75. In his statement at the preceding meeting, Mr. Economides had raised another question which warranted consideration and related to the absolute or relative nature of special rules. If rules were absolute—if the dispute settlement procedures provided for in a bilateral investment treaty or by ICSID resulted in a definitive settlement and were binding on the parties—the matter was straightforward, and in that case draft article 21 was valid. However, if the settlement was not definitive, it could not be said that the rules of customary law relating to diplomatic protection did not apply. If one of the parties to the dispute did not comply with the decision handed down, a complaint could be lodged through diplomatic channels, as was shown by the treaty provisions referred to in the footnotes of the pages corresponding to the last sentence of paragraph 108 of the Special Rapporteur’s report. It must be remembered that bilateral and multilateral investment protection treaties were concluded to prevent abuses of diplomatic protection; the proper protection of foreign investments promoted the stability of diplomatic relations.

76. That was the theory. In practice, when two parties, a State and a foreign investor, agreed on settlement procedures, that was in their own interest, and they would endeavour to settle their dispute under that procedure. That was why the Commission must either make article 21 a general provision or consider the possibility of deleting it because it stated the obvious. If the majority of the members wanted to refer the article to the Drafting Committee, however, she would not object.

77. Having read the commentaries to article 22, she now had a better understanding of why the Special Rapporteur had initially tried to limit the provisions to corporations. Unfortunately, for perfectly logical reasons, he now had in mind legal persons other than corporations, but he was neglecting an important factor, namely, the virtual absence of State practice in that regard. As the Special Rapporteur himself had acknowledged, legal persons other than corporations were extremely diverse and sometimes very complex in nature. As it stood, the article did not indicate how or according to which criteria to identify the effective link between them and the State likely to exercise diplomatic protection. The very fact that the expression "mutatis mutandis" was used showed that there was a great deal of uncertainty. As Mr. Kabatsi had pointed out at an earlier meeting, moreover, it was doubtful whether articles 18 and 19 could be applied to legal persons other than corporations and, in particular, to non-governmental organizations, foundations, partnerships and the other legal persons mentioned by the Special Rapporteur. That would be going too far, and the political uncertainties inherent in the discretionary nature of diplomatic protection raised far more serious problems which warranted careful consideration. Like other members of the Commission, she thought that it would be useful to give more in-depth consideration to relevant State practice.

78. Mr. DUGARD (Special Rapporteur) asked Ms. Xue and Mr. Mamtaz whether they considered that, since there was no State practice on the protection of legal persons other than corporations, the Commission should not include a provision such as article 22 in its draft text or whether, on the contrary, it should include it with a view to the progressive development of the law.

79. Mr. MOMTAZ said that he was not in favour of the progressive development of the law in that area and agreed with Mr. Daoudi that the provision should be deleted.

80. Ms. XUE said she also thought that it would be better to delete article 22 and to bring the matter before the Sixth Committee to seek the views of States.

81. Mr. YAMADA said that when customary law relating to diplomatic protection and special rules were in conflict, it was the special regime which prevailed under customary international law and article 21 was not necessary. When rules relating to diplomatic protection and special rules were not entirely in conflict and some of them were compatible, both would be applied in parallel, in accordance with customary international law; as article 21 stood, however, the special regime would prevail. Was that the Special Rapporteur’s objective?

82. Mr. DUGARD (Special Rapporteur) said that Mr. Yamada had put his finger on a weakness in article 21. It would need to be clearly stated, either in the commentary or in the article itself (if it was referred to the Drafting Committee), that when the two regimes were compatible, they both applied.

83. Mr. MANSFIELD (Rapporteur) said that he was not in favour of a very elaborate rule concerning "lex specialis" and that it was necessary to be clear if a generalized provision was decided upon. In that sense, he endorsed Mr. Economides’ comment: draft article 21 should be dropped and the matter should be dealt with in the commentaries, or, if it was decided to draft a general provision, information relating to its scope should be given in the commentary.

The meeting rose at 1 p.m.

2777th MEETING

Friday, 18 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fonba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Mamtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Dr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

I. Mr. SEPÚLVEDA said that there had been much debate on draft article 21, contained in the Special Rapporteur's fourth report (A/CN.4/530 and Add.1), in connection with the nature and scope of the lex specialis provision and where it should be placed in the set of draft articles. A different yet related matter was the special, autonomous regime with specific characteristics provided for in bilateral and multilateral investment guarantee treaties. The invocation of dispute settlement procedures under such treaties excluded the possibility of applying customary law rules relating to diplomatic protection. However, it was interesting to note which subjects were protected by those treaties or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In their definitions the terms “investment” and “investor” were described, but not the rights and obligations of corporations and shareholders as referred to in article 21. For the Commission's purposes such definitions ultimately constituted lex specialis, although in some instances the scope was broader and might include intellectual property rights. In general, the term “investor” was taken to mean any natural or legal person that made or had made an investment, a natural person being a national of one of the contracting parties, a legal person having been established in accordance with the legislation of one of the contracting parties and having its registered office on its territory. That was a conceptually different term from the one set out in article 21 and must be duly taken into account. Since the specific rule applicable in the circumstances defined the subject of the regulations differently, the provisions of the draft would not apply when investors were protected by special rules of international law. That included the settlement of disputes between investors and the States having subscribed to such special rules. For those reasons, he suggested that the text of the article be more closely aligned with that of the terminology of investment treaties. He nonetheless endorsed the basic thrust of article 21: the injured party must first of all exhaust all domestic remedies, and, if that did not prove satisfactory, the dispute could be submitted for international arbitration, where appropriate. At that stage, the party could not additionally claim diplomatic protection, for it was expressly prohibited by treaty law, as could be seen from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as cited in a footnote in paragraph 108 of the report. Again, as the Special Rapporteur had pointed out, the rights and duties under customary international law whereby a State could, at its discretion, extend diplomatic protection to a corporation were inconsistent with a treaty system that granted jurisdiction to an international arbitration tribunal in order to settle a dispute between a foreign investor and the host State.

2. As to draft article 22, the reference to article 21 should be deleted, as it concerned a special regime under which it would be difficult to extend protection inter alia to universities, municipalities or non-profit-making associations. He endorsed Ms. Escaramiea's remarks in that connection. Since it would be impossible to draw up separate provisions on diplomatic protection for the different types of legal persons concerned, an approach whereby the decision should be incumbent on the State that was competent to extend diplomatic protection seemed appropriate, along the lines suggested by Mr. Gaja. The State had discretionary power to provide diplomatic protection, and therefore it might also be competent to extend it to legal persons besides those that were essentially profit-making or with economic interests, provided they had been established in conformity with domestic legislation and had suffered injury as a result of an internationally wrongful act by another State. Those comments were intended to clarify and strengthen the text of the two draft articles, which could be useful for a proper interpretation of the nature and of the contemporary modalities of diplomatic protection.

3. Reverting to the subject of the debate on lex specialis, which had been conducted in two forums, he wished to express appreciation of Mr. Koskenniemi's very useful report in connection with the Working Group on the Fragmentation of International Law. Despite all the arguments put forward on the nature of lex specialis, a different approach to the problems raised by article 21 should probably be adopted. In fact, it was not a case of lex specialis, but simply a special legal formula or alternative mechanism to diplomatic protection for the peaceful settlement of a dispute arising from an injury caused to the national of one State through an internationally wrongful act by another State.

4. On the assumption that diplomatic protection and the procedures for the settlement of disputes outlined in investment treaties came under the general legal framework of State responsibility, both legal regimes would constitute lex specialis. As Mr. Koskenniemi had posited, the two special mechanisms would represent the development or application, in a particular situation, of general law. However, there was no exception to that general law, nor any conflict between the principles of State responsibility and the two optional but mutually exclusive methods for reparation of harm caused by another State.

5. What was surprising was that the draft articles should make no reference to the alternative mechanism to diplomatic protection found in investment agreements, a mechanism or institution about which one should have no reservations in view of its significant development in the last 25 years. Accepting that institution and codifying rules on the links between the two methods of resolving problems stemming from State responsibility was a task the Commission must undertake without further delay. Finally, while the title of article 21, “Lex specialis”, should be deleted, the basic rule outlined in the article should be retained.

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).
6. Mr. Sreenivasa RAO said that the discussion had been both constructive and instructive. Draft article 21 required careful review, and the desirability of including a provision on *lex specialis*, its scope and its place in the structure of the article must be considered. As many members had already observed, there did not seem to be a case for the application of *lex specialis*: it would rule out the possibility of extending diplomatic protection to natural persons, whenever other remedies under separate regimes became available, even if there was no direct conflict between such regimes and that of diplomatic protection. The Commission thus had three options: (a) to delete the article, while acknowledging in the commentary that there were other regimes for the protection of foreign investment and natural persons, applicable as appropriate; (b) to redraft the article and incorporate it as a general clause in the final provisions of the set of articles; and (c) to establish a working group to consider the matter in greater depth. He shared the view that the Commission should not attempt to define the nature and scope of *lex specialis*—a task extraneous to the subject of diplomatic protection and already being done in connection with another agenda item. He was therefore in favour of the first option, namely to delete the article.

7. As for draft article 22, if an article along the lines of article 17 was desired, then it should incorporate a formal legal connection between a legal person and the State espousing its claim. Furthermore, he agreed with other members that it was difficult to cover in one provision the various categories of legal persons on a *mutatis mutandis* basis without first identifying the differing circumstances and legal principles involved. He also endorsed suggestions to delete references to articles 18 and 19.

8. Still referring to article 22, he questioned the appropriateness of the third sentence of paragraph 120 of the report, which read: “Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it has been created.” Taken at face value, that sentence might give the impression that diplomatic protection could be extended as soon as an internationally wrongful act had been committed against a person by a host State. It should be made clear, that under normal circumstances, such wrongful acts would first of all have to be submitted to arbitration, and only when there was some discrimination or denial of justice with respect to the seeking of proper remedies would the question of diplomatic protection arise. Given the number of problems in connection with the article, he, like some other members, would go so far as to suggest deleting it, particularly on account of the absence of relevant State practice. He would rely on the guidance of the Special Rapporteur and collective wisdom of the Commission to find a suitable solution.

9. Mr. RODRÍGUEZ CEDENO, referring to draft article 22, said that paragraph 117 mentioned some legal persons, including associations, universities, municipalities and non-governmental organizations, which in some respects could be likened to corporations. Such legal persons were in general established in conformity with domestic legislation, but on account of their widely differing characteristics and objectives, it was difficult to draw up a set of common rules for them. More importantly, it was not as easy to establish a clear link between those legal persons and their State of nationality, as it was for corporations. In the event of injury caused by a host State, it was difficult to know whether it could be considered as injury to the State of nationality and thus sufficient grounds for extending diplomatic protection.

10. He wished to focus attention on non-governmental organizations, which played an increasingly important role in international relations, although his remarks might also apply to other legal persons established under domestic law and thus not subject to the provisions of international law. Non-governmental organizations were generally national in character and scope. Any injury to them or violation of their rights would be dealt with in the same way as for any other natural or legal person belonging to that State, including through recourse to international human rights mechanisms. However, transnational non-governmental organizations, namely organizations set up in one State, with interests and activities at the international level, could only operate in the host State which accepted them as such either through special procedures or through broader legislation. In most cases, the activities of such non-governmental organizations were conducted through offices in States other than the ones in which they had originally been established, and any claim, procedure or reparation relating to injury or violation of their rights would be dealt with under the legislation of the State concerned, although there was nothing to prevent protection being sought under domestic legislation and international agreements to which the State was party. While some States recognized the transnational legal personality of such non-governmental organizations, the principle was far from being universally accepted. For that reason, he considered that comparing other legal persons to corporations was untenable. Moreover, given the absence of practice and general uniform criteria allowing such a comparison to be drawn, the codification of a rule, even on the basis of progressive development, did not seem viable. He therefore agreed that article 22 should be deleted. The topic should nevertheless be given further consideration to seek a way of extending the scope of article 17 to cover the case of States which had accepted the transnational or non-governmental character of such organizations.

11. Mr. MANSFIELD said that Mr. Momtaz had sought clarification regarding the *Rainbow Warrior* case, in particular as to whether the compensation paid to Greenpeace was an example of a State exercising diplomatic protection in respect of a non-governmental organization. According to the memorandum sent by the New Zealand Government to the Secretary-General of the United Nations under its agreement with France to submit all problems relating to the case to the United Nations for a binding ruling, New Zealand sought *inter alia* an apology for the violation of its sovereignty. The memorandum also specified that, as the vessel had not been flying the New Zealand flag and the deceased crew member had been a Netherlands citizen, it was unable to assert any formal standing to claim on their behalf. It had, however, expressed concern that both Greenpeace and the family of the deceased should receive adequate compensation and that settlement of the
In his ruling, the Secretary-General, as well as ordering an apology and compensation for New Zealand, had said that there was no need to rule specifically on compensation to Greenpeace and the crew member’s family because the statement submitted by France had contained an account of the arrangements that it had made for such compensation and the assurances had constituted the response that New Zealand had been seeking.

As for the Rainbow Warrior case, the arrangement had been that the Secretary-General’s requirements had been met because France had admitted responsibility. A period had been allowed for negotiation—for valuation of the vessel and other issues—and, in the event of failure, arbitration should take place in Geneva. He recalled that Greenpeace International had personality (stichting) in the Netherlands but was also recognized in England as an unincorporated association, as they were known in English law. The Special Rapporteur could not be expected to come up with a list of all the social entities that might be involved. He was therefore in favour of retaining the mutatis mutandis formula.

As for the Rainbow Warrior case, the arrangement had been that the Secretary-General’s requirements had been met because France had admitted responsibility. A period had been allowed for negotiation—for valuation of the vessel and other issues—and, in the event of failure, arbitration should take place in Geneva. He recalled that Greenpeace International had personality (stichting) in the Netherlands but was also recognized in England as an unincorporated association, having a siège social in Lewes. The arbitration court had decided that the applicable law should be English law, since most of the affecting factors were in England; but the applicable law had in fact been a mixture of English and public international law. It was therefore dangerous to generalize. Non-governmental organizations might have a reality under more than one national law.

Mr. Brownlie (Special Rapporteur) said that article 21 had been included, first, in order to follow the example of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session and, second, to take account of the fact that bilateral investment treaties deliberately aimed to avoid the regime of diplomatic protection, because States had discretion as to whether to intervene diplomatically and, moreover, the diplomatic protection regime failed to confer a right to claim on the State of nationality of shareholders. He had, however, been persuaded by the debate within the Commission that he had been wrong on both counts: there was no need to blindly follow the draft articles on State responsibility, and Mr. Brownlie and Mr. Matheson had rightly pointed out that bilateral investment treaties did not completely exclude customary international law, to which the parties often had recourse in interpreting their treaties. The two regimes therefore complemented each other. Article 21, insofar as it suggested that bilateral investment treaties excluded customary rules, was therefore inaccurate and possibly dangerous. If retained, it should be substantially amended—for example, by deleting the lex specialis element, as suggested by Mr. Sepúlveda. Mr. Matheson, meanwhile, had suggested a clause reading: “These articles do not supersede or modify the provisions of any applicable special international legal rules or regimes relating to the protection of investment.”

Another criticism had been that there was no reason to confine the provisions of the article to bilateral investment treaties. There were, after all, other special regimes, such as treaties excluding the exhaustion of local remedies or human rights treaties, that might complement or replace diplomatic protection. It had therefore been suggested the Commission should add a general provision at the end of the text, as it had in the draft articles on State responsibility. While having its attractions, that approach was dangerous, since it might give rise to arguments that diplomatic protection might be excluded by a human rights treaty, even though the former might offer a more effective remedy. If individuals were to receive the maximum protection, they should be able to invoke all regimes. He drew attention to the situation in the occupied Palestinian territories, where Israel claimed that international humanitarian law was the applicable lex specialis, to the exclusion of international human rights rules. His considered suggestion was therefore that draft article 21 should be deleted.

According to his calculations, nine members of the Commission were against including the draft article and four, while indicating no particular enthusiasm, believed that it could be included ex abundanti cautela or else as a general provision at the end of the draft. Perhaps the Chair might wish to take a tentative vote. If the draft article was deleted, he would deal with the question of bilateral investment treaties in the commentary.

With regard to article 22, there was little State practice regarding the circumstances in which a State would protect legal persons other than corporations, for the simple reason that corporations were the legal persons that engaged in international commerce and therefore featured most prominently in international litigation. He had, in response to a suggestion by Mr. Brownlie, examined the pleadings in two cases, the Peter Pázmány University case and the Certain German Interests in Polish Upper Silesia case, but could find no evidence of State practice. In the first of those cases, the university had based its claim on article 250 of the Treaty of Peace between the Allied and Associated Powers and Hungary (Treaty of Trianon), under which the property of a Hungarian national should not be subject to retention, but the debate had really revolved around the question of whether the university was a juridical person separate from the Hungarian State. The second case, again, had turned almost entirely on the interpretation of the German-Polish Convention concerning Upper Silesia. Despite the paucity of State practice, however, there was a real need to provide guidance on legal persons other than corporations. The article could not therefore be deleted simply because there was inadequate State practice or uncertainty over the status of non-governmental organizations. It should be retained either

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4 Ibid., pp. 213 and 215.
5 See 2751st meeting, footnote 3.
because it dealt with general principles of the kind contained in the Barcelona Traction case, by way of analogy, or for the sake of progressive development. A majority of the Commission appeared to be in favour of retaining it, but changes were obviously necessary. Mr. Kateka had made the helpful suggestion that, in the title, the word “other” should be deleted and that reference should be made only to articles 17 and 20, since articles 18 and 19 clearly related to shareholders. As for the words *mutatis mutandis*, most members seemed to be in favour of keeping them. The Drafting Committee could make the final decision in that and other cases.

19. The Commission might need to examine the status of non-governmental organizations in a separate study.

20. Mr. ECONOMIDES said he would be reluctant to see total deletion of article 21. He therefore suggested that a clause should be added at the end of the draft articles, to the effect that such a provision was without prejudice to human rights treaties or others offering protection of patrimonial or personal rights. He himself would prefer a provision giving priority to human rights or investment protection regimes; diplomatic protection involved a cumbersome political procedure that States were often reluctant to set in motion, whereas human rights and other regimes were easier to implement.

21. Mr. BROWNLEE said that the two cases that had come before PCJ— or, at least, the Peter Pázmány University case— had related to important multilateral treaties and established significant precedents. If not actually State practice, they could be said to be analogous to it.

22. Mr. SEPUĽVEDA said he agreed with Mr. Economides that the article should not be deleted altogether. It would be strange if draft articles on diplomatic protection did not take account of investment treaty regimes. The Commission should not lose sight of the real world. Moreover, there was a wealth of State practice to be found in many decisions by arbitral tribunals, either those exclusively concerned with bilateral investment treaties or special tribunals. The matter warranted more detailed consideration. Second, he noted that the commentary to article 22 contained no reference to the possibility that it was for the State to determine whether there were grounds for granting diplomatic protection.

23. Ms. XUE said that deletion of article 21 would send the wrong political signal. The Commission had drafted the article because State practice included over 2,000 investment protection agreements, which had an important impact on the exercise of diplomatic protection and, as Mr. Matheson had said, should be given priority rather than being played down. To restrict guidance to the commentary would be a grave mistake.

24. As to article 22, she could see little evidence of State practice in the matter. In most of the existing cases, the State would not exercise diplomatic protection. It was, in any case, difficult to establish a legal basis for such protection being extended to schools, churches or foundations. The Asia Foundation, for example, annually got funding from the United States Congress, but according to the Special Rapporteur, it was questionable whether the United States could extend diplomatic protection to it. The human rights element in the article was important, but diplomatic protection was not all about human rights. The two regimes, although different, were complementary. That complementarity would break down if article 21 were deleted and article 22 retained. No hasty decision should be reached. The issue was one not of drafting but of policy.

25. Mr. MELESCANU said that the issue would not be resolved by reverting to a general debate. He therefore suggested that the Special Rapporteur’s suggestion should be adopted, on the clear understanding that, in future debates, the relationship that might exist between special regimes and general rules governing diplomatic protection would be given due attention. An article covering the concerns expressed by Ms. Xue and Mr. Economides could then be drafted. It would thus be possible for the Drafting Committee to move ahead without reaching a final decision.

26. Mr. GALICKI said that he still favoured retaining the substance of article 21, including the *lex specialis* element, but, as he had previously said, application might not be limited to the diplomatic protection of corporations: it might also apply to other legal persons or even to natural persons. He therefore suggested that the article should be located outside the third part to give it wider application. It was an approach that tallied with Mr. Melascanu’s suggestion. *Lex specialis* must appear at some point in the draft articles, but not necessarily in the part dealing with corporations and shareholders.

27. Mr. DAoudi, after expressing support for the view expressed by Ms. Xue, said that his impression of the debate on article 21 differed from that of the Special Rapporteur. Some reservations had been expressed, but it had been generally agreed that *lex specialis* should be reflected. On article 22, the general feeling had been that, since there was a shortage of State practice, the provision should be retained, but placed elsewhere in the draft articles.

28. Ms. ESCaramEIA said that article 21 did not really deal with *lex specialis* but with complementary regimes, even though some bilateral investment treaties did introduce special rules which purported to reject the general rule.

29. The title of the article was, however, less important than the question whether reference should be made to bilateral investment regimes, since they frequently precluded the exercise of diplomatic protection. The other crucial issue was human rights regimes, which could not be given priority because there were no legal precedents for doing so. Yet the existence of those regimes must be acknowledged, and so she supported the proposals by Mr. Economides and Mr. Melescanu. Placing a general “without prejudice” clause at the end of the section would do no harm and would demonstrate an awareness of the existence of investment and human rights treaties.

30. As to article 22, she queried assertions that there was a total absence of State practice, for it was highly improbable that in the modern world there had not been even an exchange of letters on the subject of diplomatic protection for foundations or local authorities. For that reason,
she was in favour of referring article 22, together with the amendments proposed by Mr. Kateka, to the Drafting Committee.

31. Mr. CHEE said that the chief purpose of article 21 was to protect corporations and their shareholders. Paragraph 70 taken with paragraph 90 of the Barcelona Traction judgment confirmed that ICJ had been fully aware of the lack of shareholder protection, a lack which had prompted the development of a network of bilateral investment treaties. He therefore urged the retention of the lex specialis rule. If it were to be deleted, the Commission would have to devise some kind of provision to protect shareholders of corporations, because paragraph 90 of the judgment in question made it clear that hitherto diplomatic protection for them had been contingent upon the conclusion of individual international agreements.

32. He supported article 22, in the belief that there might well be a need to protect entities that were not corporations, although caution was needed when speaking of “legal persons” since it was a very broad, ill-defined term. Moreover the distinction drawn between “business corporation” and “non-business corporation” was unclear. International law was primarily interstate law and did not normally relate to corporations, universities and similar entities, which probably explained why there were few examples of State practice in which those entities had been granted diplomatic protection. For that reason, article 22 should be omitted, since there was no point in promoting an inapplicable rule.

33. The CHAIR, speaking as a member of the Commission, suggested a compromise in respect of article 21. The Drafting Committee could be requested to draw up a text which could then be placed among the final provisions. It should be flexible enough to take account of the existence of human rights treaties, which might arguably take precedence over other agreements. A general, broadly applicable clause might satisfy the wish expressed by the majority of members that the reality of those treaties should be acknowledged. Article 22 should be a “without prejudice” clause that was sufficiently elastic to allow for any developments in State practice which might extend diplomatic protection to a wider circle of legal persons.

34. Mr. DUGARD (Special Rapporteur) submitted that his recommendations had reflected the view of the majority of Commission members. Even if there was no State practice in the matter, some provision on the subject of legal persons other than corporations had to be included in the draft articles. What would have happened in the Rainbow Warrior case if the Netherlands had attempted to give diplomatic protection to Greenpeace? What principles would have applied? Surely a tribunal confronted with that issue would have regarded the general principles of law that had emerged from the protection of corporations. It would have turned to the Barcelona Traction case and reasoned by analogy. If it had had before it draft article 17 proposed by the Commission, the court would have been guided by that provision and would have tried to ascertain whether the non-governmental organization was formed in the territory of the State which wished to exercise diplomatic protection on its behalf, whether it had its registered office there, or whether there was some other similar connection. It was therefore incumbent upon the Commission to give courts guidance in that respect. In that spirit, article 22 should be referred to the Drafting Committee.

35. The change of course in the debate made it more difficult to make a firm recommendation about article 21. Nevertheless he concurred with the Chair’s suggestion that it should be referred to the Drafting Committee, which should be given a broad mandate to draw up a “without prejudice” clause. That topic should be considered at the meeting with ILA on 29 July 2003. Although a slim majority of members had wished to drop article 21, he would prefer to retain it as a general provision at the end of the set of draft articles to ensure that account was taken of both bilateral investment treaties and human rights regimes, but without damaging either of them.

36. The CHAIR suggested, by way of a compromise, that article 21 should be referred to the Drafting Committee so that the Committee could draw up a general “without prejudice” clause to be placed at the end of that section. That provision should take account of other special regimes and the fact that they might derogate from the general rule. Article 22 and the proposed amendments to it should also be referred to the Drafting Committee.

It was so agreed.

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

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE COUNCIL OF EUROPE

37. The CHAIR welcomed Mr. Guy de Vel, Director-General of Legal Affairs of the Council of Europe, and invited him to address the Commission.

38. Mr. de VEL (Observer for the Council of Europe) said the Commission was a point of reference for all who were interested in international law. The participation of Commission members in meetings of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and the information the Council secretariat regularly provided about developments in areas of interest to the Commission had strengthened cooperation between both institutions. In that connection, he particularly welcomed General Assembly resolution 57/156 of 16 December 2002 on cooperation between the United Nations and the Council of Europe, and for that reason he had been keen to attend the Commission’s session in person.

39. Serbia and Montenegro had become the forty-fifth member of the Council of Europe in April 2003, which meant that almost all the countries of Europe had joined the Council, with the exception of Monaco and Belarus. The examination of Monaco’s application was making progress, whereas the Parliamentary Assembly had suspended consideration of the candidature of Belarus. The Holy See, Canada, Japan, Mexico and the United States of America, which were observers to the Parliamentary

* Resumed from the 2775th meeting.
Assembly, had requested enhancement of that status to allow them to participate in Committee of Ministers meetings at the ambassadorial or ministerial level.

40. The Committee of Ministers had decided to convene a summit of member States at the end of 2004 and the beginning of 2005. It would be an important juncture for the European continent because, after the Convention on the Future of Europe and the Intergovernmental Conference, it would be easier to determine the role played by the various European institutions. The Council of Europe had contributed to the Convention by submitting a memorandum on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and a memorandum on cooperation in the fields of justice and home affairs and by organizing an international conference on the Council’s Contribution to the European Union’s acquis, since some 20 Council of Europe conventions formed part of that acquis. Those moves had been rewarded by the inclusion in the draft European constitution of a provision stipulating that the European Union should seek accession to the European Convention on Human Rights. There were already some precedents for such a major political step, in that the European Union was a party to eight Council of Europe conventions. Some further provisions of the draft European constitution concerning cooperation between the Union and the Council would cement the good relations which existed as a result of his six-monthly meetings with the justice and home affairs troika and with the directors-general of the European Commission’s legal services.

41. Another important area of general policy was the reform of the European Court of Human Rights, which was likely to be deluged with applications following the accession of the new member States to the European Convention on Human Rights. The Steering Committee for Human Rights had submitted a number of proposals concerning procedural reform, and the Court itself had made several suggestions. Consequently, the measures under consideration were aimed at reducing the number of applications by heightening the effectiveness of domestic remedies, screening and speeding up applications, expanding the system of friendly settlement, revising the conditions of admissibility and improving the enforceability of the Court’s judgements. A protocol embodying those reforms was being drafted.

42. The intergovernmental activities of the Council of Europe gave priority to combating terrorism in the wake of the events of 11 September 2001. The Protocol amending the European Convention on the Suppression of Terrorism, opened for signature in May 2003, had considerably widened the purview of the Convention. To date, the Protocol had been signed by 34 member States, and it was hoped that the number would increase rapidly, because the entry into force of the Protocol would signify that the 1977 Convention could be opened to non-Members. The Directorate General of Legal Affairs had also drawn up Guidelines on Human Rights and the Fight against Terrorism, and, in pursuance of the terms of reference it had received from the Committee of Ministers, it had proposed other activities in the sphere of counter-terrorism.

43. In that context, it had turned its attention to the question of the financing of terrorism, and it had taken as a basis the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. In addition, the Select Committee of Experts on the Evaluation of Anti-Money-Laundering Measures (MONEYVAL/PC-R-EV) had been set up to appraise measures to prevent money laundering taken by member States which were not part of the Financial Action Task Force on Money Laundering. To date, the Committee had held two meetings at which it had discussed the drafting of legal instruments on special investigation techniques and examined ways of protecting witnesses and persons repenting of acts of terrorism. Several years ago, the Committee of Ministers had adopted Recommendation No. R (97) 13 concerning the intimidation of witnesses and the rights of the defence, and it was therefore hoped that a binding legal instrument would be produced shortly.

44. A report on identity documents and the fight against terrorism had led the MONEYVAL Committee to consider what activities should be launched in that respect. Incitement to terrorism would also be scrutinized by the Committee, which would take as its starting point not only the Convention on the Suppression of Terrorism and the Protocol amending it but also the travaux préparatoires to the Convention on Cybercrime.

45. The Council of Europe could, however, play an absolutely crucial role in the fight against terrorism by virtue of more than 50 years’ experience in the field of protecting human rights while fighting crime. In view of the difficulties encountered in the drafting of a general United Nations convention on the subject, the Council had been encouraged to draw up a pan-European convention by its Parliamentary Assembly, which was optimistic that such a text would lend impetus to the drafting of the United Nations convention, on account of the momentum that would be built up at the regional level by the introduction of treaty-monitoring machinery. The Committee of Ministers had welcomed that idea, and the next stage would be the holding of a conference of European ministers of justice in Sofia in October. The Committee of Experts on Terrorism would then meet at the end of October to discuss the conference’s findings and propose follow-up action.

46. The Council of Europe was likewise seriously concerned about trafficking in human beings. The Committee of Ministers had long ago issued a recommendation to the member States concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults (Recommendation No. R (91) 11), and more recently it had set up a Committee of Experts to draft a European convention on trafficking in human beings, which would meet for the first time in September. The Council had received strong support for that step from the United Nations and OSCE.

47. In regard to family law, in May 2003 the Committee of Ministers had opened for signature the Convention on Contact concerning Children, which dealt with transfrontier parental access. The European Commission had requested authorization to accede to that Convention. In the domain of bioethics, an Additional Protocol to the Convention on Human Rights and Biomedicine concerning
Transplantation of Organs and Tissues of Human Origin had just been opened for signature, and an additional protocol on biomedical research was being finalized.

48. Anti-corruption measures also received much attention from the Council of Europe. It had issued 20 guidelines on how to combat corruption, and, what was more important, its Criminal Law Convention on Corruption and Civil Law Convention on Corruption had both entered into force and an Additional Protocol to the Criminal Law Convention on Corruption had been adopted in 2003. In addition, the Council had adopted a European Code of Conduct for Public Officials as well as Recommendation Rec(2003)4 of the Committee of Ministers on common rules against corruption in the funding of political parties and electoral campaigns. All those legal instruments were monitored by the Group of States against Corruption (GRECO), which comprised most of the Council’s member States plus the United States. Moreover, the European Union had expressed a desire to join the Group. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime was to be revised in the near future. The Convention on Cybercrime had been supplemented by an Additional Protocol concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, which had been signed by six States so far.

49. Another of the Council’s vital concerns was the functioning of judicial systems in member States, since the best way to stem the rising tide of applications to the European Court of Human Rights was to improve the course of justice at the national level. To that end, the Committee of Ministers had set up the European Commission for the Efficiency of Justice (CEPEJ), which was not a monitoring body but a forum where the member States could exchange ideas on good practice and receive assistance in that respect. It would initially concentrate on investigating the quantitative and qualitative indicators for evaluating the functioning of judicial systems and on the length of judicial proceedings in member States. The Consultative Council of European Judges (CCJE), the first regional body consisting of legal practitioners and judges, was strongly backing that initiative.

50. The main beneficiaries of Council of Europe Cooperation Programmes had been the countries in transition, but long-standing member States had also been able to take advantage of them. While great importance was attached to those bilateral programmes, which had served many countries well and had covered a multitude of subjects, it had been decided that in the future they should focus on countries in South-Eastern Europe and in the Commonwealth of Independent States. Accordingly, in 2002 the Council had assisted with the reform of the Russian Federation’s judicial system, which had been completed in under a year. Several of the dozens of laws on which the Council had provided expert advice were currently before the Duma. In many other countries, the Council was offering counselling in constitutional matters, a field where the European Commission for Democracy through Law (Venice Commission) was active. The Venice Commission likewise helped with the drafting and revising of penal codes, codes of criminal procedure, civil codes, codes of civil procedure, laws on defence lawyers and public prosecutors, as well as legislation on bioethics and data protection.

51. As to cooperation in international law, at the initiative of CAHDI, a meeting was to be organized on 17 September 2003 to exchange views on the implications of the Rome Statute of the International Criminal Court. The President of the Court would participate in the meeting. Through two previous exchanges of views, the Council of Europe had contributed to ratification of the Rome Statute by its Member States.

52. At CAHDI’s most recent meeting in March 2003, it had been briefed on the Morgan case, in which an American citizen had brought proceedings against the Council of Europe before a New York District Court. In dismissing the application, the judge had indicated that the Council of Europe was an “agent or instrumentality” of a foreign State. Since the deadline for appeal had been 3 February 2003, the case could be considered closed.

53. The case had some bearing on the immunities of States and international organizations, and he wished in that connection to mention CAHDI’s pilot project on State practice concerning State immunities. A great many contributions had been received from States, and the Committee had decided on follow-up measures including the joint preparation by three research institutes of an analytical report. That effort was a practical contribution to the work of the United Nations which Mr. Hafner had shepherded to success.

54. CAHDI’s most recent meeting had been attended by Mr. Mikulka, who had described the codification efforts of the United Nations and had an exchange of views on the subject with the Committee’s members. Mr. Gil Robles, Commissioner for Human Rights of the Council of Europe, had also attended the meeting and had described the activities of his office, a young institution but one which already had a remarkable record, attested to by its reports on Chechnya and the Basque region.

55. Another of CAHDI’s activities that deserved mention was its operation as a European observatory of reservations to international treaties. That activity, which, he understood, had been mentioned in the Commission’s reports, had steadily intensified and was becoming increasingly useful, as was demonstrated by extending it to cover reservations to international treaties on the struggle against terrorism. Many such reservations were no longer open to objection but needed to be studied closely with a view to contributing to the Council’s efforts to combat international terrorism.

56. Mr. MOMTAZ thanked Mr. de Vel for the very useful information provided and said that article 1 of the European Convention on the Suppression of Terrorism as it would be amended by its Protocol of Amendment of 2003 gave no definition of terrorism, referring instead to offences within the scope of 10 other international instruments. What was the reason for that? Had the Council experienced difficulties in developing a comprehensive definition of terrorism, and was anything being done to produce one now? Article 5 of the amended Convention referred to exceptions to the obligation to extradite, and an explanatory report on that article indicated that the list...
of exceptions given was not exhaustive. Did that mean that the corresponding article in the European Convention on Extradition should be interpreted in the same way, namely, as not giving an exhaustive listing of exceptions?

57. Mr. SEPÚLVEDA asked about the Council of Europe’s experience in putting into effect regulations against financing and money laundering for both terrorism and drug trafficking. Had intelligence services found links or common denominators in terms of the financial controls that must be adopted?

58. Mr. DUGARD noted that in 2002 the European Union had adopted a framework resolution attempting to define terrorism in the most all-embracing, indeed frightening, terms, and said that the Council was to be congratulated for not following that example. Was its cautious approach motivated by fear that a comprehensive definition of terrorism might interfere drastically with human rights? As to the International Criminal Court, the European Union had actively discouraged its members from entering into agreements with the United States under article 98, paragraph 2, of the Rome Statute of the International Criminal Court. Had the Council attempted to do likewise?

59. Mr. ECONOMIDES asked whether the expansion of the membership of the Council of Europe to 45 members had resulted in additional ratifications of conventions on international law, specifically the European Convention for the Peaceful Settlement of Disputes and the European Convention on Consular Functions. Had there been any progress in the implementation of decisions of the European Court of Human Rights, notably in the Loizidou case?

60. Mr. GALICKI, noting that the Council of Europe had made real achievements in the legal field, said that the revision of the European Convention on the Suppression of Terrorism had involved a very difficult and delicate process of reaching consensus, and that that was one of the reasons why article 1 included no definition of terrorism. Especially after the difficulties encountered in the United Nations, a decision had intentionally been taken not to define terrorism but to prepare an instrument that could be applied in practice as quickly as possible. It was to be hoped that work in the United Nations on a comprehensive convention would continue, however, and that the Council’s efforts would contribute to it.

61. Another of the Council’s achievements was the finalizing of work on an additional protocol to the European Convention on Nationality, which would deal with a matter familiar to the Commission: how to prevent statelessness in the event of succession of States. Having chaired the committee responsible for those efforts, he could say that the efforts of the Commission in the same field had been extremely helpful.

62. Mr. YAMADA said he had attended CAHDI’s meeting in September 2002 as an observer and had been impressed by its serious work on a wide range of subjects. One of the subjects extensively discussed at the meeting had been immunities of States and their property. A number of substantive issues had been solved, but what had remained open was the form of the future instrument on that subject. At a meeting of the Asian-African Legal Consultative Organization in June 2003, views had been exchanged on that subject, and he wondered if CAHDI was also going to coordinate the positions of its members.

63. Mr. de VEL (Observer for the Council of Europe) said that there was no definition of terrorism in the European Convention on the Suppression of Terrorism as it would be amended by its Protocol of Amendment of 2003, because the 1977 Convention, which itself had contained no definition of terrorism, had had to be rapidly adapted to make it functional in contemporary conditions. It was not that obstacles had been encountered, and indeed in the European context the problems were not the same as in the United Nations, but instead, there had been no desire to take up the question at the time. The issue would come up, however, in the context of the comprehensive convention criminalizing the offence of terrorism that was being developed by the United Nations. The members of the European Union had adopted a definition in 2002, but it had been aimed at instituting a European arrest warrant, and it would be difficult to get the 45 members of the Council of Europe to go so far as to agree on such a measure.

64. Drug trafficking always lay in the background in the fight against money laundering and would undoubtedly come up during the revision of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The MONEYVAL Committee of the Council of Europe was responsible for reviewing measures to combat money laundering and financing of terrorism adopted by members of the Council that were not members of the Financial Action Task Force on Money Laundering: it used the same methods as did the Task Force and had in fact been set up at the latter’s behest.

65. The Council of Europe had indeed taken a position on bilateral agreements under the Rome Statute of the International Criminal Court: two recommendations had been made by the Parliamentary Assembly to the Committee of Ministers establishing clear parameters for this. The Chair of the Committee of Ministers and the Secretary-General had also made their views known on the subject.

66. With the recent expansion in the membership of the Council of Europe, a campaign had been launched to promote ratification of its conventions. In response, the number of signatories to conventions, particularly in the areas of crime and terrorism, had significantly increased. He did not at present have the figures on ratifications of specific conventions, but would provide them later in writing.

67. Implementation of the decisions of the European Court of Human Rights was one of the central issues in the discussions about reform of the Court and its functioning. The problem, though important, should not be overemphasized: according to his statistics, the implementation of only 2 per cent of the decisions had been problematic. He was not at liberty to speak about the Loizidou case except to say that new proposals had recently been formulated, holding out hope for a solution to the current impasse.
68. The importance of the work of the Committee on Nationality could not be overemphasized. The Council of Europe had been involved in the issue for a great many years: the Convention adopted in the 1960s had become somewhat out of date, and a new convention had been opened for signature several years ago. A protocol to that Convention was now being drafted, an effort to which Mr. Mikulka had made a very useful contribution.

69. As a representative of the Council of Europe, it was not his place to comment on the relations between the Council and the European Union. The draft European Convention was certainly a welcome initiative, however.

70. Mr. BENÍTEZ (Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe, Observer for the Council of Europe), replying to the question about the Council’s work on immunities of States, said that CAHDI would be considering the outstanding issues in mid-September 2003 as a practical contribution to the preparations for the discussions at the Sixth Committee of the General Assembly. The pilot project on State immunities was in the second stage of implementation.

71. The European Convention for the Peaceful Settlement of Disputes provided a well-regulated framework for inter-State dispute settlement. As had just been pointed out, there had been an increase in the number of signatories to certain specific conventions as a result of the enlargement of the Council of Europe. CAHDI, like other steering committees and ad hoc committees of the Council, had been asked to review the operation of the international instruments under its responsibility. Accordingly, for the past five years it had been systematically reviewing the impact of European conventions in the field of public international law with a view to recommending to new member States of the Council whether to accede to them or not, the ultimate objective being the efficient functioning of the conventions. CAHDI had been receiving progress reports by countries that were working out bilateral agreements under the Rome Statute of the International Criminal Court, enabling it to review the situation periodically. The exercise had been extremely useful in that the legal advisers who were members of CAHDI were able to speak very frankly about their concerns.

72. The European Convention on the Suppression of Terrorism had not criminalized the act of terrorism but sought to depoliticize it for the purposes of extradition. The review committee had been asked, not to develop a new instrument, but rather to review the existing one. It had decided first of all not to change the nature of the Convention, which the introduction of a definition of terrorism would certainly have done. It had borne in mind the definition adopted by the European Union, on the understanding that that could not be incorporated at that time as it was part of a criminalizing exercise. The definition would certainly be included now as part of the development of a comprehensive convention on terrorism.

73. As for article 5 of the European Convention on the Suppression of Terrorism and possible exceptions to the obligation to extradite, the list was not exhaustive. At the request of the Parliamentary Assembly, for the purpose of highlighting the grounds for refusal to extradite, the Council of Europe had decided explicitly to enlarge the list of such grounds. As a result of the entry into force of the amending protocol, the original Convention would be open to the signature of non-member States of the Council, which were not bound by the provisions of the European Convention on Human Rights or of its Protocols. Since the list was not exhaustive, however, a State party could refuse extradition on other human rights grounds.

74. The CHAIR thanked the representatives of the Council of Europe for the very important information provided and reiterated the Commission’s interest in continuing dialogue with that institution.

The meeting rose at 1.10 p.m.

2778th MEETING

Tuesday, 22 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rodriguez Cedeño, Ms. Xue, Mr. Yamada.


[Agenda item 9]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. YAMADA (Special Rapporteur), introducing his first report on shared natural resources (A/CN.4/533 and Add.1), explained that it was a preliminary report that was intended to provide background on the topic and seek guidance from the Commission on the future course of the study.

2. The topic of shared natural resources had been included in the Commission’s programme of work in 2002.\(^1\)

\(^1\) Reproduced in Yearbook … 2003, vol. ii (Part One).