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Summary record of the 2725th meeting

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Extract from the Yearbook of the International Law Commission:-
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Reconciliation Commission was a very important one; they had both been established under domestic law, pursuant to Security Council resolution 1315 (2000) and by agreement between the United Nations and the Government, but it would be for the two institutions to develop their relationship. To assist them in that task, his Office had sponsored three seminars, two in New York and one in Freetown. There was no lack of material for the Prosecutor of the Special Court and the President of the Truth and Reconciliation Commission to study. Moreover, the Special Court's activities would focus on a relatively small number of people: those who bore the greatest responsibility for the atrocities committed.

54. He was well aware of the Japanese Government's interest in the situation in Cambodia and could only regret the inevitable turn that events had taken there. However, the matter was a political one and was now in the hands of Member States.

55. The budget for the International Criminal Court had been prepared and was expected to be adopted in September 2002. Member States would then pay their contributions into a central fund, which would be administered by the Registrar of the Court; a similar procedure had been followed in setting up ITLOS.

56. Having cooperated with legal departments in many countries, including countries in Africa, he had the greatest respect for what they accomplished with extremely limited resources. In some cases, they lacked even the paper on which to print proposals for the ratification of treaties to be placed before their national parliaments. However, his Office could not cooperate directly with such departments without a direct mandate from the General Assembly. He provided a list of useful names and addresses to legal departments throughout the world, helped to organize informal meetings of legal advisers and encouraged colleagues in developed countries to provide assistance by, for example, making contributions to the legal libraries of developing countries. However, much more could be done. The Secretary-General had noted in his report "We the peoples: The role of the United Nations in the twenty-first century" (Millennium Report)⁸ that many countries declined to sign or ratify international treaties and conventions because they lacked the necessary expertise and resources; bilateral cooperation could help with that problem.

57. Mr. DUGARD asked the Legal Counsel, in his capacity as Under-Secretary-General of the United Nations, to inform his superiors and colleagues at Headquarters of his concern, and that of the other members of the Commission, at the fact that their honoraria had been reduced to the princely sum of one dollar and to convey their hope that those honoraria would soon be restored to an appropriate level.

The meeting rose at 11.50 a.m.

⁸ A/54/2000.

2725th MEETING

Friday, 24 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

Diplomatic protection¹ (*continued*)* (A/CN.4/514,² A/CN.4/521, sect. C, A/CN.4/523 and Add.1,³ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

SECOND AND THIRD REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. DUGARD (Special Rapporteur), introducing section C of his third report (A/CN.4/523 and Add.1), said that, unlike some members of the Commission, who saw the Calvo clause as a relic of a bygone era of Western intervention in Latin America, he saw that procedure as an integral part of the history and development of the rule on the exhaustion of local remedies and as one that remained relevant. That was why he was submitting draft article 16, on that issue, to the Commission.

2. The Calvo clause was a contractual undertaking whereby a person voluntarily linked with a State of which he was not a national agreed to waive the right to claim diplomatic protection by his State of nationality and to confine himself exclusively to local remedies relating to the performance of the contract. The scheme had been devised by the Argentine jurist Carlos Calvo to prevent nationals of the Western imperialist powers doing business in Latin America from immediately taking their contractual disputes with the host Government to the international plane, instead of first seeking to exhaust local remedies. From the outset, the Calvo clause had been controversial. Latin American States had seen it as a rule of general international law, and certainly as a regional rule of international law, and many of them, notably Mexico, had incorporated it into their constitutions. On the other hand, Western States had seen it as contrary to interna-

* Resumed from the 2719th meeting.

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

² See *Yearbook ... 2001*, vol. II (Part One).

³ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

tional law, on the ground that it offended the Vattelian fiction according to which an injury to a national was an injury to the State, and that only the State could waive the right to diplomatic protection.⁴ The leading case on the subject was the decision handed down by the General Claims Commission (Mexico and United States) in the *North American Dredging Company* case, in which it had been clearly shown that the Calvo clause was compatible with international law in general and with the right to diplomatic protection in particular. In the case in question, the claimant company had entered into a contract with the Government of Mexico containing a clause, article 18, under which the company and all persons engaged in the execution of the work agreed to be considered as Mexicans in all matters concerning the execution of the contract and further providing that under no conditions would the intervention of foreign diplomatic agents be permitted in any matter related to the contract.⁵ When a breach of the contract had occurred, the claimant company had made no attempt to exhaust local remedies, as it had been required to do under article 18 of the contract, and, relying on article V of the *compromis* establishing the General Claims Commission,⁶ which dispensed with the need to exhaust local remedies, had requested the Government of the United States to bring a claim on its behalf before the General Claims Commission. That Commission had then embarked upon an examination of the effects of article 18 of the contract and had reached a number of conclusions that were set forth in detail in section C.7 of his report. In summary, the General Claims Commission had held that the Calvo clause was a promise by an alien to exhaust local remedies. The alien had thereby waived his right to request diplomatic protection in a claim for damages arising out of the contract or any matter relating to the contract. But that did not deprive him of his right to request diplomatic protection in respect of a denial of justice or other breach of international law experienced in the process of exhausting local remedies or trying to enforce his contract.

3. The decision in the *North American Dredging Company* case had been subjected to serious criticism by jurists, chiefly on account of the refusal by the General Claims Commission to give full effect to article V of the *compromis* establishing the Commission, which had seemed to relieve the claimant of the obligation to exhaust local remedies. Nevertheless, thereafter it could no longer seriously be argued that the Calvo clause was contrary to international law. There was still debate on its purpose and scope, mainly in the context of that case. In paragraph 31 of section C.8 of his report, he had tried to list the principles that emerged from that debate.

4. First, the Calvo clause was of limited validity only in the sense that it did not constitute a complete bar to diplomatic intervention. It applied only to disputes relating to the contract between alien and host State containing the clause, and not to breaches of international law. Second, the Calvo clause confirmed the importance of the rule on

the exhaustion of local remedies. Some writers had suggested that the clause was nothing more than a reaffirmation of that rule, but most writers saw it as going beyond such a reaffirmation. The ruling in the *North American Dredging Company* case had found that the Calvo clause could trump a provision in a *compromis* waiving a requirement that local remedies should be exhausted. Third, international law placed no bar on the right of an alien to waive by contract his own power or right to request his State of nationality to exercise diplomatic protection on his behalf. Fourth, an alien could not by means of a Calvo clause waive rights that under international law belonged to his Government. The right to exercise diplomatic protection was founded on the Vattelian fiction whereby an injury to a national arising from a breach of international law was an injury to the State of nationality itself. Fifth, the waiver in a Calvo clause extended only to disputes arising out of the contract or to breach of the contract, which did not, in any event, constitute a breach of international law; nor, in particular, did it extend to a denial of justice. However, uncertainty persisted about the notion of denial of justice associated with or arising from the contract containing the Calvo clause, as was apparent in the writings of García Amador, who submitted the conclusion that proof of an aggravated form of denial of justice was required before an international claim could be brought.

5. The Calvo clause had been born out of the fear on the part of Latin American States of intervention in their domestic affairs by European States and the United States under the guise of diplomatic protection. European States and the United States, for their part, had feared that their nationals would not receive fair treatment in countries whose judicial standards they regarded as inadequate. Since then, the situation had changed completely. European States and the United States respected the sovereign equality of Latin American States and now had confidence in their judicial systems, which were subject to both regional and international monitoring. The Calvo clause nevertheless remained an important feature of the Latin American approach to international law, and that doctrine influenced the attitude of developing countries in Africa and Asia, which feared intervention by powerful States in their domestic affairs. The Calvo doctrine was already reflected in General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources. It appeared again in international instruments such as the Charter of Economic Rights and Duties of States, contained in General Assembly resolution 3281 (XXIX) of 12 December 1974, which proclaimed in its article 2, paragraph 2 (c), that disputes over compensation arising from the expropriation of foreign property must be settled under the domestic law of the nationalizing State. The influence of the Calvo doctrine was also to be seen in decision 24 of the Cartagena Agreement [Subregional integration agreement (Andean Pact)]. On the other hand, the North American Free Trade Agreement (NAFTA),⁷ which permitted foreign investors to resort to international arbitration without first exhausting local remedies, was

⁴ See E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III.

⁵ See A. H. Feller, *The Mexican Claims Commissions, 1923–1934* (New York, Macmillan, 1935), p. 187.

⁶ *Ibid.*, p. 321 *et seq.*, especially p. 326.

⁷ See *The NAFTA*, vol. I. North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (Washington, D.C., U.S. Government Printing Office, 1993).

seen by some as representing a departure from the Calvo doctrine.

6. Two options were open to the Commission: either to decline to draft any provision on the subject on the ground that to do so would be superfluous if one took the view that the Calvo clause simply reaffirmed the rule on the exhaustion of local remedies; or to draft a provision limiting the validity of the Calvo clause to disputes arising out of the contract containing the clause, without precluding the right of the State of nationality of the alien to exercise its diplomatic protection on behalf of that individual where he or she had been injured as a result of an internationally wrongful act attributable to the contracting State. Such was the purpose of draft article 16, paragraph 2 of which provided that such a clause constituted a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement, where there was a *compromis* providing for an exception to the rule on the exhaustion of local remedies. In short, the article reproduced the principles enunciated in the *North American Dredging Company* case, clearly stating that the Calvo clause was not contrary to international law, that waiver of the right to diplomatic protection was limited exclusively to disputes arising out of the contract and that any provision waiving the rule on the exhaustion of local remedies appearing in a *compromis* would not prevail over the Calvo clause.

7. Mr. SEPÚLVEDA congratulated the Special Rapporteur on the high quality of his two reports, which were remarkable for the way in which they ordered and systematized the concepts analysed and for the wealth of sources consulted. The Commission's treatment of that topic could complement its treatment of the topic of State responsibility.

8. The general principle of the exhaustion of local remedies had already been studied by the Commission, as had the exceptions to the general rule. The core concepts on which the Special Rapporteur's analysis was based were the primacy of domestic laws and domestic courts, as an expression of State sovereignty; a reaffirmation of the statutory and political powers of the host State; the possibility for the host State to remedy the injury to an alien in its own legal system before being called upon to account for itself at the international level; and the role of national courts in settling conflicts arising in the national territory. The principle of equality between the national and the alien would be vitiated if the alien was deprived of recourse to the national courts by virtue of the exercise of diplomatic protection, a situation which would be tantamount to denying the validity of the host State's legal system. A breach of an international obligation could be established only after the individual, having exhausted the remedies available, had failed to obtain satisfaction or had been the victim of a denial of justice. Only then could an international procedure begin, whether in arbitration or judicial proceedings or through the exercise of diplomatic protection.

9. Like the Special Rapporteur, he considered that the codification of the rule on the exhaustion of local remedies would be incomplete without a recognition of the

Calvo clause, which formed an integral part of the constitutional law of several Latin American countries and of Latin American regional customary law. Nor, in his view, could it be claimed that the Calvo clause was contrary to international law, on account of two important principles, namely, the sovereign equality of States, which entailed a duty of non-intervention, and the equal treatment of nationals and aliens. By virtue of that principle, anyone establishing himself in a foreign country accepted a common destiny with that country's nationals. That individual thus had a right to the same protection as nationals, and the Government had the same responsibility *vis-à-vis* aliens as *vis-à-vis* its nationals. With respect to codification, as the Special Rapporteur had pointed out, the Calvo clause was incorporated in a number of inter-American legal instruments. Admittedly, the United States had entered reservations at the time of ratification, reaffirming its right to exercise diplomatic protection. Nevertheless, the Charter of OAS, which had been the subject of no reservation on the part of any of the American States, provided a radical definition of non-intervention, prohibiting any form of intervention, direct or indirect, for any reason, in the internal or external affairs of a State.

10. As to jurisprudence on the subject, the Special Rapporteur had rightly indicated that the decision in the *North American Dredging Company* case constituted a dividing line between two periods, before the case and afterwards. The General Claims Commission had established the validity of a concession contract in which a foreign beneficiary had agreed to enjoy the same rights to bring claims as those given to Mexicans. At the same time, it had laid down the following rules: a balance had to be sought between the sovereign right of national jurisdiction and the right of nationals to the protection of their State; there was no rule of international law prohibiting the limitation of the right to diplomatic protection; an alien could not object to the right of his Government to bring an international claim in the event of a breach of an international obligation that had caused injury to the alien; the General Claims Commission had not found a generally recognized rule of positive international law that would give a Government the right to intervene to strike down a lawful contract entered into by one of its citizens; such a contract bound the beneficiary to be governed by the laws of Mexico and to use the remedies provided by them; and denial of justice or any other breach of international law gave rise to the right to diplomatic protection.

11. On the basis of that jurisprudence, the Special Rapporteur had identified a number of common denominators that could help in drafting a rule on the subject: the Calvo clause applied only to disputes relating to a contract between an alien and a host State that contained the clause; it did not apply to breaches of international law; it confirmed the validity of the customary rule on the exhaustion of local remedies; international law did not prevent an alien from exercising the right not to request protection from his Government; a private individual could not waive rights that belonged to the State under international law; through the Calvo clause, an alien undertook not to request the protection of his Government in the event of a dispute relating to the performance of the contract, but that did not extend to a denial of justice or any other breach of international law.

12. In addition to those components of the rule that the Special Rapporteur was proposing, he drew attention to the principle embodied in Basis of Discussion No. 26 formulated by the Preparatory Committee of the Conference for the Codification of International Law, held at The Hague in 1930, and referred to in a footnote in section C of the third report: “If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted.”⁸ The spirit of that provision was also reflected in article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, cited in section C.9 of the report. The arbitral tribunals that had applied the Convention had consistently concluded that no contracting State should give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another contracting State had consented to submit or had submitted to arbitration under the Convention, unless such other contracting Party had failed to abide by and comply with the award rendered in such dispute. There was a solid foundation of arbitral decisions to that effect. A similar principle was to be found in the international human rights instruments. For example, article 41, paragraph 1 (c), of the International Covenant on Civil and Political Rights stated that the Human Rights Committee could deal with a matter referred to it only after it had ascertained that all available domestic remedies had been invoked and exhausted, in conformity with the generally recognized principles of international law.

13. In conclusion, he said that he agreed with the Special Rapporteur’s recommendation on the drafting of a provision that reproduced the terms of the Calvo clause, thereby reflecting relevant jurisprudence, doctrine and some State practice which reaffirmed the role of domestic courts. In so doing, the Commission would be codifying a regional customary rule which, in the light of recent developments in international law, could legitimately be elevated to the rank of a universal rule.

14. Mr. BROWNLIE said that the well-researched and helpful report under consideration showed that the Calvo clause was not solely of historical interest. No matter how important it might be, however, it was beyond the scope of the Commission’s statute, in particular article 15 thereof: it was not a rule of law and therefore did not lend itself to codification. If the Commission was to codify the Calvo clause, it would have to determine its legality or lack thereof. The Calvo clause was simply a contractual drafting device. As to the “Vattelian fiction” referred to in section C.8 of the report, which was premised on the notion that an injury to an individual was an injury to his State of nationality, it was certainly not a substitute for analysis of the exercise of diplomatic protection on a case-by-case basis. That was why he thought that draft article 16 as submitted by the Special Rapporteur should not be referred to the Drafting Committee.

⁸ League of Nations, Conference for the Codification of International Law, *Bases of Discussion Drawn Up in 1929 by the Preparatory Committee of the Conference*, vol. III: *Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 135; reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, p. 223.

15. Mr. PELLET said that the report under consideration had confirmed the conviction he had expressed at an earlier meeting that the Calvo clause, whose principle he did not object to, should be discussed as part of the broader issue of the waiver of diplomatic protection. The report claimed to deal only with the Calvo clause, but in fact it also dealt with other institutions, particularly the waiver of the exercise of diplomatic protection by the State itself, a problem that arose in a very different way than the Calvo clause *per se*. He basically endorsed Mr. Brownlie’s analysis of the issue and agreed with him that the Calvo clause was a practice, but he did not agree with his conclusion. The fact that the Calvo clause was a practice did not necessarily mean that the questions whether that practice was in conformity with international law and what its effects in international law were should not be examined. That was obviously a topic for legal discussion and even for the codification or progressive development of international law.

16. The Special Rapporteur should have drawn a clear distinction in his report between the two aspects of the issue, namely, waiver by an individual of the diplomatic protection of his State of nationality and waiver by a State of the exercise of diplomatic protection. Since he had not done so, it was all the more difficult, if not impossible, to define the Calvo clause. He was not sure that the Special Rapporteur had been right to support García Amador’s definition,⁹ as section C.3 of the report seemed to imply. While the first and third propositions did appear to be embodiments of what he believed “the” Calvo clause was, the second, which was simply a contractual arbitral clause, was not derived from the Calvo doctrine, unless the foreign contracting party waived the diplomatic protection of his State of nationality when he agreed to arbitration. The Calvo clause was basically a contractual provision by which the foreign contracting party waived the diplomatic protection of the State of which he was a national.

17. He was not certain that that was enough, however, because he wondered whether that definition of the clause must be applied to all contracts or only to state contracts, or even limited to contracts for concessions, as article 27 of the Mexican Constitution, cited in a footnote in the report, would seem to indicate, despite the fact that the Special Rapporteur described Mexico as the most ardent advocate of the Calvo clause. In any event, he thought that the Calvo clause could be referred to only in respect of a state contract, as article 16, paragraph 1, of the text proposed by the Special Rapporteur seemed to suggest. There was, however, also the question of what the fate of such a clause would be in a contract between a national and an alien.

18. He believed the Special Rapporteur had a much broader, or perhaps looser, conception of the Calvo clause, as demonstrated by the examples of what he called the Calvo clause that he gave in section C.4 of the report: the Convention Relative to the Rights of Aliens, article 9 of the Convention on Rights and Duties of States,

⁹ See F. V. García Amador, “State responsibility: some new problems”, *Recueil des cours de l’Académie de droit international de La Harem 1958-II* (Leiden, Sijthoff, 1959), pp. 455–456; *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 62–63.

article VII of the American Treaty on Pacific Settlement (Pact of Bogotá), decisions 24 and 220 of the Cartagena Agreement (Subregional integration agreement (Andean Pact)) (para. 34) and article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In his own view, however, those were not examples of the Calvo clause at all: they were commitments, some clear, some not, on the part of the States concerned that they would not exercise diplomatic protection or would limit its exercise. They were treaty provisions that appeared in treaties, not contractual clauses that appeared in contracts. As such, and to the extent that they raised questions of validity, they were very different questions from those raised by “true” Calvo clauses. It went without saying that States could undertake not to exercise diplomatic protection or, in other words, not to assert their rights to ensure, in the person of their subjects, respect for their own rights, to use the famous phrase from the decision handed down by PCIJ in the *Mavrommatis* case. It must not be forgotten, as ICJ had recalled in the *Barcelona Traction* case, that the State alone must be deemed capable of deciding whether to exercise diplomatic protection. The national of the State could not replace the State, since it was not his own rights that were involved but those of the State, unless the fiction on which the *Mavrommatis* formula was based was to be challenged, and that, to his regret, did not seem to be the case, even though today it could be said that individuals were subjects of international law and that the State represented individuals.

19. It could nevertheless not be concluded from those observations that the Calvo clause was contrary to international law: an individual could not waive a right that was not his, but he could undertake to respect only the laws of the host country and not to seek the diplomatic protection of his State of origin. In so doing, he would be waiving a right to bring a claim, not a right to diplomatic protection itself. What he could not do was guarantee that his State of nationality would not intervene, not on his behalf, but to ensure respect for its right to see international law respected in the person of its national.

20. That appeared to be the approach taken by the Special Rapporteur, as indicated in section C.8 of the report and draft article 16, paragraph 1. Nevertheless, he was still not convinced by the reasoning used by the Special Rapporteur to reach that conclusion, and he had doubts about the wording of the draft article itself.

21. With regard to the Special Rapporteur’s reasoning, the “arguments” relating to the waiver by a State of the diplomatic protection of its nationals seemed correct in and of themselves and might be in keeping with what Calvo himself had wanted, but they had no effect on the problem with which the Commission was dealing, namely, the validity or scope of Calvo clauses in the specific sense that he himself accorded them, that is, contractual clauses by which an alien waived the diplomatic protection of his State of nationality. The examples of “false Calvo treaty clauses” given by the Special Rapporteur were not cases of complete waiver of diplomatic protection: they were usually treaty provisions that reaffirmed, and even defined, the rule on the exhaustion of local remedies. Such was the

case of the Convention relative to the Rights of Aliens, the Convention on Rights and Duties of States and the American Treaty on Pacific Settlement (Pact of Bogota). Other examples that were wrongly identified as “Calvo clauses”, such as decisions 24 and 220 of the Cartagena Agreement (Subregional integration agreement (Andean Pact)), confined themselves to recalling that the law applicable to a transnational contract was, in principle, the law of the State in which the contract was executed, and that did not mean that, if the host State violated a rule of international law in performing the contract, diplomatic protection was precluded. Last, he did not think that either General Assembly resolution 1803 (XVII) or the Charter of Economic Rights and Duties of States constituted “a classic restatement of Calvo”, as indicated in section C.9 of the report. They were, rather, a restatement of the principle established by PCIJ in the *Serbian Loans* case, according to which “any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country” [p. 41]. Accordingly, it was the municipal law and that law alone which was applicable, unless otherwise provided. That was something completely different from the validity of the Calvo clause.

22. In that connection, he had difficulty following the argument put forward in section C.8 of the report that “the waiver in a Calvo clause extends only to disputes arising out of the contract, or to breach of the contract, which does not, in any event, constitute a breach of international law”. Was that not stating the obvious? In any case, diplomatic protection could be exercised only if an internationally wrongful act had been committed, and it was international law which must be enforced, and never the contract as such. The question then arose whether or not breach of contract was contrary to international law. He doubted that the decision of the General Claims Commission (Mexico and United States) in the *North American Dredging Company* case or its subsequent decisions were the very essence of jurisprudence on the subject. Other equally respectable jurisdictional and arbitral decisions were also relevant, such as the 1904 Ralston ruling in the *Martini* case or PCIJ Judgment No. 2 in the *Chorzów Factory* case. Those precedents were much more guarded about the Calvo clause than the *North American Dredging Company* case, which was ambiguous, to say the least, as the Special Rapporteur himself had shown.

23. Having made those comments, which might belong in the commentary on article 16, he turned to the draft article itself. He agreed with the general idea underlying paragraph 1 but had a few critical remarks to make about the actual wording. He did not think that, in such a provision, it was a good idea to enumerate the “varieties” of Calvo clause, which did not do justice to the imagination of the jurists drafting them. The clause was very varied, and it would be better to use much more general wording. It would suffice to say in a first sentence that an alien could legitimately waive any request for diplomatic protection, perhaps specifying that he could do so “contractually”, but that was not required because, after all, he could also waive doing so outside a contract. Nor did he think that it was appropriate to speak of the “right” to request diplomatic protection: the word “right” might lead to confusion because a connection might be seen between it and

the idea of a “right to diplomatic protection”, which did not exist in international law. The State had the right to protect, but there was no right to protection.

24. The word “stipulation”, which was too specific, should be replaced by the word “provision” in the second sentence of article 16, paragraph 1. In the French version, the words *n’affecte en rien* should be replaced simply by the words *n’affecte pas*. The *Mavrommatis* wording should be followed as closely as possible in both French and English; accordingly, the words “on behalf of” should be replaced by the words “in respect of”. In a much more important amendment, the last part of the sentence in paragraph 1 (c) (“or when the injury to the alien is of direct concern to the State of nationality of the alien”) should be deleted because the word “direct” was not clear. Either the State was directly injured, too, and then diplomatic protection was not involved, or the individual alone was the direct victim of the injury, but, in any event, and still following the *Mavrommatis* wording, the State had the right to enforce international law in the person of its national, and there was nothing special about the premise contained in that phrase.

25. He was strongly opposed to draft article 16, paragraph 2, because it contradicted everything that the draft said about the exhaustion of local remedies. The existence of a Calvo clause was by no means necessary to create a presumption in favour of the exhaustion of local remedies. That presumption existed independently of any contractual clause. It was even a major condition for the exercise of diplomatic protection. If, as he hoped, the Commission decided against the text as it stood, he wondered whether a new paragraph 2 should not be inserted in draft article 16 to the effect that the State of which the injured person was a national could validly and unrestrictedly waive the exercise of its diplomatic protection. What went without saying went even better by saying it. In that case, of course, article 16 would cover a larger area than the Calvo clause did and should be entitled “Waiver of diplomatic protection”.

26. At the start of his introduction, the Special Rapporteur had said that it was imperative for his draft articles to refer to the Calvo clause. Given the differences of views that he sensed in the Commission on the subject, it might be wiser to do without a provision which was in fact merely the consequence of other principles already contained in the draft articles, namely, the *Mavrommatis* wording and the indisputable requirement of the exhaustion of local remedies.

27. Mr. PAMBOU-TCHIVOUNDA said that he wondered whether all the interest in considering the Calvo clause in connection with the rule on the exhaustion of local remedies should not focus instead on the scope of a clause contained in a contract between an individual and a State. He agreed wholeheartedly with the comment by Mr. Pellet that what was at issue was not just any contract, but a government contract.

28. As far as waiver was concerned, the clause in question would enable an individual to think that he was authorized by his State of nationality to undertake on its be-

half a commitment that the State would not exercise a right to which it was entitled. As Mr. Pellet had pointed out, that right belonged not to the individual but to the State. The problem of the validity of the Calvo clause thus arose only as between the parties to the contract. The Commission should decide how a State whose national said that he waived its diplomatic protection was bound by such a statement. It was also important to decide when exactly the State could make such a waiver. Was it at the time of the conclusion of the contract between the individual and the other contracting State, or was it when the individual requested the protection of his State of nationality, the dispute having begun? The exercise of waiver by the State of origin of the individual must be situated temporally for the waiver to have an effect. That involved a problem of validity but also of opposability.

29. Mr. Sreenivasa RAO said that the Calvo clause was of historical importance, but in practice it was used less and less. For example, today most States concluded investment agreements that made provision for direct recourse to international arbitration in the event of a dispute. He was afraid that the Commission was devoting too much time to the consideration of a subject that had lost much of its relevance.

30. Mr. SEPÚLVEDA said that the Calvo clause should not be considered a relic. In Mexico, all foreign companies set up in conformity with national legislation were required to sign a contract containing such a clause. International arbitration was provided for only in certain categories of dispute. In most cases, a foreign company must comply with a Calvo clause, that is, agree to submit to national legislation, for all matters relating to the interpretation or performance of a contract.

31. The CHAIR said he did not have the impression that Mr. Sepúlveda’s remarks were inconsistent with the comments by Mr. Sreenivasa Rao or Mr. Brownlie. After all, at issue was merely a contractual clause, and the Commission should take care not to depart too much from its main objective, which was to produce concrete results that were acceptable to all.

Unilateral acts of States (*continued*)* (A/CN.4/524, A/CN.4/525 and Add.1 and 2,¹⁰ A/CN.4/521, sect. D)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

32. Mr. KAMTO said that the Commission should not lose sight of the important work carried out on the subject of unilateral acts over the years. The fundamental question it faced was whether a certain legal entity called a “unilateral act” existed in international law and, if so, what legal regime governed it. He commended the Special Rapporteur on the work he had done in his fifth report (A/CN.4/525 and Add.1 and 2), which was a great improvement over what had been done previously. In addition to

* Resumed from the 2723rd meeting.

¹⁰ See footnote 3 above.

providing a recapitulation, which was very useful for new and old members alike, it set out the results of in-depth research on doctrine and jurisprudence. In that connection, he shared the view expressed by Mr. Gaja and others that information on State practice was painfully lacking. Mr. Sepúlveda had referred to highly relevant sources which might enable the Commission to pursue its work without awaiting States' replies to the questionnaire.

33. Commenting on chapter I of the fifth report as a whole, he drew the Special Rapporteur's attention to several repetitions, particularly in paragraphs 99 and 100. In paragraph 106 of the French text, the Special Rapporteur referred to *défauts de manifestation de la volonté* ("defects in the expression of will"). That phrase was not very clear—perhaps there was a translation problem. In any case, it was necessary to state whether the word "defects" meant irregularities which might affect the expression of will or the absence of an expression of will. With regard to substance, one important question was whether a unilateral act constituted a source of international law of the same rank as the usual sources, namely, treaties and custom. In other words, could a unilateral act derogate from general international law or *erga omnes* obligations? He thought that a unilateral act should never take precedence over general international law or the provisions of a multilateral convention to which the author State of the unilateral act was a party. Jurisprudence contained several indications to that effect. For example, in the *S.S. "Wimbledon"* case, PCIJ, ruling on the denial of that vessel's access to the Kiel canal pursuant to German regulations on neutrality promulgated during the Russo-Polish war, had found that a neutrality regulation, which was a unilateral act, could not take precedence over the provisions of a peace treaty [in this case the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles)]. A unilateral act was thus a source of international law, but not at the same level as treaties and custom.

34. In paragraph 87 of the report, the words *pacta sunt servanda* in parentheses should be replaced by the words *acta sunt servanda*. The main question, however, was whether the expression should be retained. Paragraph 94 said that the State was free to formulate unilateral acts outside the framework of international law, but such acts could not be contrary to *jus cogens* norms. He asked whether the word "outside" concerned the formulation or the effects of the unilateral act. It was, of course, the effects which were important.

35. Turning to the text of the draft article proposed in paragraph 119 of the report, he referred to two terminology problems. First, article 5 (c) concerned the corruption of the "representative of the State", whereas article 5 (d) spoke of the "person formulating the act". It was not necessary to use two different wordings and, since the concept of representation was not relevant in the framework of unilateral acts, it would be preferable to say "the person formulating the act" in both cases. Article 5 (h) referred to "a norm of fundamental importance to domestic law". What did that mean? Was it a reference to a constitutional norm? In any case, it would be better to use the term contained in the 1969 Vienna Convention, "peremptory" norm. On the face of it, articles 5 (d) and 5 (e) were redundant, unless the Special Rapporteur was trying to make

a distinction between coercion of the person formulating the act and coercion in the form of the threat or use of force directed against the State and leading it to formulate a unilateral act.

36. As to the interpretation of unilateral acts, it was not clear in paragraph 123 of the report whether the Special Rapporteur was referring to the *Fisheries Jurisdiction (Spain v. Canada)* case or the *Land and Maritime Boundary between Cameroon and Nigeria* case. In any event, the Special Rapporteur seemed to be saying that, for the moment, he was merely providing some information on what his proposals would be. He therefore reserved the right to return to the question of the interpretation of unilateral acts at a later stage.

37. Mr. PELLET said he strongly supported the suggestion that the relationship between unilateral acts and other sources of international law should be studied. Such a study might not be essential in the case of the 1969 Vienna Convention, but it was a very interesting point in the context of unilateral acts, and the Special Rapporteur should be encouraged not to limit himself to the model of the Convention.

38. Mr. KOSKENNIEMI said that he was opposed to the idea of classifying unilateral acts according to the sources of international law. Such acts created obligations, not law, and the unfortunate use of the word "validity" throughout article 5 stemmed from the inability to conceptualize unilateral acts in terms of reciprocal obligations between States which could, under certain circumstances, create a network of opposabilities. Such reciprocal legal relationships could not be subsumed under general conditions of validity for unilateral acts; their opposability depended on the particular nature of the relationship between the acting party and those who had taken account of that act and might have relied on it. Thus, in the words of Mr. Pellet, he was "totally" opposed to sending article 5 to the Drafting Committee because the issues which it raised were not drafting issues.

39. The CHAIR said that he wondered whether the debate was not really about something close to the doctrine of estoppel.

40. Mr. KAMTO said that taking Mr. Koskenniemi's reasoning to its logical conclusion would lead to the voluntarist view that there were no unilateral acts in international law: every legal act or source of international law was an expression of agreement between the will of two parties, although some time might elapse between those two expressions of will, that is, a *consentement dissocié*. Unilateral acts did not generally create reciprocal obligations and were not part of a direct or instantaneous bilateral or multilateral process with other subjects of international law. Of course, some unilateral acts could not be readily distinguished from international agreements, but in other cases there was indeed a difference between them. In any event, even a theoretical study of the relationship between unilateral acts and the sources of international law would clarify the concept of unilateral acts and would not, moreover, affect the Commission's continuing efforts to codify the topic.

41. Mr. TOMKA said that he had doubts about how far the Commission had come in its work on the topic, which it had begun to study in 1997; thus far, only four draft articles had been referred to the Drafting Committee. The Commission was in a situation similar to that in which it had found itself some 40 years previously with the topic of State responsibility. At that time, the first Special Rapporteur, Mr. García Amador, had concentrated on one particular aspect of the topic; later, others had taken over and, with the Commission's approval, had sought to establish general rules. In the present case, perhaps the Commission should reverse that approach and begin with a systematic study of particular categories of unilateral acts in order to formulate general rules. For example, the type of pledge which the United Nations Legal Counsel had mentioned in his statement to the Commission might be interesting and the Special Rapporteur should provide a more detailed analysis of the legal effects, enforceability and consequences of the examples of promise mentioned in his report.

42. Unilateral acts were not law-creating or norm-creating mechanisms. In convention and custom, the participation of several States and a common will were required. A unilateral act might mark the beginning of a State practice which, in turn, created a norm.

43. With regard to the invalidity of unilateral acts [draft articles 5 (a)–5 (h)], the Special Rapporteur rightly stated in paragraph 99 of his report that it was necessary to distinguish between absolute and relative invalidity, but at the end of the paragraph he gave an example of relative validity which seemed to contradict article 5 (h). That distinction between absolute and relative might not be necessary in the text of the draft articles; the Drafting Committee would probably find another way of expressing it. In paragraph 99, the Special Rapporteur also gave an example of absolute invalidity involving coercion of the representative of the State, but a person who was coerced was not expressing his will or that of his State, without which there was no legal act. Thus, it would seem that absolute invalidity was covered by articles 5 (e) and 5 (f) and relative invalidity by articles 5 (a) (providing that the question of reliance on the bona fides of other States was taken into account), 5 (b), 5 (c) and 5 (h). He shared Mr. Simma's views on article 5 (g). In any event, articles 5 (a) to 5 (h) required further work.

44. Mr. Sreenivasa RAO said that the conceptualization of unilateral acts of States had not yet been achieved because of the scope that the Special Rapporteur himself had set for the topic. He had dropped the reference to the concept of autonomy from the definition of unilateral acts; the problem was that he was still treating them as autonomous acts and trying to study their value in law. Unilateral acts and the different forms in which they were expressed could be of interest and have legal effects, but they did not have the value of international obligations in and of themselves. They could be assessed only in light of the responses, actions and acceptance of other States in one form or another. Without that counterpart, unilateral acts seemed to dangle in the air, particularly as the State which was free to make them was free to terminate them as well. Unfortunately, most unilateral acts were statements of national policy. He therefore wondered why so

many members of the Commission were concerned about lack of access to the preparatory work in the interpretation of such acts. The preparatory work in question was not that of treaty law; it was the context in which the statement was made, the compulsion, the occasion or any other factor which led the country to act or react in a certain way. Experience showed that States which made unilateral pronouncements, feeling the compulsion to act in a particular way because of those statements, logically believed in good faith that they had acquired an obligation. When nuclear States said that they would not use nuclear weapons against non-nuclear States, that was a unilateral statement. Some States might accept it, others might have doubts and still others might not believe it, but the author State considered that it had assumed an obligation. However, it was a matter of comity, not an international obligation. Hence, there was nothing immoral in the fact that India had for 40 years held to its unilateral commitment not to develop nuclear weapons, but had revoked it when circumstances had changed and the expected consequences of its commitment had not materialized. Very few international agreements survived for more than 40 years. Furthermore, the way in which the unilateral obligation created by a unilateral act was terminated differed from the way in which a treaty was terminated. In the latter case, there were a procedure and an agreed methodology which must be respected, whereas in the case of a unilateral act only estoppel, acquiescence or the existence of a treaty, custom or other obligation prevented an equally unilateral termination.

45. Mr. Sepúlveda had raised a very interesting point in the context of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), namely, that of a unilateral act of which several States were the joint authors, but in that case there were a treaty format and the signatures of the parties. In another example, State A made a unilateral statement of national policy and State B responded with another unilateral statement. There was a true concordance between the two and a commonality of expectations arising out of it; there was no treaty format and no custom because only a few States were involved, but the two States were bound by a reciprocal commitment. Yet another example was provided by the Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Sea Bed, in which the United States and three other States had, in the early stages of discussions on the United Nations Convention on the Law of the Sea, set up an alternative system for regulating investments in deep seabed mining. All those examples of State practice should be studied carefully in an attempt to establish the effects and the logic of such acts, which bordered on international obligations without being a source of international law in and of themselves. The Drafting Committee would certainly take account of all the comments made on the issue of the invalidity of unilateral acts, it being understood that the termination of unilateral acts was a topic of study as important as that of their formulation.

The meeting rose at 1.05 p.m.