to recognize the Court’s jurisdiction to entertain a case directed against it.

16. The Court had also taken a number of other decisions with which he would not burden the Commission. He would mention only that the Court had acceded to the request of the parties to form special chambers of five judges to deal with the case concerning the *Frontier Dispute (Benin/Niger)* case and the case concerning *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Fron-*

*tier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*.

17. The Court’s docket remained heavily burdened, and a number of cases were, or would shortly be, ready for hearing. The Court would therefore have to maintain its high level of activity. The *Oil Platforms* case was currently at the deliberations stage. Hearings would also be organized in several other cases before the end of the calendar year. The Court was considering ways and means of improving its working methods so as to ensure timely and efficient exercise of its judicial functions.

18. The Court and the Commission, in performing their respective tasks, each had to be constantly aware of the work accomplished by the other. The Commission’s programme of work for the current session was heavy, and many of the items on the agenda were of the highest relevance for several cases on the Court’s docket, including diplomatic protection, reservations to treaties, unilateral acts of States, the responsibility of international organizations, and others. The fragmentation of international law was also of interest. He assured the Commission that the Court would remain as attentive to its work as it had always been.

19. Finally, he congratulated the Commission on the fact that its proceedings were conducted in all the six official languages of the United Nations, whereas he had been obliged to make his statement in English because the official languages of the Court were, for historical reasons, restricted to English and French.

20. The CHAIR thanked the President of the Court for his very interesting statement and the useful information on the appointment of new judges, interaction between the Commission and the Court, the latter’s judgments, its docket and its official languages.

21. Mr. BROWNLIE asked whether the oral arguments presented to the Court were of value.

22. Mr. SHI (President of the International Court of Justice) said that the oral statements of the parties’ counsel helped members of the Court greatly in their deliberations, especially in cases like that concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, where counsel for Nigeria had raised eight points regarding jurisdiction and admissibility that had been argued so well and so forcefully that the members had spent long hours in closed session analysing those thought-provoking contentions.

23. The oral sittings proved tiring for elderly judges, but they afforded an opportunity to cover ground not dealt with in the written pleadings. For that reason, the members of the Court always read the minutes of the oral submissions with great care. The oral arguments of counsel were therefore heeded and were most valuable.

24. Ms. ESCARAMEIA said that the presentation of the substantive connection between the Commission and the Court had been very informative. Since the fragmentation of international law was a very real problem, she wished to know whether there were any contacts between ICJ, ITLOS, the *ad hoc* criminal tribunals and the International Criminal Court. Had such exchanges been dis-

<sup>10</sup> General Assembly resolution 55/12 of 1 November 2000.

cussed in ICJ? Had the latter invited the presidents of the other courts to describe their work, or would such a move detract from a court's independence and autonomy? Would such links foster an awareness of the difficulties encountered by each judicial body?

25. Mr. SHI (President of the International Court of Justice) said that the members of ICJ were concerned about the fragmentation of international law. To date, there had been no contacts between the various specialized judicial bodies, although it was indeed vital to arrive at a uniform interpretation of certain points of international law. The members of the Court had not discussed the matter formally, although they had exchanged views on the subject behind the scenes.

26. Some of the courts in question were not part of the United Nations system, while others were subsidiary organs of the Security Council. Nevertheless, it would be helpful if the General Assembly were to adopt a resolution indicating how to deal with the fragmentation of international law in international judicial bodies, some of which held differing views on specific legal issues.

27. Judge Guillaume, former President of the Court, had written a number of essays on the topic in which he had suggested that the Court, as the principal judicial organ of the United Nations, which considered all kinds of questions in the sphere of private and public international law, might give advisory opinions to other judicial bodies in the event of differences of interpretation. In the General Assembly, however, some States had rejected that idea on the grounds that it would turn the Court into an appeal body and the international community, as a whole, was not yet ready to accept such a step.

28. Mr. Sreenivasa RAO said it was gratifying that the President of the Court had mentioned the productive interactive relationship between the Court and the Commission. The workload and the complexity of the cases brought before the Court called for continuous adjustment and methodological reforms on its part. In that connection, the value of oral pleadings must be enhanced by introducing greater informality into them so they were no longer merely a repetition of the contents of written submissions, but became lively exchanges which would allow the Court to reach the crux of an argument.

29. The Court, other international judicial bodies and the Commission should contribute to the harmonious interpretation of legal issues in order to overcome the fragmentation of international law. In the beginning, several opinions might exist, but, as time went by, dissenting opinions often became the view of the majority. It was quite a normal process, and a creative means of fostering it must be found.

30. Mr. SEPÚLVEDA said that Judge Shi's description of the links between the Court and the Commission had been of particular interest to him, especially in the light of the Planning Group's recent discussion of relations between the Sixth Committee and the Commission. At times, those two bodies, both of which had important legal functions, seemed to be disconnected, although, admittedly, the Sixth Committee focused more on the politi-

cal aspects of issues, whereas the Commission's concerns were predominantly of a legal nature.

31. Judge Shi had drawn attention to the fact that the participation of members of the Commission as counsel in cases being heard by the Court raised the Commission's profile and that the opinions of the Commission, because of their soundness, served as a basis for the Court's decisions and judgments. In addition, some members of the Commission went on to become judges at the Court. The discussion which had just taken place had served to emphasize the intrinsic importance of the Commission.

32. The President of the Court, as a former representative in the Sixth Committee, no doubt knew what sort of links should exist between the Sixth Committee and the Commission. His presence at the Commission meeting had underlined the high esteem in which the Commission's members were held as they strove to achieve a better legal order.

33. Mr. MOMTAZ asked what difficulties the Court encountered in the exercise of its judicial functions and whether it was contemplating any revision of its Rules.

34. Mr. SHI (President of the International Court of Justice) said that, since the Court dealt with disputes between States, it had to respect the sovereign equality of those States and, as a result, had to allow them enough time to prepare their cases. It meant that well over two years could elapse between the submission of the original application, or the notification of a special agreement, and the presentation of replies and rejoinders in response to the parties' memorials and counter-memorials. That written stage was then followed by oral hearings for which some parties' agents required an additional five to six weeks of preparation.

35. Once the written pleadings were submitted and the oral hearings finished, the internal judicial procedure began. Before the formal deliberations in chamber, and in order to ensure the quality of the Court's judgments, each member had to write what were called Notes and were in fact preliminary judgments, addressing all the legal issues. Usually the drafting of the Notes took about a month and their translation another several weeks. They were then distributed to all members, and another week or so was allotted for them to be studied, after which the formal deliberations began.

36. Those lasted a week on average, two weeks in particularly difficult cases, and then began the process of drafting the Court's judgment. By the time the judgment was considered by the Court on second reading, several more weeks would have passed and various revisions made. A formal vote was then taken, following which individual opinions could be written. Unlike officials of domestic courts, members of the Court received very little assistance from law clerks, of which there were only five for the whole institution, and their recruitment had been authorized only a year ago.

37. It was thus very clear that the Court's proceedings were extremely time- and labour-intensive. Efforts could certainly be made to simplify the proceedings, but nothing must be done that might diminish the quality of the

judgments, and the reasoning behind them must be very clearly explicated.

38. A number of changes aimed at improving internal judicial methods had been made: members were no longer required to write Notes on preliminary objections in the jurisdiction/admissibility phase or on requests for provisional measures, as long as the legal issues were not too complicated, and the Court had taken steps to limit the duration of oral proceedings.

39. In short, any measures to streamline proceedings must be carried out in keeping with the principles of respect for the sovereignty of States and preservation of the quality of the Court's judgments.

40. The CHAIR warmly thanked the President of the International Court of Justice on behalf of the Commission for the very interesting information he had provided about the Court's functioning, which was valuable not only for the Commission's members but also for the members of the International Law Seminar who were attending the meeting. He asked the President to convey to the members of the Court the Commission's cordial greetings and its desire for further productive exchanges between the two bodies.

*Mr. Melescanu (Vice-Chair) took the Chair.*

**Diplomatic protection<sup>11</sup> (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>12</sup> A/CN.4/L.631)**

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

41. Mr. GALICKI, referring to the recently issued addendum to the fourth report (A/CN.4/530 and Add.1), said it had been prepared by the Special Rapporteur with his usual competence, deep knowledge and openness. The title, "Proposed articles on diplomatic protection of corporations and shareholders", was somewhat misleading, since that was not the subject of the two draft articles contained in the addendum. Draft article 21, on *lex specialis*, excluded the application of some of the articles formulated earlier but did not specify which ones. Draft article 22 dealt with diplomatic protection of legal persons other than corporations and their shareholders. It was to be included in the third part, entitled "Legal persons", and the technical question to be solved was proper correlation of the titles of the articles throughout that part.

42. The two new draft articles covered exceptions to the main rules formulated earlier in the draft, but each did so in its own way. Article 21, based on the maxim *lex specialis derogat legi generali*, provided for the priority of special rules of international law where the protection of corporations or shareholders was governed by such rules. In paragraph 112, the Special Rapporteur cited the opinion expressed by the Commission in the commentary

to article 55 of the draft articles on State responsibility for internationally wrongful acts<sup>13</sup> that, for the principle *lex specialis derogat legi generali* to apply, there must be some actual inconsistency between two provisions or a discernible intention that one provision was to exclude the other. A requirement of actual inconsistency or discernible intention should perhaps be added to the text of article 21, thereby more precisely defining the scope of operation of *lex specialis* rules *vis-à-vis* general norms. A second aspect of article 55 on State responsibility was missing in article 21, namely that general articles should not apply solely "where" but also "to the extent that" the subject matter was governed by special rules of international law. That more extensively developed approach should be incorporated in the draft on diplomatic protection.

43. Mr. Koskenniemi had rightly pointed out that the operation of the *lex specialis* principle should not be limited to protection of corporations and shareholders but should be extended to other situations regulated by the draft articles. The matter seemed to be of crucial importance, especially in the light of the Commission's parallel work on the fragmentation of international law, where *lex specialis* was one of the main problems analysed.

44. Paradoxically, while Mr. Koskenniemi proposed a more extended formulation of the *lex specialis* principle, Mr. Brownlie suggested that a separate provision on *lex specialis* might not be necessary. True, its application to questions of diplomatic protection might derive from general principles of law. Yet even if one recognized the general nature of the *lex specialis* principle, in some situations like that of diplomatic protection, its practical application might require that additional particular rules be followed. Article 55 of the draft on State responsibility likewise confirmed the usefulness of having specific regulations on *lex specialis*.

45. In view of the widely diverging proposals made, a cautious approach should be taken: the idea of having an individual provision on *lex specialis* should not be rejected *in toto*, yet the suggestion of not confining the application of article 21 to diplomatic protection of corporations and shareholders seemed reasonable. Examples could be found of the application of that principle to other legal persons and perhaps even to natural persons—for instance, the self-contained regime of liability for damage caused by space objects. He was therefore in favour of modifying article 21 and possibly placing it somewhere other than in the third part, to make it applicable in a more general way.

46. As to article 22, he supported the view expressed by the Special Rapporteur in paragraph 113 that it was not possible to draft further articles dealing with the diplomatic protection of each kind of legal person. The main difficulty with the practical application of the article, as noted in paragraph 121, was the infinite variety of forms that legal persons could take. In general, the possibility of being registered as a legal person flowed from the internal legislation of the State, and the procedures and requirements established by individual States varied widely. Paragraph 121 gave an excellent example of such differentiation in the legal position of the European Economic

<sup>11</sup> 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.

<sup>12</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>13</sup> See 2751st meeting, footnote 3.

Interest Grouping whereby, as the Special Rapporteur rightly pointed out, the same types of entities, endowed with equal legal capacities by a uniform statute, could be granted legal personality in one European Union member State and left without it in another.

47. One must also be conscious of the growing number of creatures of municipal law, as paragraph 117 put it, that might be interested in benefiting from their status of legal persons. The unlimited, unilateral extension by individual States of legal personality to various entities might create serious problems with the practical exercise of diplomatic protection of such entities *vis-à-vis* other States which might not necessarily be eager to recognize such legal personality. Even the very broad formula of *mutatis mutandis* application set out in article 22 did not seem to solve the problem. It might therefore be useful to include some sort of requirement of mutual recognition of legal personality of a given entity by the States concerned.

48. Despite those remarks, he thought both draft articles were necessary, were based on thorough research and were a useful addition to the set of articles previously accepted by the Commission. The draft articles, together with the comments made on them during the discussion, should therefore be referred to the Drafting Committee.

*Mr. Candioti (Chair) resumed the Chair.*

49. Mr. ADDO said he agreed with much of the Special Rapporteur's report. Draft article 21, which stipulated that when a bilateral or multilateral investment treaty was invoked the rules of customary international law did not apply, was not only acceptable: it stated the obvious. He concurred with Mr. Brownlie that there was no real need for including it, but it caused no harm and could be retained *ex abundanti cautela*. It should therefore be referred to the Drafting Committee.

50. As for draft article 22, it would be nearly impossible to draft articles for each and every specific legal person. Accordingly, use of the words *mutatis mutandis* was very apt. The phrase had become part of the vernacular, and there was no more succinct way of expressing the underlying idea. That article too should be referred to the Drafting Committee.

51. Mr. GAJA thanked the Special Rapporteur for a thoughtful and useful addendum to his report that highlighted two questions. As to the first of those questions, he agreed with the Special Rapporteur about the existence of many special rules on diplomatic protection. Some excluded or deferred protection, providing a method for dispute settlement that gave the investor a direct role. Others modified the requirement of nationality of claims or derogated from the local remedies rule. While most mainly affected diplomatic protection of corporations or their shareholders, a provision on *lex specialis* should not, in his view, be limited to them. He concurred with Mr. Galicki on that point: such a provision should have a wider scope and be placed among the draft's final provisions. If *lex specialis* was based solely on treaty provisions, however, a reference to it might not be necessary.

52. The Latin expression *mutatis mutandis* in draft article 22 was not, as was suggested in paragraph 123, a

maxim. In a legal text, it would be better not to use expressions in an unfamiliar language like Latin, and its equivalent could be found in most languages. His main problem with the expression, however, was that it conveyed very little about the circumstances that would entail the application of a different rule and about the contents of that rule. It therefore seemed preferable for a positive rule to be expressed with regard to legal persons other than corporations. To that end, an analysis of State practice would be needed, and that, unfortunately, was missing from the addendum to the report.

53. He would tentatively suggest wording along the lines that the State entitled to exercise diplomatic protection of a legal person other than a corporation was the State under whose law the legal personality had been granted, provided that the place of management was located or registration took place on the territory of the same State. An appropriate formulation could be found by the Drafting Committee so as to establish some formal link between the basic attribution of legal personality and the State deemed entitled to exercise diplomatic protection.

54. Mr. CHEE commended the Special Rapporteur on the addendum to the fourth report. The description in paragraph 109 of the advantages of bilateral investment treaties and ICSID for the current system of diplomatic protection under customary international law reflected the statement by ICJ in the *Barcelona Traction* case. Furthermore, in view of the extensive State practice regarding bilateral investment treaties and ICSID, it might be appropriate to conclude that article 21 was fit for codification. According to Verzijl, the frequency of a particular class of bilateral treaties or the constant repetition therein of a particular clause might in itself create a practice corroborated by general *opinio juris*.<sup>14</sup> Doehring also concluded that consistent treaty practice under certain conditions could effectively contribute to the formation of new law with regard to arbitration clauses.<sup>15</sup> Moreover, article 15 of the Commission's statute stated that the expression "codification" was used as meaning "the more precise formulation and systematization of rules of international law in fields where there already ha[d] been extensive State practice, precedent and doctrine". It was well known that the codification effort was made on the grounds that written law was superior to customary law.

55. In connection with article 21 he would also draw attention to State practice regarding the "stabilization clause" in contracts between the foreign investor and the host State. It was an additional and effective device for protecting the foreign investor's investment, had been upheld by several arbitral tribunals and commanded the support of distinguished jurists. That remark applied to bilateral investment treaties between foreign investors from developed States and developing host States. However, it seemed that problems arose in connection with bilateral investment treaties between foreign investors and developed host States. It might be appropriate for the Commission to look into such problems in the light of the globalized economy and the interdependence among States with respect to equitable economic relations.

<sup>14</sup> J. H. W. Verzijl, *International Law in Historical Perspective*, vol. I (Leiden, Sijthoff, 1968), p. 40.

<sup>15</sup> Doehring, *loc. cit.* (2774th meeting, footnote 7).

56. He wished to withdraw his earlier suggestion to add the word “business” before “corporation” in draft article 22, in view of the Special Rapporteur’s explanation in paragraph 117. Articles 21 and 22 were acceptable and should be referred to the Drafting Committee.

57. Mr. KATEKA commended the Special Rapporteur on his report and echoed his remark about completing the topic within the five-year period. Article 21 should apply generally to the whole set of articles on diplomatic protection and should not be confined to corporations alone. As Mr. Brownlie had suggested, it might not be necessary to have a provision on *lex specialis*. However, since a precedent had been set in the draft articles on State responsibility, there seemed to be no harm in incorporating such a provision in the present draft. Perhaps the General Assembly or a diplomatic conference would subsequently delete those provisions.

58. The title of article 22 should read “Other legal persons”, since that was what the article in fact dealt with. Furthermore, with reference to the last sentence of paragraph 122, he failed to understand why it spoke of articles 18 and 19, when most of the other legal persons concerned had no shareholders in the classical sense of company law. Finally, he was in favour of retaining the Latin expression *mutatis mutandis*.

59. Mr. MATHESON expressed gratitude for the warm welcome extended to him as a new member by the Commission and said he endorsed the remarks on the excellent quality of the report. As to article 21, he was in favour of specifying the application of *lex specialis*, although the Commission could be flexible as to what form that should take. It was appropriate not only to make clear how the principle related to the draft article but also to recognize the very important regimes which applied in the area of protection of investment. He also had some sympathy with the alternative idea that the article could be broader in scope. The matter could be dealt with in the commentary, but the Commission would no doubt prefer it to be incorporated in the draft articles proper.

60. As Mr. Brownlie had pointed out, certain parts of the report seemed too categorical in their description of the application of *lex specialis*. That was also true of the phrase in paragraph 108 that “customary law rules relating to diplomatic protection are excluded”. He suggested it would be more accurate to say that other regimes specifically derogated from customary law rules and would apply, but in other respects such rules would and did apply in arbitrations conducted in the area of diplomatic protection.

61. Mr. ECONOMIDES said that the *lex specialis* provision in article 21 should not be limited to corporations and their shareholders, but should also apply to natural persons who, for instance, acted under the terms of human rights treaties. The general provision should be placed at the end of the draft to cover all of the articles. He saw no reason why investment and human rights treaties should be excluded. In fact, the Commission should accord priority to them instead of setting in motion the unwieldy, political procedure of diplomatic protection.

62. He pointed out that the *lex specialis* exclusion was not absolute, but conditional. Although it would apply to

investment or human rights treaties, in certain circumstances, such as where a contracting State failed to comply with the judgment rendered, diplomatic protection could be reconsidered, as was indicated in the footnotes corresponding to the last sentence of the paragraph. The general provision should be drafted to reflect that situation. Also, he agreed that the phrase “These articles do not apply” at the beginning of article 21 should be replaced by a more specific reference to the articles in question.

63. As far as draft article 22 was concerned, he endorsed the use of the Latin expression *mutatis mutandis* but questioned the use of the term “principles”, suggesting that “provisions” might be preferable. Again, were all of articles 17 to 21 involved or only some of them? In his opinion, articles 21 and 22 could be referred to the Drafting Committee.

64. Mr. DUGARD (Special Rapporteur) said that initially he had tended towards a narrow provision in article 21 on the grounds that the most obvious *lex specialis* related to multilateral or bilateral investment treaties. However, there seemed to be support for a broader provision dealing not only with corporations but also with natural persons. He suggested, in order to expedite the proceedings, that rather than continuing discussion on the subject in plenary, the Drafting Committee should be assigned the task of redrafting the provision.

65. The CHAIR recalled Mr. Gaja’s comments on the expression *mutatis mutandis* as well as the need to recognize other legal persons or establish some formal link between them and the State concerned by diplomatic protection.

66. Mr. GAJA said that to use the expression *mutatis mutandis* was an easy solution, but it was important to be clear as to its exact implications. With regard to article 21, the Commission had a precedent in the topic of State responsibility, where the theme of *lex specialis* had been developed. However, he was not certain that, according to article 55 of the draft articles on State responsibility, *lex specialis* necessarily referred to treaties. This provision could also refer to some areas of general international law that were not covered by general rules. Perhaps a phrase to the effect that general rules might not cover all aspects of general international law would have been more appropriate. From the Special Rapporteur’s explanation he had understood that in his view in the case of diplomatic protection exceptions were based only on treaties. Perhaps that also needed to be specified.

67. Mr. DUGARD (Special Rapporteur) pointed out that there was very little State practice aside from that relating to the protection of corporations. There had been cases where States had afforded protection to non-governmental organizations, such as to Greenpeace in the dispute with France over the destruction of a ship in Auckland Harbour, but there was not enough State practice to be able to formulate general principles on the subject. For that reason, emphasis should be placed on the protection of corporations. The general provision to be drafted should lay down general principles to guide States in the diplomatic protection of legal persons other than corporations. The Commission could not hope to cater for each and every situation.

68. Mr. MELESCANU said that, in principle, he endorsed the idea of a broader provision on *lex specialis* to be worked out by the Drafting Committee, as suggested by the Special Rapporteur. However, he was concerned that if the exercise was not carried out properly, some difficulties would be encountered in the interpretation of the provision at a later stage. The discussion on general and special provisions had only just begun in the Study Group on the Fragmentation of International Law. The Drafting Committee would therefore have to clearly define the contents, scope and application of the *lex specialis* provision.

69. Mr. BROWNLIE, referring to concerns expressed about the relative absence of State practice, said it could be held that the positions of delegations of States before international tribunals were a form of State practice. Paragraph 119 of the report referred to the few pertinent decisions of PCIJ, and further research into the pleadings there might provide some State views. As for Mr. Melascanu's remarks on the approach to follow, he pointed out that, for the purpose of progressive development, one needed something to work on before it could be developed. Perhaps the Commission need say no more with respect to article 2 than that there was some unfinished business to be done.

*The meeting rose at 1 p.m.*

## 2776th MEETING

*Wednesday, 16 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, 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. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### **The responsibility of international organizations (concluded)\* (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)**

[Agenda item 7]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the Drafting Committee's report on the respon-

sibility of international organizations (A/CN.4/L.632), said that in his first report (A/CN.4/532) the Special Rapporteur had proposed three articles, all of which had been referred to the Drafting Committee. The latter had examined them and adopted three texts, an encouraging development which held out hope for the progress of the Commission's work on the topic. Following is the text of the draft articles adopted by the Committee:

#### *Article 1. Scope of the present draft articles*

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

#### *Article 2. Use of terms*

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

#### *Article 3. General principles*

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

2. The topic was in fact a sequel to the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>2</sup> That did not mean that the Commission would simply copy the articles on State responsibility, but rather that it would follow the basic trend that had taken shape in respect of that topic. However, when an article on the current topic embodied the same legal principle as an article on State responsibility, the language should remain the same in order to avoid any confusion or ambiguity.

3. Draft article 1, on the scope of the draft articles, was composed of two sentences which the Drafting Committee had preferred to separate and place in two different paragraphs.

4. Paragraph 1 corresponded to the first sentence of article 1 proposed by the Special Rapporteur and had its origin in article 57 of the draft articles on State responsibility for internationally wrongful acts. It indicated that

\* Resumed from the 2763rd meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st session, footnote 3.