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Summary record of the 2727th meeting

Topic:
<multiple topics>

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tion, for example the tautology of speaking of both will and intention. The Commission could then focus on the specific categories of effects.

62. Mr. BROWNLIE said that it was fine to sound constructive, but it was another matter to *be* constructive. None of the previous speakers had produced any solid evidence of the existence of general principles. Mr. Kamto had invoked the case law of ICJ in support of the idea that there was a general concept of unilateral acts. But that was not so. Each case was fact-related. The Court did not rely on a general theory of unilateral acts. The *Temple of Preah Vihear* case, for instance, made no reference to such a theory.

63. Mr. PELLET pointed out that, in the *Nuclear Tests (Australia v. France)* case, ICJ had clearly said, "It is well-recognized" [para. 43]. That itself was a generalization, and an interesting one.

64. If it was not possible to generalize, this meant that everything depended on the circumstances. That was true, of course, but it did not release the Commission from the task of seeking to identify a small number of legal rules that made it possible to say that, in specific circumstances, States committed themselves through their unilateral expressions of will. He failed to see how the opposite could be affirmed. It was the very function of law and of those who codified it to try to unite what appeared to be diverse. It was pointless to assert from the outset that the goal could never be reached. A small number of principles would be open to interpretation, but that was a job for jurists. Thus, he agreed with Mr. Brownlie's point of departure but was in full disagreement with his conclusions.

65. Mr. BROWNLIE said that the *Nuclear Tests* cases were usually cited in respect of the principle of good faith. Perhaps the Commission should be studying *that* principle.

66. The CHAIR, speaking as a member of the Commission, said he hoped that the Special Rapporteur would address the ideas presented by Mr. Simma.

67. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, owing to time constraints, he would address only some of the comments made in the discussion and would revert to all the issues in greater detail in his reply later on. To start with Mr. Brownlie's last point, he did not think that unilateral acts could be confined to the decisions of ICJ on the *Nuclear Tests* cases. The *Frontier Dispute* case and many other decisions should also be taken into account, as well as unilateral declarations in general. The Commission could not disregard existing jurisprudence and doctrine on unilateral acts or the views of Governments, which had expressed their positions both in a questionnaire and in the Sixth Committee. Questioning the existence of such an international legal act as a unilateral act would not be appropriate within a broad concept of international law in which a State could assume international commitments,

not just in the usual way (through a convention) but also through a unilateral act.

68. The suggestion of leaving the topic in abeyance might be considered, but he did not think the Commission should change its course, because that would introduce uncertainty and create legal and political confusion regarding whether unilateral acts did in fact exist in international law. If the Commission were to restrict itself to a study, would it not be possible to arrive at a definition and develop an overall theory of unilateral acts, or at least rules applicable to them? Of course, the Commission could not attempt to regulate unilateral acts, because they were very diverse and produced different legal effects; they could not all be lumped together. It was possible to draw up rules, but perhaps not to regulate the legal effects in all cases.

69. The Commission would need to comment on the rest of the chapter and decide what to refer to the Drafting Committee: presumably the definition and the first two articles. The Working Group could then address issues related to interpretation and other aspects.

The meeting rose at 1 p.m.

2727th MEETING

Thursday, 30 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 2]

1. The CHAIR said that, following informal consultations, it was being proposed that the functions of Special

* Resumed from the 2721st meeting.

Rapporteur for the topic of “Shared natural resources” should be entrusted to Mr. Chusei Yamada.

It was so decided.

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

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

2. Ms. XUE said that unilateral acts of States were one of the most complicated areas of international legal relations and that this explained why the Commission was divided on the question after a most stimulating debate. Perhaps the Commission should take some time to consider the direction of its work so that it could best benefit from the Special Rapporteur’s efforts. The complexity of the topic could be attributed to the wealth of State practice in respect of unilateral acts. States often made different kinds of declarations or statements that could contain a promise, protest, recognition or waiver, and a commitment made unilaterally could become an obligation, often as part of a settlement procedure by a third party. However, unlike treaty relations, unilateral acts were full of uncertainties as to the legal intention, the extent of their effects in time and in scope, and their relationship with existing treaty obligations. Circumstantial evidence thus became important and even essential in determining whether the author of a unilateral act was bound by the act. Like international courts, States became very cautious whenever it came to legal rights and obligations. That explained why the Special Rapporteur had drafted clauses comparable to those of the 1969 Vienna Convention on competence, invalidity and the interpretation of unilateral acts. However, there were certain points about which the Commission should be very careful.

3. First, in the case of treaties, there were, both domestically and internationally, certain and authoritative procedural rules which gave legitimacy to treaty provisions as a source of law. In addition, the legal intention to be bound by the provisions of the treaty was unequivocal to all parties. Those subjective and objective factors were, however, often absent in the case of unilateral acts, and that lacuna could not be filled by doctrine and research work alone, not because unilateral acts were poorly made but because their beauty often lay in ambiguity.

4. Second, the question whether unilateral acts were a source of law or a source of obligations was the result of confusion between the making of rules and the production of legal effects. If a unilateral act was placed in a specific context in real life, it would be found that in some circumstances it could create an obligation for the author State, that the obligation often determined the future conduct of that State and that other States might rely on that conduct. Whether as rights or as obligations, however, the legal effects of a unilateral act could not stand on their own; they must be governed by international law. A State could not make or recognize any territorial claim on Ant-

arctica or claim more than a 12-nautical-mile territorial sea nowadays. If the Commission took unilateral acts out of the context of existing law, particularly treaty relations, and treated them as purely creating legal effects in terms of rights and obligations, it might easily get disoriented because it was placing too much emphasis on criteria for the formulation of such acts. In international law, various types of unilateral acts, such as recognition, could have an impact on international relations, and that was more a matter of concern than the conditions and criteria under and according to which such acts were formulated. It was therefore surprising that, while the Special Rapporteur had adopted a number of clauses from the 1969 Vienna Convention, he had not included the words “governed by international law”, as contained in that Convention (art. 2), in his draft article 1.

5. Third, the introduction of certain rules on unilateral acts would serve a useful purpose for the stabilization of international relations, but, given its nature, the topic of unilateral acts should be treated with care. Before one could look for a general pattern of behaviour, however, there must first be a thorough study of State practice in that regard. Mr. Simma’s offer to assist the Special Rapporteur to carry out a comprehensive study of State practice would certainly be a valuable contribution. Until that had been done, it would be too early to decide whether the work should be done on a general basis or should begin with a study of specific unilateral acts.

6. Mr. CANDIOTI said he hoped that at the current session the Drafting Committee would consider draft articles 1 to 4, which had been referred to it at the fifty-second session of the Commission.² Since then, the Special Rapporteur had submitted new draft articles and had put forward some ideas on how the future work on the topic might be structured. In paragraphs 48 to 81 of his fifth report (A/CN.4/525 and Add.1 and 2), the Special Rapporteur came back, with new considerations, to the question of the definition of unilateral acts (draft art. 1) and concluded by repeating his earlier proposal. That called for four comments.

7. In the first place, there should be a clear indication of the strictly unilateral nature of that type of act, since, as ICJ had stated in the *Nuclear Tests* cases, a unilateral act required no form of expression of will on the part of any subject of international law other than its author. Second, the term “unequivocal”, which characterized the expression of will, was not necessary because it involved a problem of interpretation rather than a problem of definition. Third, the words “in relation to one or more other States or international organizations” might be replaced by simpler wording, particularly because, as members of the Commission had already pointed out, a unilateral act could be formulated with the intention of producing legal effects *erga omnes* or legal effects for entities which were neither States nor international organizations. What was important was that the act had consequences for the international legal system. The condition that States or international organizations must know about the expression of will was redundant, since, if it was expressed, will was

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

² See *Yearbook ... 2000*, vol. II (Part Two), pp. 88–90, paras. 517–525.

externalized and there was thus a possibility that it was known. Another element which should be included in the definition of a unilateral act and which would distinguish it from the definition of a treaty contained in the 1969 Vienna Convention was the non-relevance of the form in which will was expressed, to which ICJ had also drawn attention in the *Nuclear Tests* cases. It would therefore be better to opt for a simpler definition of a unilateral act, which would read: “For the purposes of the present articles, ‘unilateral act of a State’ means an expression of will, whatever its form, formulated by a State with the intention of producing legal effects at the international level and not requiring any expression of will by another subject of international law.”

8. With regard to the causes of invalidity of a unilateral act, the Special Rapporteur reformulated the rule contained in the former article 5 stating eight causes of invalidity in draft articles 5 (a) to 5 (h). That reformulation covered the idea of a collective or joint unilateral act, a case which must be provided for, but which would be better dealt with in a separate provision or in the commentary in order to simplify the text and avoid confusion with a multilateral act. Such a detailed analysis of the content and wording of the eight causes of invalidity was perhaps not necessary at the current stage because practice and jurisprudence in respect of the invalidity of unilateral acts had not yet been sufficiently studied. It would be better to state a general rule on the conditions of validity of such acts, namely, whether their content was materially possible, whether they were lawful in international law, whether the State’s organ had the capacity to perform unilateral acts, whether there was any defect in the expression of will, whether the expression of will was a matter of public knowledge and whether the intention was to produce legal effects at the international level. Without such a general provision, the various causes of invalidity could be grouped under two headings, that of the wrongfulness of the act and that of a defect in the expression of will. The Working Group which had discussed that question at the preceding session should meet again to consider draft articles 5 (a) to 5 (h) in detail, bearing in mind the comments and suggestions made during the debate.

9. In his fifth report, the Special Rapporteur also submitted new wording for the draft articles on the interpretation of unilateral acts contained in his fourth report.³ The new wording was based on that of the 1969 Vienna Convention and on the principle that a unilateral act was always a written declaration or document, whereas more general and flexible rules than those governing the interpretation of treaties had to be established. An expression of will did not necessarily have to be written and did not necessarily take the form of a single act or declaration. In paragraph 127 of the fifth report, the Special Rapporteur drew attention to the basic criteria which had been adopted by ICJ in the *Fisheries Jurisdiction (Spain v. Canada)* case and which had included that of trying to determine whether, by its unilateral act, the State had had the intention of producing legal effects at the international level by deducing that intention from a natural and reasonable interpretation of the expression of will, taking into account the context

and circumstances which had prevailed at the time of the expression of will—including the level of confidence or legitimate expectations which the unilateral act might have created in other actors—and the purposes intended to be served. The two draft articles on interpretation should therefore be referred to the Drafting Committee, which should be requested to include all those elements in a sufficiently broad general rule on the interpretation of unilateral acts by relegating to the commentary details such as the use of preambles and preparatory work, on the understanding that it might later be necessary to draft rules of interpretation that were specific to certain categories of acts.

10. In paragraphs 136 to 147 of the fifth report, the Special Rapporteur dwelt at length on the classification of unilateral acts according to their legal effects, a task he considered not only possible but also necessary. That classification would perhaps be premature until the Commission had made more progress in collecting and analysing information on State practice. In that connection, there were points in common in legal writings, which had been reproduced by Governments in their replies to the questionnaire or in their statements in the Sixth Committee on the four classic categories of unilateral acts (promise, recognition, protest and waiver) referred to by the Special Rapporteur, who pointed out himself that some unilateral acts combined the characteristics of several of those categories.

11. In chapter II of his fifth report, the Special Rapporteur drew the Commission’s attention to a number of questions, including that of the time when the unilateral act produced legal effects, and proposed the corresponding draft articles. Draft article 7, which was based on article 27 of the 1969 Vienna Convention, stated that a unilateral act was binding in nature. That provision did, of course, apply to acts such as promise, which were formulated with the intention of creating an obligation for their author, but it could not serve as a general rule, in that it could not necessarily be said that protest, for example, was binding on the State which formulated it. At the present stage in the study of the topic, an *acta sunt servanda* provision could not go much further than a statement of the author State’s duty to adopt consistent conduct in respect of that act, taking into account the principle of good faith and the need to respect the level of confidence and legitimate expectations created by the act, and also bearing in mind the diversity of unilateral acts. It was only when the Commission had moved on to specific categories of unilateral acts that the legal consequences of each act could be stated more specifically. Consideration would be given, for example, to the binding nature of promise, the opposability of recognition, and the questions of non-opposability in the case of protest and irrevocability in the case of waiver.

12. In chapter IV of his fifth report, the Special Rapporteur dealt with the structure of the draft articles and future work on the topic, which he divided up into one part on rules that were common to all unilateral acts and another part on the rules applicable only to a certain category of acts. That proposal was acceptable as a starting point and should be referred to the Working Group for the necessary

³ See 2723rd meeting, footnote 2.

improvement and reformulation. For example, the second part, on specific rules, should not be limited to the rules applicable to promise or unilateral acts by which States assumed obligations. It should also include specific rules relating to other categories, such as the need for waiver to be explicit, the need to maintain protest and the possibility of withdrawing it, and the form and consequences of recognition and methods and limits of revoking it. Some of the questions introduced on a preliminary basis in chapter IV also related to rules that were specific to a particular category of acts and to some general rules as well. The Working Group would have to consider all those questions in detail.

13. It was also to be hoped that many other States would follow the example of those which had already provided information on their practice in respect of unilateral acts. Mr. Pellet's suggestion that the secretariat should be requested to draw up as broad as possible an inventory of State practice, particularly recent and contemporary practice, was very appropriate and might be supplemented by Mr. Simma's proposal that an institution might provide support for research on the question. With the assistance of an informal working group, the Special Rapporteur should therefore draw up a schedule of work defining the purpose of the research and focusing on an analysis of practice based on specific examples of the four classic categories of unilateral acts. When that information had been made available, the Commission would be able to decide what further work had to be done in order to give final shape to general and specific draft rules. He therefore proposed that the Commission should take a decision in favour of the proposals by Mr. Pellet and Mr. Simma.

14. Mr. SIMMA said that the very small number of States which had replied to the questionnaire on their practice in respect of unilateral acts could perhaps be explained by the fact that such acts were present everywhere in State practice. His own proposal had been that financial support should be sought from an institution in Germany, and that would mean that the request would have to be made by a German academic. He was therefore prepared to make that request, together with the Special Rapporteur. That proposal and the one relating to intervention by the secretariat were not mutually exclusive. It was simply a matter of finding a good way of combining them.

15. Mr. DAOUDI said that, although the fifth report contained a wealth of information, he was not sure whether the rules formulated in it applied to all unilateral acts, which constituted a heterogeneous category with different legal regimes, effects and methods of formation. Before defining unilateral acts, a vertical approach should be taken in order to deal in greater depth with each of the acts in question, thereby allowing for the possibility of subsequently adopting a horizontal approach in order to determine whether such acts had common characteristics on the basis of which general rules, and then special rules, could be established for certain types of acts. A definition, which should come at the end of the study, should therefore not be adopted at the present time. The vertical study in question should be done on the basis of State practice because, while doctrine and jurisprudence were secondary sources of international law, they were not enough in the

present case. The study should, moreover, not be limited to the practice of the very small number of States which had replied to the questionnaire. A study of the practice of unilateral acts in international law, which might be carried out by the secretariat, possibly with the assistance of a research institute, as Mr. Simma had proposed, would therefore be desirable.

16. In theoretical terms, unilateral acts were a fact of international law. Their legal value could, of course, be based on the principle *pacta sunt servanda*, but in practice the binding nature of unilateral acts was based on the principle of good faith and concern to guarantee the security of international legal relations. Unilateral acts were not sources of law, but in some conditions they were binding on the States which had formulated them.

17. As far as conditions of validity were concerned, it would be a good thing, as the Special Rapporteur proposed, to use, *mutatis mutandis*, the criteria of article 7 of the 1969 Vienna Convention on the question of who could bind the State. It would nevertheless have to be determined in State practice whether other organs could bind the State in specific areas. The references to the provisions of articles 7 and 8 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session,⁴ and to article 4, as one member had proposed, did not need to be included, however, because what was involved was not responsibility but an expression of will that was binding on the State and could not be formulated simply by an official of the State.

18. With regard to the lawfulness of the purpose of the unilateral act, account should be taken not only of the case of a unilateral act that was contrary to *jus cogens*, as referred to by the Special Rapporteur, but also of a unilateral act that was contrary to customary law, as illustrated by the example of a 1980 declaration by the Syrian Government setting the limit of Syria's territorial waters 35 kilometres from the coast. Since that decision had given rise to strong protests, particularly by the United States which had said that it recognized only the usual three-nautical-mile zone, Syria had gone back on its decision in order to comply with the rule recognized by the law of the sea. In that case, a unilateral act which was contrary to customary rules had given rise to protests, namely unilateral acts challenging the validity of that act. However, where other States were silent, it was not to be ruled out that a unilateral act was signalling the start of a change in international custom and of a new practice which would be borne out by legal decisions.

19. Referring to the distinction between absolute invalidity and relative invalidity, he pointed out that only the author State could challenge the competence of the person who had formulated the unilateral act. He was not sure that the other States could invoke that argument.

20. In the case of unilateral acts which were contrary to a decision of the Security Council, a distinction had to be made. He was not sure that invalidity could be invoked because the act in question was contrary to recommenda-

⁴ See 2712th meeting, footnote 13.

tions made by the Council under Chapter VI of the Charter of the United Nations, which were not being implemented by States, as could be seen in practice. A unilateral act that was contrary to a decision taken by the Council under Chapter VII of the Charter of the United Nations would, however, be null and void. Article 103 of the Charter did not refer to the problem of the invalidity of a unilateral act, but did indicate that the principles of the Charter took precedence over unilateral acts which contradicted them.

21. Referring to the question of interpretation, he pointed out that unilateral acts were often prepared very rapidly in ministries of foreign affairs and usually did not involve preparatory work.

22. Mr. GAJA, referring to the point made by Mr. Daoudi as to who could invoke the invalidity of a unilateral act, said that in the example of the declaration by the Government of Syria relating to the extension of its territorial waters, it was the States other than the author State of the act which had questioned the validity of the act because of the adverse effects it would have had on those other States.

23. The CHAIR, speaking as a member of the Commission, asked Mr. Gaja whether he thought that the possibility of invoking invalidity was limited to the States which were affected by the act, and whether it could be considered that there were acts which affected some States and others which affected all States and that that determined whether or not States could react to a unilateral act.

24. Mr. GAJA said that, in the case of the law of the sea, all States were affected. In other situations, only some States were affected by the act, such as States bound by a particular treaty.

25. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the debate on the topic of unilateral acts of States, said that the sometimes critical but very constructive comments which had been made on his report had related to the topic in general and the feasibility of his study, with some members questioning whether unilateral acts really existed in international law and whether it was important and possible to formulate rules governing their functioning. Specific questions had also been raised about the texts submitted for the Commission's consideration.

26. With regard to the general comments, one member of the Commission had said that he was concerned about the lack of progress on the study, since some basic questions had still not been solved after five years of work. No progress could be made, however, until the Commission had reached a minimum agreement on how the topic was to be treated. A theoretical approach was essential, but so was a practical approach. The Commission must consider the topic in depth and take account of the opinions of Governments, which were to be found not only in their replies to the questionnaire but also in their statements in the Sixth Committee. He therefore agreed with Mr. Simma's proposal that a mechanism should be set up to carry out a study of State practice with the assistance of an outside private institution. The members of the Commission might thus transmit information on their countries' practice, as he had requested them to do in the last

few years, but without focusing on the most recent cases, which might be controversial.

27. Various trends had taken shape during the debate. For some members, it was impossible to codify unilateral acts, particularly because they did not exist as such in international law and did not produce legal effects. In other words, they were not sources of international law or international obligations. For other members, the topic was very difficult and the approach adopted would have to be reviewed if progress was to be made. Still others had said that, although they had some doubts, they thought that the subject matter was codifiable and that rules had to be established in order to guarantee legal relations between States. One member had thus suggested that the Commission should first make sure that unilateral acts existed and then, if so, determine which regime was applicable to them. For the vast majority of members, and in his own opinion, unilateral acts did exist. They frequently came up in the news, and that was the first thing to be taken into account, but they did not always involve a legal commitment. It then had to be determined whether such acts were political or legal in nature and, if they were legal, to which category of legal acts they belonged. The Commission's study related to acts which were, above all, unilateral from the formal point of view, but which, at the same time, produced effects in and of themselves. It had been said that the intention of the State was a basic element for determining the nature of the act. Would the expression of the unilateral will of the State then be enough for the act to produce legal effects? The question was whether such acts were truly unilateral, in other words, not conventional and thus the possible subject of specific rules, and particularly whether they could be regarded as legal acts in the strict sense of the term, namely, as producing legal effects. In the majority view, a unilateral act could be binding on the author State, subject to certain conditions of validity. The jurisprudence did not focus on the judgments handed down in 1974 by ICJ in the *Nuclear Tests* cases, even if it was a major reference for the study of one of the unilateral acts that was best defined in doctrine, namely, promise. Other important decisions had been handed down in various cases, including the *Temple of Preah Vihear* case and the *Fisheries Jurisdiction (Spain v. Canada)* case. In all those decisions, the Court had stated that the unilateral acts in question were of a *sui generis* nature because of the way they were formulated, which was different from the way a conventional act was formulated.

28. In chapter II of the fifth report, attention was drawn to the need to formulate a rule on the binding nature of unilateral acts which might be defined by reference to the principle *pacta sunt servanda* contained in the 1969 Vienna Convention. Such recognition would be a step forward in the codification of the rules applicable to unilateral acts. It might be possible to draft a provision defining a principle *acta sunt servanda*, but that question would require further study by the Working Group which would meet the following week.

29. Some members had expressed the view that unilateral acts were not an institution in their own right, but rather acts which were not related to existing institutions. Others had taken the view that such acts did not create obligations for States, but only expectations, and that there was

therefore no need to formulate generally applicable rules. For still others, legal relations were not limited to those deriving from a treaty or a customary rule, and the State could be bound by other means, such as a unilateral act, which, in some members' opinion, was a well-established institution in international law, an opinion he shared. A unilateral act was not a source of law within the meaning of Article 38 of the Statute of ICJ, which was the main reference as far as methods of creating rules of international law were concerned. However, unilateral acts could be a source of obligations. One member had asked whether there must be reciprocity. According to doctrine and jurisprudence, the main characteristic of unilateral acts was that, in order to be valid, they did not require acceptance or any other reaction by the other party in order to produce legal effects. Reciprocity must, moreover, be distinguished from the interest of the author State. It should also be noted that reciprocity was not always present even in the conventional sphere, since a treaty could involve commitment without reciprocity.

30. Some members had said that it would be better to restrict the study to two unilateral acts, namely, promise and recognition, since general rules could not be formulated because the variety of possible subject matters was far too great. In his view, it was possible to draft common rules on the formulation and interpretation of unilateral acts. A unilateral act was a unilateral expression of will, which was the same in all cases, whatever its content or legal effects. It was the intention of the State which gave a legal effect to each of the four recognized types of unilateral act, namely, recognition, waiver, promise and protest. Some members had expressed the view that what was important was the effects produced rather than the intention. In order to determine the legal effects of an act, however, it was first necessary to determine its nature and, accordingly, to determine the intention of the author of the act, and that involved an interpretation. He therefore believed that it was possible to formulate a common definition and common rules applicable to all acts. That would be the task of the Working Group.

31. The topic was definitely complex, but the work on it could continue if a consensus could be reached on certain points. The majority of the members of the Commission appeared to share that opinion. Some had proposed that there should be a pause so that progress could be made on the study of State practice, but he did not agree. His view was that the Commission could continue what had been started and go on to consider practice later.

32. He was opposed not only to a pause but also to the total abandonment of the topic, as had been proposed by one member of the Commission, since such a decision would contradict the Commission's earlier message to the international community that the security of international legal relations was important and that the codification of the operation of unilateral acts might help build confidence in such relations. He therefore proposed that the Working Group should first try to formulate rules that were common to all acts and then focus on the consideration of specific rules for a particular category of unilateral act, such as promise or recognition.

33. Referring to the comments that had been made on various points dealt with in the fifth report, he said he believed that the members of the Commission generally agreed that the definition of a unilateral act contained in draft article 1 could apply to all the acts in question. Some members had, of course, expressed doubts about the need to characterize the expression of will as "unequivocal", had referred to the probably ambiguous nature of some of those acts and had asked whether a unilateral act really had to be "known". All those questions might be solved by the Drafting Committee. It had also been pointed out that consideration should be given to the possibility of broadening the category of addressees of a unilateral act to include entities such as liberation movements, in addition to States and international organizations. That point might be dealt with in the commentary if it was not dealt with in the body of the article itself, but that, too, was for the Committee to decide.

34. With regard to the formulation of a unilateral act and, in particular, the persons authorized to act on behalf of the State and bind it at the international level, two trends of opinion had taken shape. One wanted to limit capacity to formulate a unilateral act to very specific persons, including those referred to in article 7 of the 1969 Vienna Convention, while the other, which was larger, considered that such capacity had to be extended to other persons, if not every person authorized by the State to formulate unilateral acts likely to affect other States. In that connection, some members of the Commission had drawn attention to paragraph 93 of the report, which referred to articles 7 to 9 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session. What he had meant to say in that paragraph was that the extension of responsibility provided for in those articles or perhaps in article 3 was not valid or applicable in the case of unilateral acts because the two subject matters had evolved differently in international law and the considerations to be taken into account were also different.

35. With regard to conditions of validity and causes of invalidity of unilateral acts, some members had indicated that it would be better not to draw a distinction between absolute invalidity and relative invalidity, while others had been of the opinion that such a distinction might be quite useful. In his own opinion, the concept of "absolute" or "relative" invalidity played an important role in determining who could invoke the invalidity of an act. As was indicated in the report, when the act in question was liable to be absolutely invalid, as in the case of an act which was contrary to a preemptory norm of international law or an act formulated under coercion, any State could invoke its invalidity. That was in the general interest, whereas in the other cases the problem was different. Capacity to invoke error as a cause of invalidity belonged to the State concerned, and in that case invalidity was relative. The act could be confirmed by the author State, either explicitly or by means of subsequent conduct, as unambiguously provided for in the Vienna regime on the law of treaties. In that connection, another question arose. In the case of protest, it was the addressee State which could invoke the invalidity of the act on the grounds of an error or any other cause of relative invalidity. In the case of promise, it could be invoked by the author State. The situation varied

according to the act, but that did not mean that a rule applicable to all unilateral acts could not be formulated. The possibility of invoking the invalidity of the act would be left to a State—either the author State or the addressee State—or, in other words, to the States which had established a contractual relationship.

36. He recalled once again that a unilateral act necessarily produced bilateral legal effects, but that did not mean that it was of a conventional nature and that it was therefore subject to the Vienna regime.

37. With regard to articles 5 (a) to 5 (h) on causes of invalidity of unilateral acts, some members had rightly pointed out that the word “consent” referred to the law of treaties and therefore did not belong in the context of unilateral acts. As to the nonconformity of a unilateral act with a peremptory norm of international law (*jus cogens*), he agreed with the suggestion that account should also be taken of article 64 of the 1969 Vienna Convention, which related to the emergence of a new peremptory norm of general international law (*jus cogens*). Referring to the invalidity of a unilateral act as a result of nonconformity with a decision of the Security Council, some members of the Commission had indicated that it was necessary to specify whether the decisions concerned included only those taken under or in the framework of Chapter VII of the Charter of the United Nations, which were binding, or also those taken in the framework of Chapter VI of the Charter. Perhaps only those adopted under Articles 41 and 42 of the Charter would be taken into account. Some members of the Commission had referred to the invalidity of a unilateral act as a result of nonconformity with an earlier obligation assumed by a State either conventionally or unilaterally. In his own view, that would not be a case of the invalidity of the act or of a defect of validity, but a case of conflict of rules, which was governed by the Vienna regime in provisions that were different from those relating to the invalidity of treaties.

38. Situating the topic of unilateral acts in relation to other topics on the Commission’s agenda, particularly that of State responsibility, he recalled that, in the latter case, the act or omission by which a State engaged its international responsibility was usually, if not always, a unilateral act. It was a wrongful act which created a separate situation and to which the concept of invalidity did not apply. An act contrary to international law, a unilateral act which constituted a breach of an international obligation, was a wrongful act, and a wrongful act was invalid and produced no legal effects. It was then international responsibility which came into play.

39. Noting that the use of the word “invoke” in the text of the articles had been considered unnecessary, he said that that term appeared in the corresponding provisions of the 1969 and 1986 Vienna Conventions. In the text under consideration, it referred to the possibility that a State could invoke a cause of invalidity. The invocation of invalidity was something different. In any event, invalidity could be determined only by a court.

40. Important comments had been made on the interpretation of unilateral acts, which was dealt with in draft

articles (a) and (b). Although some members of the Commission thought that it was too early to discuss that question, he was of the opinion that the rules of interpretation, which were essential, should be considered now. Only interpretation made it possible to determine whether an act was unilateral, whether it was legal, whether it produced legal effects and thus bound the author State and whether it was not covered by other regimes such as the law of treaties. It had been emphasized in the Commission and in the Sixth Committee, moreover, that common rules of interpretation could apply to the unilateral acts falling within the scope of the topic. With regard to rules of interpretation, in particular, comments had been made on the reference to the intention of the author State. He repeated that its interpretation must be done in good faith and in accordance with the terms of the declaration in their context, namely, the text itself and its preamble and annexes. The determination of the intention of the author State was indispensable. It could be deduced not only from the terms of the oral or written declaration, in the particular context and in accordance with specific circumstances, but also, when it was not possible to determine the meaning according to the general rule of interpretation, from additional means, such as the preparatory work. Since doubts had been expressed about the use of preparatory work, however, he had placed that term in square brackets in article (b). He nevertheless believed that, despite the problems which might arise, it was possible to use the preparatory work, such as the internal correspondence of ministries of foreign affairs or organs of the State which had taken part in the formulation of the act. In any event, there was nothing to prevent the use of such supplementary means of interpretation, provided that it was combined with an expression such as “when that is possible”, “as necessary” or any other wording referring to the possibility of using the preparatory work, while recognizing that that was neither easy nor frequent.

41. Some members of the Commission had drawn attention to the need to refer explicitly in the text to the restrictive nature of interpretation. That interesting point might dispel fears that any act at all could be binding on the State or that the State might be bound by any act formulated by one of its representatives. Judicial decisions in respect of interpretation were clear-cut, particularly in cases of territorial disputes: the act in question was not of a legal nature, and it was therefore of a different nature. It might be political, but it was not binding on the State which formulated it.

42. The draft articles on causes of invalidity and on interpretation should probably be referred to the Working Group so that it might determine whether provisions common to all acts could be formulated and then deal with the substantive questions raised and indicate whether rules should be added or deleted.

43. During the discussions, reference had been made to some of the “classic” unilateral acts in international law (waiver, promise, protest, recognition), although that characterization was not accepted by all. With regard to recognition, the question had been raised of the irrevocability of an act by which a State recognized a situation, a right or a legal claim—and, in particular, the irrevocabil-

ity of an act of recognition of a State, a question which had not yet been considered because it did not appear to lend itself to the formulation of common rules, but which did warrant some discussion. An act of recognition, or a declaration of recognition, did produce legal effects. In the case of the recognition of a State, several considerations came into play. First of all, the existence of a State as a subject of international law depended not on its recognition but on factors or a combination of factors which, under international law, defined an entity as a State, such as duties or rights. Second, since an act of recognition was a declaratory act, it could be concluded that it produced specific legal effects and that a State which recognized an entity accorded it the status of a State in its international relations.

44. One member of the Commission had said that a State could also revoke a unilateral act which it had formulated. That was a substantive issue that related to the legal effects of unilateral acts. Could a State which formulated an act unilaterally also revoke it unilaterally? The reply to that question was apparently negative: the act was unilateral, but the legal relationship established obviously was not and was therefore bilateral. In his view, a State which formulated an act of recognition would not be able to revoke it.

45. He regretted that he had been unable to reply to all the questions asked, but he assured the Commission that the Working Group would go into all of them in greater detail.

46. The CHAIR said that the informal consultations on the topic would continue in the Working Group on the basis of the proposal made by Mr. Simma and the comments made by Mr. Candiotti.

Diplomatic protection⁵ (continued)* (A/CN.4/514,⁶ A/CN.4/521, sect. C, A/CN.4/523 and Add.1,⁷ A/CN.4/L.613 and Rev.1)

[Agenda item 4]

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

47. Mr. COMISSÁRIO AFONSO said that the Calvo clause was based on the two premises that an independent sovereign State was entitled, according to the principle of the equality of States, to complete freedom from interference in any form, whether diplomatic or by force, and that aliens were entitled to no greater rights and privileges than those available to nationals, and the courts of the host State therefore had exclusive jurisdiction over alien claims. In other words, in the context of the Calvo clause, national treatment was the equivalent of the “inter-

national minimum standard”. Specifically, international law required States to accord national treatment to aliens, national laws governed the rights and privileges of aliens and no international adjudication would be admissible.

48. Those two principles were now widely accepted in international law and practice and were embodied in many United Nations resolutions and instruments, such as the Charter of Economic Rights and Duties of States.⁸

49. While he supported that position, he could not help noting that, on at least two accounts, the international context differed from that in which the Calvo clause had been formulated a century ago. First of all, the conduct of States in the modern-day world was strongly influenced, if not conditioned, by common standards imposed by international human rights law. It was, of course, open to discussion how those rights had a bearing on the institution of diplomatic protection in general and on the rule on the exhaustion of local remedies in particular, but the fact was that the existence of the Universal Declaration of Human Rights and other international human rights instruments blurred the distinction between aliens and nationals as far as their treatment was concerned. Indeed, even the way in which a State treated its own citizens within its own territory was no longer a matter of its exclusive sovereignty. Second, the importance that Governments attached, and the recognition they accorded, to private entrepreneurship made it possible for foreign private investments to enjoy a secure legal environment at the present time through bilateral and multilateral agreements designed to promote and protect them.

50. He therefore believed that the Calvo clause could be reconciled with the right of a State to exercise diplomatic protection. The Special Rapporteur could probably indicate when and under which conditions a waiver of the exercise of diplomatic protection or the settlement of an alien’s claim could defeat that right.

51. With regard to draft article 16 as proposed by the Special Rapporteur, he agreed that the Calvo clause should not be extended to a denial of justice. That should be clearly stated in the text. He very much doubted whether paragraph 2 was necessary, because it simply expressed what was embedded in the concept of diplomatic protection. The rule on the exhaustion of local remedies implied that resort to international remedies was always possible, especially in cases of a denial of justice. He was therefore in favour of the deletion of that paragraph.

52. Mr. GAJA said that he would consider the Calvo “clause” and not the Calvo “doctrine”, which was an aspect of the primary rules relating to the treatment of aliens. The first sentence of paragraph 1 of article 16 as proposed by the Special Rapporteur seemed to have only symbolic value. It upheld the validity of the Calvo clause while giving it very limited effects: an alien was regarded as having validly waived his right “to request diplomatic protection in respect of matters pertaining to the contract”. The legal significance of that waiver was uncertain. Nowhere in the draft articles did the alien’s request appear to be a precon-

* Resumed from the 2725th meeting.

⁵ 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.

⁶ See *Yearbook ... 2001*, vol. II (Part One).

⁷ See footnote 1 above.

⁸ See 2725th meeting, para. 5.

dition for the exercise of diplomatic protection. According to the draft articles already referred to the Drafting Committee, the State of nationality was free to exercise diplomatic protection at its own discretion. The question therefore did not seem to be whether the Calvo clause was valid or not under international law. As interpreted in draft article 16, it was neither prohibited under international law nor regarded as lawful. It was simply irrelevant. There would be a breach of contract, but no breach of an obligation under international law, either by the alien or, of course, by the State of nationality, if the alien requested diplomatic protection from that State. Even supposing that an obligation existed for the alien under international law not to request diplomatic protection from his State of nationality, that would hardly be decisive in practice. While it was likely that the exercise of diplomatic protection would take place only if there had been a request, the request would not necessarily have to come from the injured individual personally because other individuals could well draw the attention of the State of nationality to the problem, and they would not be bound by the contract containing the Calvo clause. There would not be a breach of an alleged rule of international law prohibiting an alien from invoking the diplomatic protection of his State of nationality.

53. In any event, according to the Special Rapporteur, the alien's obligation not to request diplomatic protection ceased to exist once an internationally wrongful act had occurred. Apart from a denial of justice committed during the use of local remedies in connection with a breach of contract, there could be other internationally wrongful acts. As Mr. Pellet had pointed out at an earlier meeting, draft article 16, paragraph 1, implied that an alien could not request the diplomatic protection of his State of nationality until an internationally wrongful act had been committed, but in any case such protection would not be available at that stage. Once an internationally wrongful act had been committed, diplomatic protection could be requested and exercised, whether or not it was provided for in a Calvo clause.

54. Draft article 16, paragraph 2, did not add anything, as Mr. Comissário Afonso had just argued. As the Special Rapporteur had explained, the paragraph stated a presumption against the waiver of the rule on the exhaustion of local remedies by the host State. This was superfluous, because the discussion of draft article 14 had shown that a waiver could not be tacitly inferred.

55. The confirmation of the validity of the Calvo clause was thus highly symbolic. It was also to some extent confusing because the first sentence of draft article 16 seemed to substantiate the position of some host States that the Calvo clause would have the effect in international law of preventing the State of nationality from exercising diplomatic protection, even where an internationally wrongful act had been committed. That was not, however, the underlying intention of article 16, the second sentence of which was in line with the idea that the State of nationality enjoyed the prerogative of exercising its diplomatic protection and that the Calvo clause could not affect that right.

56. His own preference would be for a general provision concerning waiver, both on the part of the State of nationality and on the part of the host State.

57. Ms. XUE thanked the Special Rapporteur for the succinctness and usefulness of section C of his third report (A/CN.4/523 and Add.1) relating to draft article 16, which dealt with the Calvo clause. The clause was very clearly analysed, as were its historical background and current implementation, on the basis of State practice, jurisprudence and doctrine. Two extreme positions had been taken. On the one hand, the rule on the exhaustion of local remedies had been accepted and reaffirmed over the years. On the other, that rule had never deprived the State of nationality of the right to protect its nationals when they had been injured as a result of an internationally wrongful act committed by the respondent State. The Calvo clause should therefore be recognized as one of the rules relating to diplomatic protection.

58. In his report, the Special Rapporteur proposed two options. The first would be to decide not to draft a provision on the question because the Calvo clause merely reaffirmed the rule on the exhaustion of local remedies, which had already been stated in article 10. The second option would be to include a provision which was similar to that contained in article 16. A close look at article 16 showed that the Special Rapporteur had tried to maintain a balance between the sovereign interests of national jurisdiction and the sovereign interests of the protection of nationals abroad. The aim was to avoid any undue interference and any abuse of a right. She was of the opinion that, for a number of reasons and subject to a few drafting improvements, article 16 should be retained. In the first place, as a codified rule, it reaffirmed the right of a State to enter into that type of contractual relationship with an alien who was carrying on business in its territory. Bearing in mind the importance of the activities of transnational corporations and their impact on the world economy, it was clear that that provision was essential. Second, article 16 clarified the limits of such a contractual relationship, particularly by guaranteeing the rights of the State of nationality under international law. Third, in the event that a contract had been drafted differently, as in the *North American Dredging Company* case, it had to be clearly stipulated that local remedies must be exhausted before the case could be referred to international judicial settlement. She hoped that that was the meaning of paragraph 2 of article 16.

59. While she was in favour of draft article 16 as a whole, she had some reservations about paragraph 1. In the other parts of the draft articles, it was only when an internationally wrongful act had been attributed to the respondent State that the State of nationality could exercise its diplomatic protection. In article 16, a new condition was added, namely, that the injury to the alien must be of direct concern to the State of nationality. It would have to be explained whether that expression referred to a breach of an international obligation, to an injury caused directly to the State as well or to a more general concern for the protection of human rights. Otherwise, the thrust of the entire clause would be greatly weakened. Subject to the

comments she had made, she was of the opinion that article 16 should be referred to the Drafting Committee.

60. Mr. MOMTAZ thanked the Special Rapporteur for the additional effort he had made in section C of his third report on the Calvo clause. That text had a great deal of merit, not least because it had refreshed the memory of the members of the Commission about a question which was no longer a subject of much discussion at the present time. The general impression was that, in its day, the real purpose of the Calvo clause had been to rule out diplomatic protection under any circumstances and that that “extremist” approach had never been recognized in international law, even in a regional context. The Special Rapporteur referred (sect. C.4) to the codification of the Calvo clause on the American continent. He explained that those codification efforts had been successful in the Latin American countries and, in support of that statement, cited three regional instruments which seemed to emphasize the need for an alien injured by a wrongful act to bring a case before the competent courts of the respondent State or, in other words, for the rule on the exhaustion of local remedies. In the three cases, the breach of that rule had given rise to abuses which had rightly been denounced by the Latin American States in the late nineteenth and early twentieth centuries. He asked the Special Rapporteur whether, at the time when the Calvo clause was invented, the rule on the exhaustion of local remedies had been regarded as a customary rule. He himself did not think so, and he would like to establish a relationship between the Calvo clause and the making of the rule during that period. The resolution on “international responsibility of the State” adopted in 1933 by the Seventh International Conference of American States⁹ was sufficiently explicit in that regard. Moreover, the jurisprudence established by the General Claims Commission (Mexico and United States) in the context of the *North American Dredging Company* case had also stressed the need to exhaust local remedies. In view of the fact that the Latin American States had softened their position somewhat since then, he was not sure that the Calvo clause had to be codified in the draft articles. It was interesting to note that the developing countries, which were always trying to attract foreign investments, were also trying to create conditions that were favourable to, and would offer legal guarantees for, such investments. The result was that foreign investors received more favourable treatment than national investors, something which the Calvo clause was designed to denounce and prevent. Obviously, nothing prevented an alien from undertaking not to request the diplomatic protection of the State of which he was a national. It went without saying, as had been stressed on many occasions, that such a promise was in no way binding on the State of nationality. In his opinion, the questions raised in section C of the third report were closely linked to those raised by a waiver of the rule on the exhaustion of local remedies, and it would be better for all of them to be considered in that context.

⁹ *The International Conferences of American States, 1889–1936* (Washington, D.C., Carnegie Endowment for International Peace, 1938), p. 546; reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 6, p. 226.

61. He was therefore in favour of the first option proposed by the Special Rapporteur, provided that reference was made to the Calvo clause in the commentary to the relevant draft article, which would probably be the one relating to the rule on the exhaustion of local remedies.

62. The CHAIR, speaking as a member of the Commission, said that the main problem the Commission faced was the lack of consensus and that it would have to be solved without prejudicing any arguments that some members regarded as relevant. He had been quite surprised and unhappy when the Special Rapporteur had indicated that he intended to include material on the Calvo clause in the draft articles because the prospects of reaching agreement on it were close to zero. He did, of course, endorse the rule on the exhaustion of local remedies, but, as Mr. Brownlie had very clearly indicated, the Commission should decline to draft any provision on the Calvo clause because that was not part of its mandate. He urged the members of the Commission not to take a decision on a question which had had more of an emotional than a legal impact in past decades, and not to refer draft article 16 to the Drafting Committee. He invited them simply to take note of the report on the question.

63. Mr. KABATSI congratulated the Special Rapporteur on his particularly rich third report and the skills he had displayed in dealing with the matters under consideration, in particular the rule on the exhaustion of local remedies, the burden of proof in the application of that rule and the controversy surrounding the Calvo clause. He appreciated the fact that the Special Rapporteur had not given in to the temptation of imposing his own position and conclusions on the Commission, but had left the latter entirely free to decide without having to worry about his feelings. He recalled that in the past some special rapporteurs had taken offence at the Commission’s decisions and that one of them had even resigned.

64. With regard to the scope of the draft articles, it therefore had to be determined whether the topic must be limited to the nationality of claims and the exhaustion of local remedies or expanded to cover other questions, such as functional protection by international organizations of their officials, the right of the State of nationality of a ship or aircraft to submit a claim on behalf of the crew and passengers, the case where a State exercised its diplomatic protection in respect of a national of another State as a result of the delegation of such a right, and the case where a State or an international organization administered or controlled a territory. In that connection, he was firmly convinced that, for the reasons the Special Rapporteur had given in paragraph 17 of his report, the scope of the draft articles should be limited for the time being to the questions he had identified.

65. In respect of exceptions to the general principle that local remedies must be exhausted, he was in favour of draft article 14 and, in particular, option 3 proposed in subparagraph (a) (“provide no reasonable possibility of an effective remedy”). As to the burden of proof in the application of the rule on the exhaustion of local remedies, he agreed with the proposal made in draft article 15, para-

graph 2, which very clearly stated the responsibilities of the respondent State and the claimant State.

66. In the case of article 16, the question was whether the Calvo clause added anything new to the rule on the exhaustion of local remedies. It might not, as had been pointed out by the members who regarded article 16 as superfluous. He himself was not entirely certain. He did think, however, that that provision placed useful emphasis on the rule and made it slightly clearer. It should therefore be retained. Paragraph 2 of article 16 did not seem to add much to the content of paragraph 1 and could be abandoned. Subject to that comment, he was in favour of the inclusion of that provision in the draft articles.

67. Mr. DAOUDI said that he associated himself with the members who had thanked the Special Rapporteur for his third report, which, in addition to the wealth of information it contained, had the merit of being remarkably objective. With regard to the two options which the Special Rapporteur was proposing in the conclusion of his report, there was obviously a great temptation to choose the first, namely, not to include the Calvo clause in the draft articles, for two main reasons. In the first place, the circumstances which had led to the Latin American States to adopt the Calvo clause were no longer valid today, even if there were still some traces of it in the doctrine of those States. In the second place, States now agreed to waive the requirement, in contracts concluded with aliens, not only of the exhaustion of local remedies, but also of the application of their national law.

68. He nevertheless believed that the second option, the proposed draft article 16, was more interesting because it was more in keeping with the principles of the sovereignty of States and non-interference in their internal affairs. In paragraph 1, draft article 16 contained three variants of the Calvo clause which had been taken almost word for word from García Amador. The wording of subparagraph (a) was entirely acceptable, but that was not the case for subparagraphs (b) and (c), which provided for the possibility that an alien could waive the diplomatic protection of his State of nationality even when the host State had committed an internationally wrongful act or when there had been a denial of justice. That right belonged not to a private individual but rather to his State of nationality.

69. The second part of paragraph 1, which began with the words "Such a contractual stipulation shall not, however, affect the right of the State of nationality...", might well replace the present text of paragraph 2, which was unnecessary and greatly attenuated the effects of the rule by making it a mere presumption, something which might give rise to a conflict of interpretation that would be left to the judge or the arbitrator to decide. Subject to those reservations, he agreed that the draft article should be referred to the Drafting Committee.

70. Mr. DUGARD (Special Rapporteur) stressed the fact that the Calvo clause had influenced the debate on diplomatic protection throughout its history and that the Commission could not put it to one side on the ground that it was a purely contractual arrangement. If the Commission decided to dismiss that clause on the grounds that

it did not come within its mandate of codifying rules of international law, it might give the impression that it had not discussed that question because it raised such difficult issues. The topic was undeniably a difficult one and was highly emotional and symbolic, but it was not one the Commission could lightly dismiss for reasons of policy. He hoped that the members would bear that in mind when discussing the question at subsequent meetings.

The meeting rose at 1.05 p.m.

2728th MEETING

Friday, 31 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Ms. Xue, 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. KOSKENNIEMI said that the Calvo clause was no more than a very minor addition to existing law. He agreed with Mr. Brownlie that the clause dealt with a matter which did not really fall within the scope of the topic.
2. When an exception was made to a rule, it often took on considerable importance. Such an exception was contained in draft article 16, paragraph 1, in section C of the

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).