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Summary record of the 2756th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2003, vol. I

ally wrongful acts, omitting it might raise doubts about whether it applied to the responsibility of international organizations, something about which he personally had absolutely no doubt.

81. Mr. GAJA (Special Rapporteur), summing up the discussion, expressed his gratitude for the kind words and thoughtful comments of many members. There had been criticism, too, which he did not intend to underrate, but the general approach in the report and the structure of the proposed draft articles had emerged relatively unscathed. Even on the most controversial point, the definition of international organizations, most of the criticism concerned the way the definition should be drafted rather than the identification of the core organizations whose practice would be relevant to the study.

82. The main purpose of draft article 1 was to define the scope of the topic as accurately as possible by making it clear that the draft applied to questions of responsibility in relation to acts that were wrongful under international law. Several members had expressed the view that the question of liability for injurious consequences arising out of the acts of an international organization that were not prohibited by international law should be dealt with in the context of, or as a sequel to, the study now being undertaken with regard to States. References had been made to harm that was caused or might be caused by space organizations or organizations engaged in technical assistance or disarmament control. If the resulting harm did not imply a breach of an obligation under international law, questions of liability should not be regarded as part of the current topic. He was aware, as had been pointed out in the course of the debate, that there were treaty regimes which seemed to combine the two aspects, but these regimes provided special rules. This situation would have to be referred to in the draft, but in the meantime enough progress might well be made in the study of the fragmentation of international law to give a clearer idea of what *lex specialis* meant.

83. The proposal to leave out matters of civil liability had also met with significant support, together with some dissent, although that dissent did not concern the exclusion of matters governed by private law, in other words, within the realm of civil liability, or of administrative law in civil-law countries. International law did not generally regulate such matters: as had been pointed out, there were very few treaties and, he would add, hardly any other instruments of international law that had specific provisions thereon.

84. It had been suggested that the study should be extended to rules of international law that could affect the responsibility of member States for the wrongful act of an organization, even if that act was connected with a contract and the dispute was submitted to a national court for commercial arbitration. While he did not wish to commit himself before gaining an idea of the Commission's views, he thought that consideration could indeed be given to whether there were rules of international law that might be relevant in private litigation. That would be in line with the approach taken by the Institute of International Law at its 1995 session in Lisbon in dealing in a similar context with issues of civil liability and international law.

85. The international responsibility of States for the conduct of international organizations was central to the study: the bulk of the writings on responsibility of international organizations and the best-known instances of practice related to that very question, not to questions of attribution to international organizations. Irrespective of whether the Commission concluded that States could be responsible for such conduct, it could not ignore that central question, which was no doubt also one of the most difficult. It had been left out of the draft articles on State responsibility for internationally wrongful acts, in which State responsibility for aid or assistance to an organization in the commission of a wrongful act and other aspects of Chapter IV of Part One had likewise not been considered. In article 1, paragraph 1, he had simply reproduced what was said in article 57 of the draft articles on State responsibility. Several members had suggested transposing the second sentence of that paragraph to a separate paragraph, and he had no difficulty with that suggestion, despite the similarity of the issues mentioned. The phrase "acts that are wrongful under international law" in the first sentence had been criticized for not reflecting the language of article 1 of the draft articles on State responsibility, namely "internationally wrongful acts". The reason, as was stated in paragraph 32 of his report, was that if the definition was to be comprehensive and accurate, one could not speak only of the responsibility of an organization for its own conduct, since such responsibility could also arise for the conduct of another organization of which the first organization was a member.

86. To conclude his summary of the discussion on draft article 1, his preference for the provisions on the scope of the topic was to have as accurate a description as possible of the questions covered. Certain members of the Commission appeared to prefer a less comprehensive description, focusing on the main issues, but that, together with the other points he had raised so far, could be left to the Drafting Committee.

87. The CHAIR said that Mr. Yamada's suggestion, supported by others, that consideration should be given to establishing contact with ILA in connection with the responsibility of international organizations, could be taken up by the Planning Group once it was established.

The meeting rose at 1 p.m.

2756th MEETING

Tuesday, 13 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia,

Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

Election of officers (*concluded*)*

1. The CHAIR welcomed the three newly elected members of the Commission, Mr. Economides, Mr. Kolodkin and Mr. Melescanu. As the Group of Eastern European States was now complete, it could propose a candidate for the position of first Vice-Chair.

2. Mr. GALICKI proposed Mr. Melescanu for the position of first Vice-Chair on behalf of the Group of Eastern European States.

Mr. Melescanu was elected first Vice-Chair by acclamation.

The responsibility of international organizations (*continued*) (A/CN.4/529, sect. E, A/CN.4/532,[1] A/CN.4/L.632)

[Agenda item 7]

First report of the Special Rapporteur (*concluded*)

3. The CHAIR invited Mr. Gaja, Special Rapporteur on the responsibility of international organizations, to continue his summary of the discussion on the topic.

4. Mr. GAJA (Special Rapporteur), addressing the more controversial part of his report, noted that Mr. Koskenniemi had spoken of the question of an international organization's legal personality as an example of a "cultural clash" (2754th meeting, para. 1) and had referred to two opposing views: according to one, legal personality existed *a priori*, and, according to the other, it resulted from the organization's rights and obligations. His own view lay somewhere between the two. If an organization had a right or an obligation under international law, it must necessarily possess legal personality. That was not to say that all the rights and obligations of an international organization fell under international law. That depended above all on the organization's capacity. An organization might act under the law of a particular State—for example, when concluding a contract—and it might also act as an organ of a State. He noted in passing that it was hardly revolutionary to hold that some rights and obligations under international law accrued to individuals. They thus had legal personality, although their capacity was limited.

5. In the definition of "international organization" contained in draft article 2, legal personality was clearly implied in the words "in its own capacity". The French and Spanish translations (*en son nom propre* and *a su propio nombre*) were less clear than the English. In any case, it would make little sense to speak of the international responsibility of an entity which did not possess legal personality. He had no objection whatsoever to referring expressly to the existence of the legal personality of an international organization in the definition, as many members of the Commission had suggested.

6. Many members had also proposed that the definition should mention that the organization's constituent instrument was a treaty, or, at any rate, that the organization had been established by States. Most of them recognized that non-State entities sometimes participated in establishing an organization and that the constituent instrument might not be a treaty. He cited as examples OSCE and OPEC. In other cases such as that of the World Tourism Organization, no formal treaty existed. The Commission might follow the suggestion by Ms. Escarameia and Mr. Sreenivasa Rao that reference should be made to an international instrument, although that term would also need to be defined. As Mr. Mansfield had emphasized, moreover, a reference to States alone as creators or members of an international organization would not correspond to a significant trend in practice. The prevailing view seemed to be that the draft articles should also deal with organizations which included non-State entities among their members. An accurate definition should reflect that in a less succinct way than in draft article 2.

7. The reference in draft article 2 to "governmental functions" had attracted considerable criticism, partly because of the difficulty of translating that expression into French and Spanish. An organization's functions were usually defined in its constituent instrument. But if an organization acquired new functions in practice, as was the case with NATO, ECOWAS and the European Union, its international responsibility could not be excluded simply because it had committed a wrongful act in the exercise of functions not covered by the treaty establishing the organization. For example, if an organization took military action and that constituted a wrongful act under international law, it could not be said that the organization escaped responsibility simply because it had exercised functions not originally provided for. Thus, the definition should take into account the functions that the organization actually exercised, rather than those contained in its constituent instrument.

8. The reference to governmental functions had been designed to encompass those organizations that had some legislative (in the broad sense) executive or judicial functions of the type that were part of the core activity of States. That approach had been approved by certain members and criticized by others, who had stressed that it was difficult to determine the meaning of "governmental functions". Admittedly, the criterion was a vague one, and various members had expressed a preference for the traditional definition of an international organization as an intergovernmental organization. There were two reasons to limit the scope of the draft articles to a defined category of international organizations. The first was that, given the great variety of international organizations, the application of rules developed on the model of the draft articles on State responsibility for internationally wrong-

* Resumed from the 2751st meeting.

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

ful acts[2] should be limited to entities that had some characteristics in common with States. The second was that known practice with regard to issues of the responsibility of international organizations was limited to a few organizations such as the United Nations, NATO and the European Union. The practice of other organizations was probably limited, but it was also very difficult to ascertain. With regard to the key questions of attribution and member State responsibility, the difficulty was that it was not certain that the principles that could be developed with regard to the major existing organizations could apply in the same way to all existing organizations. According to some members of the Commission, it was necessary to establish a typology. However, in order to choose among the various organizations, a sufficiently precise criterion was needed, and no such criterion was currently available. If a functional definition was unacceptable or impossible, he therefore proposed falling back on a general definition of international organizations, to be formulated by updating the traditional definition to be found in the 1969 Vienna Convention and in other conventions. In so doing, it would also be necessary to clarify the meaning of the term "intergovernmental", in the light of the requirement to come up with an exact definition applicable at least to all the major organizations.

9. In view of members' comments, draft article 2 clearly needed rewriting. Accordingly, he suggested that an open-ended working group should be convened for that purpose and that the Commission should consider the results of that group's work before referring the article to the Drafting Committee.

10. Draft article 3 had attracted few comments. No objections had been raised with regard to the text. The only issue discussed concerned the deliberate omission from the current text of a paragraph that appeared in article 3 of the draft articles on State responsibility. Only Mr. Kabatsi, Mr. Galicki and Mr. Candioti had criticized that decision. Since the current draft articles were not intended to parallel faithfully the draft on State responsibility, that omission should not give rise to any major difficulties, particularly given that the point was arguably superfluous. It would be strange to make a reference in article 3 to the internal law of States, as had been suggested.

11. Mr. Koskenniemi and Mr. Pellet had briefly examined the question of the relationship between international law and the law of international organizations. They had referred to the hierarchy of norms and to the key distinction between obligations of an organization towards its member States and its obligations towards non-member States. In his view, as Article 103 of the Charter of the United Nations showed, that distinction was not always conclusive. It would thus be difficult to formulate a general rule in that regard. However, he shared the view of Mr. Pellet that the issue should be examined in the context of the objective element—in other words, when considering a breach of an obligation under international law.

12. With regard to Mr. Kamto's suggestion to add a paragraph on the responsibility of member States of the organization, either because they had contributed to the wrongful act or because the organization had acted as an organ of a State, he pointed out that the latter case was covered, at least implicitly, in the draft articles on State responsibility for internationally wrongful acts. The issue of the responsibility of member States was too problematic to be dealt with at the stage of formulation of general principles. Once the relevant draft articles had been discussed, it would be possible to add something to draft article 3.

13. In conclusion, he proposed that articles 1 and 3 should be referred to the Drafting Committee and that article 2 should be dealt with in the way he had suggested.

14. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the Special Rapporteur's suggestion that an open-ended working group should be established to deal with unresolved issues relating to article 2 and that articles 1 and 3 should be referred to the Drafting Committee.

It was so decided.

Diplomatic protection[3] (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,[4] A/CN.4/L.631)

[Agenda item 3]

Fourth report of the Special Rapporteur

15. Mr. DUGARD (Special Rapporteur) said that, before introducing his report, he wished to comment on the treatment currently accorded to special rapporteurs. First, the Fifth Committee had decided arbitrarily to discontinue the payment of honoraria to special rapporteurs. Second, conference services had laid down strict new rules concerning the date of submission and the length of reports and the time needed for their translation and publication. Special rapporteurs now had to write their reports without any financial reward while continuing to perform their other functions. Only the knowledge that the Commission could not function without their reports compelled them to complete those reports on time.

16. The decision of the Fifth Committee was unfair, discriminatory and exploitative. He trusted that the Commission would again voice its complaints on that score, but, knowing that delegations would pay little attention, he appealed to members of the Commission who had the ear of their Governments to persuade them to raise the matter in the Fifth Committee.

17. His fourth report on diplomatic protection (A/CN.4/530 and Add.1) dealt with only one kind of legal person, namely, the corporation. That was because it was the most important kind of legal person for current purposes and most of the relevant judicial decisions dealt with it. Other draft articles would be added to those in the report, however, applying the principles expounded in respect of corporations to other legal persons. For the time being, he would limit himself to introducing draft articles 17 and 18. Draft articles 19 and 20, which also appeared

[2] See 2751st meeting, footnote 3.

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

[4] See footnote 1 above.

in the report, would be introduced at a later stage in the debate.

18. One decision dominated all discussions on the subject: the judgment of ICJ in the *Barcelona Traction* case, which was introduced in paragraphs 4 to 10 of the report. In that case, the Court had stated the rule that the right of diplomatic protection in respect of an injury to a corporation belonged to the State under whose laws the corporation was incorporated and in whose territory it had its registered office (in that case, Canada) and not to the State of nationality of the shareholders (in that case, Belgium). The Court had acknowledged that there was a certain amount of practice relating to bilateral or multilateral investment treaties that tended to confer direct protection on shareholders, but that that did not provide evidence that a rule of customary international law existed in favour of the right of the State of nationality of shareholders to exercise diplomatic protection on their behalf. It had dismissed such practice as constituting *lex specialis* (see para. 6 of the report).

19. In reaching its decision, ICJ had ruled on three policy considerations, which were set forth in paragraph 10 of the report. First, where shareholders invested in a corporation doing business abroad, they undertook risks, including the risk that the corporation might in the exercise of its discretion decline to exercise diplomatic protection on their behalf. Second, if the State of nationality of shareholders was permitted to exercise diplomatic protection, that might result in a multiplicity of claims because, in multilateral corporations, the shareholders were nationals of many countries. Third, the Court had said that it would not apply by way of analogy rules relating to dual nationality of natural persons to corporations and shareholders, which would allow the States of nationality of both to exercise diplomatic protection.

20. There had been widespread disagreement among judges over the reasoning of ICJ, as was evidenced by the fact that 8 of the 16 judges had given separate opinions, of which 5 had supported the right of the State of nationality of shareholders to exercise diplomatic protection. Among the judges who had supported the Court's reasoning, Mr. Padilla Nervo had really captured the ideological dimension of the debate when he stated that it was not the shareholders in those huge corporations who were in need of diplomatic protection, but rather the poorer or weaker States where the investments took place which needed to be protected against encroachment by powerful financial groups or against unwarranted diplomatic pressure.

21. The decision of ICJ in the *Barcelona Traction* case had been subjected to a wide range of criticisms, the most notable of which were listed in paragraphs 14 to 21 of his report. First, had the Court paid more attention to State practice as expressed in bilateral and multilateral investment treaties and to arbitral decisions interpreting such treaties, instead of dismissing them as *lex specialis*, it might have concluded that there was a customary rule in favour of the protection of shareholders. Second, the Court had established an unworkable standard since, in practice, States would not protect companies with which they had no genuine link. He had quoted at length from reports submitted to ILA by Bederman and Kokott,[5] in which they pointed out that the traditional law of diplomatic protection had been to a large extent replaced by dispute settlement procedures provided for in bilateral or multilateral investment treaties, meaning that what the Court had categorized as *lex specialis* had become very common. Third, the Court's reasoning occasionally lacked coherence. On the one hand, the judgment appeared to reject the application of the "genuine link" to companies; on the other, it concluded that there was "a close and permanent connection" [p. 42, para. 71] between Canada and the company. Finally, the Court had failed to justify its statements on policy mentioned in paragraph 10 of the report.

22. With regard to the authority of *Barcelona Traction*, the decisions of ICJ were not binding on the Commission, and the Commission might well decide not to follow that judgment. The Commission might also feel that, in the case in question, the Court had not been laying down a general rule, but had been resolving a particular issue. Moreover, in the *ELSI* case, a chamber of the Court had ignored *Barcelona Traction* when, as was described in paragraphs 23 to 26 of the report, it had allowed the United States to exercise diplomatic protection on behalf of two American companies which held all the shares in an Italian company. That having been said, it must be acknowledged that, 30 years on, *Barcelona Traction* was viewed as a true reflection of customary international law on the subject and that the practice of States in the diplomatic protection of corporations was guided by it.

23. Before proposing rules on the nationality and diplomatic protection of corporations or their shareholders, it was necessary to clarify the options open to the Commission with respect to the State that was entitled to exercise diplomatic protection. That was what he did in paragraphs 28 to 46 of his report, where he proposed seven options. Option 1, that of the State of incorporation, might be described as the *Barcelona Traction* rule, whose advantages and disadvantages had already been indicated. Option 2 was that of the State in which the company was incorporated and with which it had a genuine link. It might more accurately reflect State practice, since many States would prefer to protect only those corporations with which they had a genuine link. The main problem with that option, particularly if it was seen as an additional factor, was that many corporations were incorporated in a State for tax advantages and had no genuine link with that State. For the purposes of diplomatic protection, such companies would become stateless. Option 3 was that of the State of *siège social* or domicile, which, in practice, was not very different from that of the State of incorporation. The terms *siège social* and "domicile" were used in private international law, however, and perhaps the Commission should avoid using them. Option 4 was that of the State of economic control. Whether the standard of majority shareholding or of a preponderance of shares was used, in practice it was very difficult to prove economic control. The decision in the *Barcelona Traction* case illustrated how difficult it was to identify with certainty the share-

[5] D. J. Bederman, "Lump sum agreements and diplomatic protection", provisional report, and J. Kokott, "The role of diplomatic protection in the field of the protection of foreign investment", provisional report, ILA, *Report of the Seventieth Conference* (see 2751st meeting, footnote 7), pp. 230 and 259 respectively.

holders of a company. Option 5 was a combination of the criteria of State of incorporation and State of economic control. There might be something to be said for allowing dual protection, but, if one accepted the criticism of the concept of economic control, it made little sense to recognize that form of dual nationality. Option 6 was to use the State of incorporation in the first instance, with the State of economic control enjoying a secondary right of protection. In addition to the difficulties with the concept of economic control, there was another difficulty with determining at what stage a State of incorporation was unwilling or unable to exercise its right and when a secondary right came into existence. Option 7 would allow the States of nationality of all shareholders to bring legal action. In other words, it would allow a multiplicity of actions, and that raised dangers that would best be avoided.

24. At the end of the day, the *Barcelona Traction* rule was probably the one that should be considered seriously and codified, subject to the exception that the decision itself recognized. In draft article 17, he tried to draft a provision that gave effect to that rule. Paragraph 1 of the draft articles said that a State was entitled to exercise diplomatic protection, but that it was for the State to decide whether to do so or not. The discretionary nature of the right might mean that companies that did not have a genuine link with the State of incorporation went unprotected. That was why investors preferred the security of bilateral investment treaties, a shortcoming which ICJ itself had recognized. In paragraph 2 of the draft article, he suggested that the State of nationality of a corporation was the State in which the corporation was incorporated, adding in square brackets the phrase "and in whose territory it has registered its office" because some members wished reference to be made to the corporation's office. In the *Barcelona Traction* decision, the Court had emphasized both requirements. He was not sure that the two conditions were necessary. They seemed to amount to the same thing in practice.

25. Draft article 18 dealt with exceptions to the rule that it was the State of incorporation that could exercise diplomatic protection. The first exception was when the corporation had ceased to exist in the place of its incorporation. The phrase "ceased to exist", which had been used by ICJ in the *Barcelona Traction* decision [p. 41, para. 66], did not appeal to all writers, many preferring the lower threshold of intervention on behalf of the shareholders when the company was "practically defunct" [*ibid*.]. His own view was that the first solution was probably preferable. The criticisms dealt mainly with the way in which it had been applied by the Court in the *Barcelona Traction* case, rather than with the term itself. The other problem that might arise was that of the place in which the corporation had ceased to exist. The Court in *Barcelona Traction* had not expressly stated that the company must have ceased to exist in the place of incorporation, but that was clear from the context of the proceedings. The Court had been prepared to recognize that the company had ceased to exist in Spain, but it had emphasized that that did not prevent it from continuing to exist in Canada, where it had been incorporated, and that had influenced the Court's finding that the company had not ceased to exist.

26. The other exception was the one that allowed the State of nationality of the shareholders to intervene when a corporation had the nationality of the State responsible for causing the injury. It was the most important exception to the rule established by ICJ in its judgment in the *Barcelona Traction* case. It was not unusual for a State to insist that foreigners in its territory should do business there through a company incorporated under that State's law. If the State (often a developing State) confiscated the assets of the company or injured it in some other way, the only relief available to that company at the international level was through the intervention of the State of nationality of its shareholders. The rule was not free from controversy. Some had suggested that it should be recognized only when the injured company had been compelled to incorporate in the State which had injured it or in which it was "practically defunct". The Court, in the *Barcelona Traction* decision, had raised the possibility of such a rule, but had not given a definitive answer either on its existence or on its scope. To examine the arguments for and against that exception, one should look at the support it had received pre-*Barcelona Traction*, in *Barcelona Traction* and after the decision had been handed down in that case.

27. Before *Barcelona Traction*, the existence of the exception had been supported in State practice, arbitral awards and doctrine. Practice and judicial decisions were far from clear, however. The strongest support for such an exception was to be found in three cases in which the injured company had been compelled to incorporate in the wrong-doing State: *Delagoa Bay Railway*, *Mexican Eagle* and *El Triunfo Company*.

28. In *Barcelona Traction*, ICJ had raised the possibility of the exception and then had found that it was unnecessary for it to pronounce on the matter since it had not been a case in which the State of incorporation (Canada) had injured the company. It was quite clear, however, that the Court had been fairly sympathetic to the exception, as had been emphasized by a number of judges such as Fitzmaurice, who had stated that the rule was clearly part of customary international law. On the other hand, Judges Padilla Nervo, Morelli and Ammoun had been vigorously opposed to the exception.

29. Post–*Barcelona Traction*, some support for the principle could be found, mainly in the context of the interpretation of investment treaties. In the *ELSI* case, a Chamber of ICJ had allowed the United States to protect American shareholders in an Italian company which had been incorporated and registered in Italy and had been injured by the Italian Government. The Chamber had not dealt with the issue in that case, but it had clearly been present in the minds of some of the judges, as was shown by an exchange between Judges Oda and Schwebel in their separate opinions, with Judge Schwebel expressing strong support for the exception. It was difficult to know what to conclude from the *ELSI* case, but it would seem to strengthen the outlook of the majority of judges who had expressed their opinions in favour of the exception proposed in the *Barcelona Traction* case.

30. Thus, before *Barcelona Traction*, there had been some support for the proposed exception, although opinions had been divided. The *obiter dictum* of ICJ in the *Barcelona Traction* case and the separate opinions of some of the judges had added to the weight of arguments in favour of the exception. Subsequent developments, albeit in the

context of treaty interpretation, had confirmed that trend. Moreover, both the United States and the United Kingdom had declared their support for the exception. Writers remained divided on the issue. He himself proposed that the Commission should accept the exception and that the latter should not be limited to situations in which the injured company had been compelled to incorporate in the wrong-doing State, but should apply in situations where the company was not "practically defunct". If the Commission had reservations about the exception, however, it would be very difficult to dismiss situations where a corporation had been compelled to incorporate in the wrong-doing State in order to be allowed to do business there.

The meeting rose at 11.30 a.m.

2757th MEETING

Wednesday, 14 May 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

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

Diplomatic protection[1] (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,[2] A/CN.4/L.631)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BROWNLIE said that the Special Rapporteur's fourth report (A/CN.4/530 and Add.1) was helpful and well documented and that its quality was matched by that of the introduction by the Special Rapporteur, who had made it clear that he was confining his study to that of corporations. Personally, he could see little justification for such a restriction and hoped that it would not be too strongly emphasized. Other bodies—cities, local authorities, universities, professional associations, non-governmental organizations—might require diplomatic protection, and some important cases—Ratibor, for example—involved universities and cities.

2. Numerous bilateral investment treaties were now being concluded, and one might ask to what extent a pattern of such treaties constituted proof of the development of customary international law. There were currently well over 2,000 bilateral investment treaties, but large numbers did not necessarily make for quality, and there was still a need to discover *opinio juris*. It was his impression that when bilateral investment treaties actually led to arbitration in which the applicable law was a mixture of the law of the respondent State and public international law, they had an extraordinarily unbalancing effect. A recent arbitral decision, not yet in the public domain, illustrated that proposition. Bilateral investment treaties thus raised very serious policy problems.

3. The *Barcelona Traction* case was an important part of the literature on diplomatic protection. The Special Rapporteur asked in his report whether the decision of ICJ in the case bound the Commission, but no such problem should arise: the decision had been carefully argued by two important teams of international lawyers, was part of the literature and simply had to be taken very seriously. The *ELSI* case also had to be taken seriously. It was quite clearly based on a cause of action relating to a bilateral treaty of friendship, and the alleged inconsistencies between the *ELSI* and *Barcelona Traction* cases should not worry the Commission unduly.

4. A central element in *Barcelona Traction* was the policy question. ICJ, sometimes accused of not taking policy into account, had on that occasion quite clearly done so: taking the view that if the holder of bearer shares, which were on the market for extended periods, could emerge from under the carapace of the corporation to make a claim, that would create considerable instability. It would be difficult for States and others to have clear expectations as to who their economic visitors actually were, and there would be a constantly changing population of holders of bearer shares. That was clearly a central point of policy and of public order as well. Judging from paragraph 10 of the report, the Special Rapporteur seemed to have accepted the broad policy lines of *Barcelona Traction*.

5. The first part of draft article 17 posed serious problems that would have to be dealt with by the Drafting Committee. Draft article 18 contained the proposition that shareholders did not receive diplomatic protection and their claims were not admissible in isolation from their relationship with a corporation. Subparagraph (*a*) set out the exception: that the corporation should have ceased to exist in the place of its incorporation. He had no difficulties with the exception, which was not controversial and seemed to be based on common sense. In some quarters, however, a more flexible approach was preferred, allowing the shareholder separate protection and recognition of his or her interests when the corporation existed in principle but was practically defunct. While he had no strong feelings on the matter, there did seem to be room for debate.

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

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