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Summary record of the 2757th meeting

Topic:
Diplomatic protection

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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 protection¹ (*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).

6. A second exception, set out in draft article 18, subparagraph (b), namely that the corporation had the nationality of the State responsible for causing injury to the corporation, was highly controversial, and he was opposed to including it. All the evidence was carefully considered in paragraphs 65 to 87 of the report, but the authority for the exception was very weak. In a passage from his own publication, *Principles of Public International Law*, partly quoted in paragraph 85 of the report, he had written that the exception, if it existed, was anomalous, since it ignored the traditional rule that a State was not guilty of a breach of international law for injuring one of its own nationals, and that if one accepted the general considerations of policy advanced by ICJ in *Barcelona Traction*, then the alleged exception was disqualified.³

7. Subject to those observations, he thought that draft articles 17 and 18 were ready to be referred to the Drafting Committee.

8. Mr. PELLET said he was a fervent supporter of draft article 18, subparagraph (b), but would outline his views later. For the moment, he would like clarification from Mr. Brownlie about the statement that certain municipalities or universities might require diplomatic protection. Some universities were not public but private, of course, but municipalities were always emanations of the State and hence could suffer no direct harm, nor have need of diplomatic protection, since they were part of the State and it acted on their behalf.

9. Mr. BROWNLIE said that for an institution which was under the direct control of the State, what Mr. Pellet said was quite true. That was not the case of many universities, however, or of lower-level institutions in which the State might have a very indirect interest but which, at least for the purposes of local law, were private institutions. If litigation in the courts of Ukraine had been possible at the time of the Chernobyl disaster, for example, it would have proved difficult, as the institution responsible for the reactor was in fact a private-law institution. There were many other institutions that were difficult to classify as being part of the public sector or the private sector.

10. In response to a follow-up question by Mr. Pellet, he said there was no easy way, even in terms of comparative public law, to define the legal status of local authorities. Under English law, local authorities were by no means simply an emanation of the State: other than in London, they were not controlled by the State.

11. The CHAIR said that if the local authorities were acting as a State organ, then the State could act directly in the exercise of its responsibility, and diplomatic protection did not come into play. Diplomatic protection was an indirect route for providing protection for individuals or legal persons that were of the nationality of the State.

12. Mr. KOSKENNIEMI said that two opposing policy rationales were being applied to the problem. With reference to paragraph 85 of the report, he would like to know why Mr. Brownlie thought the general policy of the *Barcelona Traction* case overrode the particular concern outlined by the Special Rapporteur in paragraph 65, in

which he defended the exception in draft article 18, subparagraph (b), by outlining a different policy rationale in a very clear fashion: “A capital-importing State will not infrequently require a foreign consortium wishing to do business in its territory to do so through the instrument of a company incorporated under its law.” The Special Rapporteur went on to say that the State might then engage in dubious actions *vis-à-vis* that company, opening the door to evasion of the law, unless an exception like the one proposed in subparagraph (b) was made.

13. Mr. BROWNLIE said that the more serious cases involved a direct attack on the interests of the shareholder, but if the shareholder was of the same nationality as the corporation, a major problem of principle arose. There were two levels of argument, one relating to the parameter of protection or non-protection of shareholders, and the other to the more global parameter of how the State dealt with its own nationals. It was not surprising that the question had resulted in great divergences of view among the authorities: many international lawyers found the exception to be unattractive.

14. Mr. KAMTO said the Special Rapporteur had submitted a comprehensive and rigorous report on a difficult subject, the diplomatic protection of corporations.

15. Paragraph 10 spoke of the risk that the corporation might, in the exercise of its discretion, decline to exercise diplomatic protection, but surely it was the State of nationality of the corporation, not the corporation itself, that was meant. Paragraph 27 was so beautifully balanced that it was hard to know which way the Special Rapporteur was leaning. If, as he stated further on and as draft article 17 implied, the *Barcelona Traction* case was superannuated and no longer reflected the contemporary law of international investments, then that law must be developed on the basis of the practice followed in bilateral and multilateral investment treaties, with a view to codifying the diplomatic protection of shareholders, albeit with some conditions attached. If, however, *Barcelona Traction* today remained an accurate statement of the relevant customary law, a balancing act would have to be performed.

16. It was difficult to imagine that, for the purposes of obtaining compensation, foreign investors would prefer diplomatic protection over the protection offered by investment treaties. Such protection was often extremely extensive, couched in arbitration clauses that recent arbitral decisions characterized as riddled with traps for States. In any case, it was much easier to set in motion than was diplomatic protection: witness the recent decisions by ICSID.

17. One could not reason today as Judge Padilla Nervo had in his separate opinion in the *Barcelona Traction* case. At the time, he had undoubtedly been correct in saying that it was the poorer or weaker States in which investments were made that needed protection. They still stood in need of protection, but the economic context had changed. With the help of globalization, investments were now being made in every direction: indeed, many investors from developing countries were investing in other developing countries.

³ See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), especially p. 495.

18. The Special Rapporteur had spoken of the danger of statelessness if the genuine link criterion was retained. It had, however, been incorporated in the *Barcelona Traction* decision, though in different terms from those in the *Nottebohm* case, which was understandable in that the latter had concerned an individual, not a legal person. The question was whether the Commission wished to encourage the phenomenon of tax havens, even indirectly, by formally denying the existence of a genuine link. He for one hoped not, especially since the *Barcelona Traction* decision went in the opposite direction.

19. Protection of shareholders in line with the exception envisaged by ICJ in the *Barcelona Traction* case was essential when the State that had caused injury to the corporation was the State of nationality of that corporation. The Special Rapporteur was proposing that the Commission should allow such a case as an exception, where the corporation had been forced to incorporate under the domestic law of the State in which the investment was made. It seemed an unnecessary requirement except in the sense that, without it, the investor could have gone elsewhere. It was always open to an investor not to invest in a particular country, but what was important was to provide a final legal safety net for the shareholder, who would otherwise be completely robbed without even a chance to present his or her case before an objective third party, namely an international court.

20. Sometimes an investor could not expect any help from the State, as could be seen from the *Biloune* case. Mr. Biloune, of Syrian nationality, had resided in Ghana for 22 years before being expelled in 1987. He had created a company of which he had held 60 per cent of the shares. The company had concluded agreements with its Ghanaian partners to build a hotel complex in Accra. Invoking the absence of a building contract, the authorities had stopped the construction and demolished part of the building. Mr. Biloune had then been arrested and held for 13 days before being expelled. Was it conceivable for Mr. Biloune's company, which had since gone bankrupt, to have obtained the diplomatic protection of its State of nationality? In such a case, the shareholder, and certainly a majority shareholder, should be able to request the diplomatic protection of his or her State of nationality, which for Mr. Biloune was Syria. Such a possibility should be encouraged, especially since under certain inter-State legislation, such as that of the Organization for the Harmonization of Business Law in Africa, it was now possible to have a company consisting of a single shareholder with a legal personality different from that of the sole shareholder.

21. Mr. Brownlie was right to raise the question of the protection of shareholders in international law, but protecting foreign shareholders was not the same as protecting nationals. It was the company, and not the foreign shareholder, that had the nationality of the host State of the investment. As for national shareholders, they should be able to protect their rights in the State of nationality, in accordance with domestic legislation. National shareholders came under existing law for nationals. Thus, there were different procedures, depending on the nationality of the shareholder; it was the only way to avoid the question of principles raised by Mr. Brownlie. However, that

should not prevent the Commission from envisaging diplomatic protection for foreign shareholders.

22. He agreed with the wording of draft article 17 but was in favour of deleting the phrase in brackets. Draft article 18 was acceptable, but a time limit should be set in subparagraph (a). If a company went bankrupt, it should not have recourse to diplomatic protection indefinitely. Perhaps the time limit could be set from the date on which the company announced bankruptcy. Likewise, subparagraph (b) should include the requirement of a "reasonable time limit" for exercising diplomatic protection.

23. Mr. PELLET said that he agreed almost entirely with Mr. Kamto's comments, in particular his defence of draft article 18, subparagraph (b). But he was somewhat puzzled as to why the question of time limits with regard to the protection of the shareholders of a company suddenly had to be addressed. Such a question could easily be posed for the whole subject of diplomatic protection. The issue was whether diplomatic protection could be exercised indefinitely. However, the legal impact of determining whether time had run its course was such a general problem in international law that he was not certain it had to be reflected in the draft articles.

24. Mr. KAMTO said that, as the article concerned an exception to the rule, the Commission should at least call for a reasonable time limit. Such a remedy should not be available to foreign shareholders indefinitely. Nevertheless, if members were not convinced, he would not press the point.

25. Mr. MOMTAZ said that the purpose of specifying a reasonable time limit was presumably to prevent a proliferation of claims by the States of nationality of the shareholders.

26. Mr. Sreenivasa RAO said that, as he understood it, Mr. Kamto was arguing that, if a company was incorporated in a particular State, it had that State's nationality, and if there was an injury to that company by virtue of an action of the State of incorporation, remedies must be sought in the domestic courts of that country. Yet draft article 18, subparagraph (b), concerned the extent to which a foreign State should be allowed to provide diplomatic protection to its nationals who were shareholders in a company that was incorporated in a foreign State. A State could provide diplomatic protection only if the person injured was its national. Shareholders should not be treated as a separate group or provided with separate protection. The Commission was not talking about individuals separately from the company itself. The Special Rapporteur had rightly stressed that the personality of a corporation was different from that of its shareholders. Thus, if diplomatic protection was tied to the personality of the company, how could foreign nationals who were shareholders of a company be provided separate diplomatic protection? If the Commission decided that a State had a right to provide diplomatic protection to nationals who were shareholders in a company incorporated in a foreign country, that would pose problems, as Mr. Kamto was aware.

27. Mr. KAMTO, replying to Mr. Sreenivasa Rao's comments, said that the Special Rapporteur had sought to provide for the exceptions envisaged in *Barcelona Trac-*

tion. It was the right approach, because it was consistent with the situation in the international community today. The Commission could not pretend that investment law did not have particular rules. Foreign investment did not have the same status in the legal system of the host State. It could have the same status if the corporation had been established in accordance with the rules of international law, but the fact remained that foreign investment always enjoyed special protection, whether through bilateral or multilateral investment agreements or through diplomatic protection. The question was how a corporation could exhaust local remedies if it was injured by the host State, as in the *Biloune* case. It was difficult to imagine how someone who had been thrown in prison and then expelled could exhaust local remedies.

28. Even assuming that local remedies could be exhausted and that the rights of the corporation were not sufficiently protected, foreign shareholders should have recourse to their State of nationality to obtain the protection not available to them under the rules of domestic law. In the *Biloune* case, perhaps the Ghanaian nationals holding the remaining 40 per cent of the shares in the company could have instituted legal proceedings in Ghana; Mr. Biloune might have tried to do so from abroad, but it was highly unlikely that he would have been successful. There must be some way to provide protection under international law for such cases.

29. Mr. PELLET said that Mr. Kamto's comments did not clarify the problem. It would be preferable to introduce the possibility of the exhaustion of local remedies. The Commission must consider the circumstances in which diplomatic protection was possible—in which recourse to local remedies had no chance of success—which was what Mr. Kamto had in mind with the *Biloune* case. Another example was the *Diallo* case pending before ICJ. The point under discussion was a corporation which had the nationality of the host State. In principle, diplomatic protection could not be exercised, because the condition set out in draft article 17, which reaffirmed *Barcelona Traction*, was not met. The question arose only when a foreign shareholder, who might or might not have a majority holding, was prosecuted by the authorities and could not exercise his or her rights. In such instances draft article 18, subparagraph (b), was an essential safety net. However, at issue was not the exhaustion of local remedies but rather the other condition for the exercise of diplomatic protection, namely nationality. If the Commission confined itself to the *Barcelona Traction* principle, reflected in draft article 17, the shareholder would not enjoy any protection, and the corporation was perfectly opaque. If the corporation that was the victim of the internationally wrongful acts of the host State had the nationality of the host State, then draft article 18, subparagraph (b), was justified. The Commission should proceed as though local remedies had been—or could not be—exhausted.

30. Ms. ESCARAMEIA said that she endorsed the Special Rapporteur's suggestions for draft articles 17 and 18 and was in favour of deleting the phrase in brackets at the end of draft article 17, paragraph 2, because it followed logically from the requirements of the provision.

31. The Special Rapporteur's justification for choosing the *Barcelona Traction* rule was that it was still the prac-

tice of most States. In analysing the *Barcelona Traction* case, the Special Rapporteur stressed that ICJ had been divided and that it could have taken into account the treatment of enemy companies in time of war, State practice in settlements through lump-sum agreements, investment treaties and arbitral awards, including the *Delagoa Bay Railway* case. There had also been a discussion of the practice of bilateral investment agreements, studies by Bederman and Kokott⁴ and the *ELSI* case, which in substance addressed the same situation. The many examples given were confusing and could have led to precisely the opposite conclusion. Even legal arguments such as equity, harmonization with the *Nottebohm* genuine link and questions of analogy with dual nationality of individuals could have been cited. She nonetheless agreed with the Special Rapporteur's choice for draft article 17, because it was the best alternative in today's world. It was a choice based on policy rather than on legal necessity.

32. In her opinion, long and complex proceedings, if not chaos, could result from using the option of the State of nationality of shareholders. The State of nationality of shareholders would also create problems with the rule of continuity of nationality, given that shares changed hands so quickly.

33. The option involving the State of economic control (para. 32 of the report) was not clear. The Special Rapporteur had spoken in that connection of the majority shareholders, but sometimes a 1 per cent holding was more important for one State than a 30 per cent holding for another State. It depended on the State. Thus, the State of economic control rule might be unfair, because it might have a greater impact on the economies of States that did not have economic control and would be more likely to seek protection.

34. If the idea of the genuine link of the State of incorporation was adopted, most corporations would become stateless, because in practice they would have no possibility of obtaining diplomatic protection. As Mr. Kamto had rightly noted, surely the Commission did not want to encourage the use of tax havens, but it did not want to deprive corporations of the possibility of diplomatic protection. Dual protection of the shareholders—by the State of incorporation and by the State of nationality of the shareholders—would also cause many problems. *Barcelona Traction* was still the safest, clearest, most readily applicable and least confusing alternative.

35. As for draft article 18, subparagraph (a), the requirement that a corporation had ceased to exist might be too high a threshold. It would be preferable to use the words "practically defunct", as in the *Delagoa Bay Railway* case, or the phrase "deprived of the possibility of a remedy available through the company", as in the *Barcelona Traction* case [p. 41, para. 66]. In that way, the corporation would not have actually ceased to exist, but simply become non-functional, leaving no possibility of a remedy.

36. She agreed that draft article 18, subparagraph (b), involved an issue of equity. If the company was compelled to acquire the nationality of the State in which it

⁴ See 2756th meeting, footnote 5.

was incorporated, that would bring an equivalent of the Calvo clause⁵ into play, because the company would be deprived of any kind of protection. This was a frequent occurrence, and the report cited many examples, such as the *Delagoa Bay Railway*, *Mexican Eagle* and *El Triunfo Company* cases. Those important exceptions should be retained; to do otherwise would be unfair to corporations. If the exceptions were recognized and the Commission decided that the State of nationality of the shareholder was entitled to exercise diplomatic protection, the question then arose which State: all of them or just those with economic control? The Special Rapporteur seemed to have in mind any State of any shareholder. In principle, she was not opposed to that view, but it might be better to include a reference to the economic control of the company, which would then need to be defined.

37. Mr. BROWNLIE, raising the question of equity as touched upon by Ms. Escarameia when she referred to the second exception in draft article 18, said it was difficult to see how equity applied in that instance. Was the world one in which the importing of foreign capital was compulsory? On the contrary, investors were free agents and could choose to invest as they saw fit. If they were told that a local company must be formed, he did not think it was inequitable for investors to be required to meet certain conditions. Equity cut in different directions. As a result of bilateral investment treaties and other influences, the local remedies rule was in any case frequently inapplicable, and the host State of foreign capital often had to face compulsory arbitration. It was a strange proposition to assert that the matter was one of equity. Investors must take some risks. The attitude of claimant investors under bilateral investment treaties was that they had some sort of guarantee and that if things went wrong, they were going to receive massive damages, which might amount to a considerable percentage of the local economy. Thus, it was important to be very careful when bringing in considerations of equity.

38. Mr. Sreenivasa RAO said he agreed with some of Mr. Brownlie's remarks. The Special Rapporteur's concern about the statelessness of some companies, to which Ms. Escarameia had referred, was a problem in isolation. However, in the context of economic development, and given the policies of countries seeking investments; the contractual arrangements currently being entered into, either as investment agreements or in other forms; the strict contractual conditions imposed on the host State; and the threat of massive damages in arbitration cases, the question of statelessness did not seem to pose a problem. Statelessness was a situation in which no other remedy existed and no one was prepared to promote the cause of the injured person, who was left without any way of receiving compensation for a serious injury.

39. How often did nationalization take place nowadays, and how serious was the problem in connection with statelessness? Some analysis was needed if the Commission was to speak of equity. In some cases, heavy damages were sought from States, to the detriment of the local economy—hence the need to be careful about making a case for statelessness in draft article 18, subparagraph (b).

40. Mr. SEPÚLVEDA said he agreed with Mr. Sreenivasa Rao that the question of statelessness was irrelevant, because the corporation was required to have the nationality of the State in which it was incorporated in accordance with the State's legislation. Such a corporation was not defenceless and had a number of forms of recourse, including compulsory international arbitration provided for under bilateral treaties on foreign investment guarantees and protection. But another element had not been taken sufficiently into account: the State in which the corporation was incorporated provided a legal system for settling disputes. Mr. Kamto had cited an extreme case in which the domestic legal system did not apply, but in the overwhelming majority of cases that system operated well, and, as a result, corporations which were incorporated, registered and domiciled in the host State had domestic remedies available to them. Only in exceptional cases was it necessary to apply to an international arbitration court or seek diplomatic protection.

41. Mr. DUGARD (Special Rapporteur), endorsing Mr. Sepúlveda's remarks in response to Mr. Sreenivasa Rao, said that the Commission was not dealing with an issue of statelessness: the corporation was incorporated in the State in which it did business, so it had the nationality of that State. Similarly, the shareholders were not stateless, having the nationality of the State of which they were natural persons. As Mr. Sepúlveda had pointed out, in most cases the corporation would indeed have remedies under the law of the host State. Only where those remedies had been exhausted and no justice obtained would draft article 18, subparagraph (b), come into play.

42. Mr. PELLET supported the Special Rapporteur's reasoning. In the normal situation covered by *Barcelona Traction*, corporation A had the nationality of State B and sustained injury in State C, the shareholder being a shareholder of State B. In the scenario covered by draft article 18, subparagraph (b), the shareholder was still a shareholder of State B, but corporation A had the nationality of the State in which it sustained injury. The difference was that, to draw an analogy with *Barcelona Traction*, the corporation was no longer a Canadian corporation but a Spanish corporation, and, if the corporation was Spanish, the scenario changed completely. Raising the issue of statelessness only complicated matters, as no corporation could be stateless. If the issue of statelessness was left aside, Ms. Escarameia was right and, from a purely formalistic standpoint, it was, as Mr. Sepúlveda argued, an internal matter for the State that injured the corporation. If, however, one were to venture beyond such purely formalistic considerations, the problem was no longer merely internal, because the presence of a shareholder internalized an international problem. In such circumstances it was equitable to have recourse to the scenario covered by draft article 18, subparagraph (b), *Barcelona Traction* no longer being applicable because the corporation was Spanish and the shareholder continued to be Belgian.

43. Ms. ESCARAMEIA said that her point—one made by the Special Rapporteur in his report—had been that such a situation would *virtually* amount to one of statelessness, in the sense that the corporation would have no State to protect it. Draft article 18, subparagraph (b), applied to a very extreme case, where local remedies could not be exhausted, or had been exhausted; where there could

⁵ See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 206–208.

be no recourse to compulsory arbitration; and where the corporation enjoyed absolutely no protection, because it had the same nationality as the State that had injured it. Did the Commission seek, or did it not seek, to protect the capital and investment of a corporation in that situation? That was the policy decision it faced.

44. Mr. Sreenivasa RAO said he had been speaking figuratively in raising the issue of statelessness. If the scenario envisaged under draft article 18, subparagraph (b), was excluded, according to some members, as he understood, a situation tantamount to statelessness might arise.

45. Mr. KOLODKIN said that the Special Rapporteur had correctly defined the scope of his report and of the draft articles. The report provided a relatively clear formulation of an aspect of customary international law that was ripe for codification. He was not sure, however, whether the same could be said of diplomatic protection of other entities. In his view, the report devoted adequate space to an analysis of *Barcelona Traction*, since it was the case in which the general principles governing diplomatic protection of corporations were formulated. Justifiably little space was devoted to the *ELSI* case—a case on the consequences of the specific application of a concrete international treaty, and thus essentially an application of *lex specialis*.

46. The Special Rapporteur's analysis of hypothetical variant formulations of the norm on diplomatic protection of corporations was very useful and made it possible to assess the existing approaches to the question, primarily in doctrine. Last but not least, the Special Rapporteur's conclusions deserved to be supported as a whole.

47. First, he agreed with the general approach and methodology adopted, and could support the Special Rapporteur's proposal, in paragraph 47 of his report, to draft articles on the basis of the principles formulated in *Barcelona Traction*. It was important that that approach should also be consistent with the views of States, at least as formulated in the Sixth Committee.

48. Second, on the substance, it would be correct to start by codifying the rule whereby the right to exercise diplomatic protection of corporations was held by the State of their nationality, before going on to formulate exceptions—cases where such a right might be held by the State of citizenship of the shareholders. He had no problems with draft article 17, but a few doubts as to the exceptions. As the Special Rapporteur had rightly noted, the exceptions had been recognized by ICJ in *Barcelona Traction*, albeit to differing degrees. It must, however, be noted that that part of the Court's decision had given rise to differing opinions. The exceptions were formulated in draft article 18, but perhaps also provided for in draft article 19. In that case, it might be useful not to separate the presentation of draft articles 18 and 19. However, others might take a different view, and he would defer to the Special Rapporteur with regard to the issue of presentation.

49. He had no fundamental doubts about the exception in draft article 18, subparagraph (a), other than for a few minor drafting points. However, he had a few doubts with regard to draft article 18, subparagraph (b). The possible scope of application of the exception should perhaps be

limited to a situation in which the legislation of the host country—the country in receipt of the investments—might require the creation of a corporation. In that regard the exception under subparagraph (b) would be quite justifiable. In his view, the Commission would also be right to limit itself to a codification of the principles found in the *Barcelona Traction* case, as noted by the Special Rapporteur in paragraph 27 of his report, as that case reflected customary international law. Accordingly, draft articles 17 and 18 could be referred to the Drafting Committee.

50. Mr. GAJA said that, in spite of the Special Rapporteur's professed reluctance to take up the subject of diplomatic protection of legal persons, his fourth report was his best yet. He particularly welcomed the Special Rapporteur's clear statement of the options open to the Commission, and of the policy arguments for and against each possible solution.

51. His own claim to expertise in that field rested solely on the fact that he had assisted Roberto Ago in his pleadings on the question of diplomatic protection of shareholders in the *Barcelona Traction* case and had later been one of the counsel in the *ELSI* case, though on that occasion he had not pleaded on the issue currently under discussion. On both occasions he had been engaged on behalf of the respondent State—a fact that might affect his attitude to the present matter.

52. He agreed with the Special Rapporteur's approach of taking the *Barcelona Traction* judgment as guidance for his own proposals. In spite of certain commentators' attempts to draw elements from the *ELSI* judgment on the basis of which to reconsider what ICJ had said in the *Barcelona Traction* case, he found that little could be gleaned from that case for the Commission's purposes. The Court's jurisdiction in the *ELSI* case had been limited to the interpretation and application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Italy⁶—one of the many concluded by the United States in the period immediately following the Second World War. The applicant and respondent States had agreed that the treaty granted rights to shareholders, but they had differed about the extent of those rights. For instance, did the shareholders' rights to organize, control and manage a corporation under article III of the treaty include the right that the assets of the corporation should not be the object of requisition? The Chamber of the Court had not found it necessary to reach a conclusion on the extent of rights, but had hinted in some passages of the judgment that the wider interpretation of the treaty provision was more acceptable. The *Barcelona Traction* judgment, which concerned general international law, had indeed been referred to, albeit in passing, in the parties' pleadings, but it could hardly be considered as decisive for the interpretation of the relevant treaty. It was quite understandable that bilateral investment treaties and also treaties of friendship, commerce and navigation set out to give shareholders wider protection than was otherwise available under general international law.

53. Regarding the basic rule drawn from *Barcelona Traction* by the Special Rapporteur in draft article 17,

⁶ Signed in Rome on 2 February 1948 (United Nations, *Treaty Series*, vol. 79, no. 1040), p. 171.

he had no objection to suppressing one of the two formal criteria listed in that judgment, namely, the criterion, currently placed in square brackets, of the registered office. As the Special Rapporteur noted, the registered office was generally located in the State of incorporation. In his view, the main reason why the Court had mentioned that both the place of incorporation and the registered office should be located in the State exercising diplomatic protection was that civil-law countries tended to give relevance to the place of the seat, whereas common-law countries preferred the criterion of the place of incorporation, particularly where conflicts of laws arose. The Commission could well accept one single criterion, and the choice of place of incorporation seemed justified, in view of its growing dominance in other areas of law.

54. On the other hand, he would hesitate before eliminating from the general rule any reference to the existence of an effective link between the corporation and the State of nationality. First of all, he understood the *Barcelona Traction* judgment as having asserted that requirement, only finding that “no absolute test of the ‘genuine connection’ has found general acceptance” [p. 42, para. 70]. Thus, the test had in fact also been used by the ICJ, as had been noted in particular in Judge Fitzmaurice’s separate opinion.

55. Furthermore, as a matter of policy, the reasons militating in favour of dropping a reference to effectiveness with regard to the nationality of individuals did not fully apply to the case of corporations. In many States incorporation was not made conditional on any substantial link between the corporation and the State of incorporation. Thus, incorporation was a much more tenuous relationship than citizenship as between the individual and the State. Admittedly, as the Special Rapporteur noted, in the absence of an effective link the State of nationality of incorporation was in any case unlikely to exercise diplomatic protection. However, that did not seem sufficient reason for saying that the State of incorporation *could* exercise diplomatic protection. Thus, he would favour the introduction of some element to that effect.

56. On the exceptions, like other members he had no particular problems with draft article 18, subparagraph (a), although it raised some questions of drafting and of substance. As to article 18, subparagraph (b), he noted, first, that ICJ had been much less affirmative with regard to that exception in the *Barcelona Traction* judgment. With regard to subparagraph (a), some elements in paragraph 66 of the judgment conveyed, albeit implicitly, that the Court favoured the existence of that exception. However, as to the second exception, in a passage cited in paragraph 75 of the fourth report, the Court had not endorsed that exception in the same way as the separate opinions of Judges Fitzmaurice, Tanaka and Jessup had. It might also be recalled that Judge Padilla Nervo had affirmed that the passage in question did not imply the existence of an exception of a more general scope—an understandable view, given that judge’s attitude to general international law concerning protection of shareholders. Thus, the exception under subparagraph (b) did not have a strong basis in the *Barcelona Traction* judgment.

57. As for the policy aspects, the exception, if it was to be retained, needed to be qualified. Most investments that

gave rise to wrongful acts were made by companies incorporated in the State of investment, although they might be part of a group of corporations based elsewhere. Hence, in a majority of cases the exception, rather than the rule, would apply. It was true, as had been mentioned in the report and in the debate, that in many cases foreign would-be investors were required to establish a corporation in the host State. That might be one of the elements of equity. However, if an exception as stated in draft article 18, subparagraph (b), were adopted and came to be accepted as an expression of general international law, the host State would be wise to make it a condition for an investment, not that the company should be incorporated locally, but that it should be incorporated elsewhere, so that it would not come under the exception that would open up the way for the protection of all the shareholders.

58. Finally, he shared the doubts voiced by Ms. Escarameia regarding the general reference to “shareholders”. That reference, understandable in the context of draft article 18, subparagraph (a), should perhaps be narrowed down in the context of article 18, subparagraph (b), so as to obviate the possibility of intervention by the national States of minority shareholders.

59. Mr. PELLET said it appeared to be generally accepted that determination of the nationality of corporations was a problem of internal law. Mr. Gaja had explained that internal laws varied in that regard and fell into two major systems: common-law countries favoured the criterion of the place of incorporation, while countries espousing civil or Romano-Germanic law favoured the criterion of the place of the registered office. What he failed to understand was the conclusion drawn by Mr. Gaja from that observation, namely, that the registered office criterion should be abandoned in favour of the incorporation criterion. That position was all the more regrettable in that Mr. Gaja hailed from a country that had seen the birth of Roman law. He was at a loss to understand why Mr. Gaja wished to throw himself voluntarily to the lions and place himself under the protection of common-law imperialism. There was no reason to accord precedence to either one of the two alternative systems. It was absolutely indispensable to retain the words “and in whose territory it has its registered office”, in draft article 19, paragraph 2, amending the conjunction “and” to read “or”, so as to reflect the fact that the two systems were equally valid.

60. Mr. GAJA said that not all the “Latin” countries adopted the criterion of the seat. In Italian law, for instance, article 25 of Law 218 (1995) on private international law used the criterion of incorporation.

61. As for the alternative nature of the two criteria, the *Barcelona Traction* judgment referred to “the State under the laws of which it is incorporated *and** in whose territory it has its registered office” [p. 42, para. 70].

62. It was questionable whether it was really internal law that conferred nationality on corporations. He had some doubts as to whether that was true with respect to legal, as opposed to natural, persons. The system of attribution of nationality to corporations varied, depending on whether, for instance, taxation, investment or corporate law issues were involved.

63. Mr. MELESCANU noted that Mr. Gaja had endorsed Ms. Escarameia's idea of possible actions for diplomatic protection by shareholders of the State representing the majority shareholders. If the Commission pursued that idea, it would come up against a problem posed by the legal systems of all countries that had a functioning market economy, namely, the existence of special laws protecting minority shareholders. If the Commission wanted to introduce the concept of majority shareholders, it would have to deal with other issues that included the rights of minority shareholders.

64. He was impressed by Mr. Gaja's reasoning with regard to paragraph 24 of the report. He agreed strongly that, if the Commission chose to establish a clear exception like the one in draft article 18, subparagraph (b), it would face exceptional situations. For instance, in order to avoid actions for diplomatic protection based on that exception, States might be tempted to require corporations to incorporate in another country. That could also affect the proposed approach, which he supported, of using the principles enunciated in the *Barcelona Traction* case as a basis for the present draft.

65. Mr. KAMTO, referring to the suggestion to delete the wording in square brackets in draft article 17, paragraph 2, said that the criteria of State of incorporation and territory of registered office were cumulative, not alternative. Both criteria were stated clearly in the *Barcelona Traction* judgment, where the conjunction "and" was used rather than "or". The Commission could not use internal law as a starting point; it must start from the problem created in international law in order to solve it. If it retained only the criterion of State of incorporation, the indirect effect would be to encourage tax havens: companies would incorporate in one State and conduct their operations in another. The Commission should not encourage such practices by adopting a rule that departed from the clear criteria set in *Barcelona Traction*, which must be the point of departure for the draft articles.

66. The exception in draft article 18, subparagraph (b), might prompt States to require foreign companies to incorporate elsewhere in order to avoid actions for diplomatic protection. He did not see what States would gain from doing so, however, since the country in which the company had its registered office would be able to exercise diplomatic protection. States might escape actions for the diplomatic protection of shareholders, but they would not escape actions for diplomatic protection completely.

67. Not only did the idea of restricting protection to majority shareholders complicate matters, it was also discriminatory. He supported Mr. Momtaz's suggestion to impose a reasonable time limit for instituting diplomatic protection proceedings under draft article 18, subparagraph (b), and felt that the Commission should consider that idea.

68. Mr. CHEE, referring to draft article 18, subparagraph (b), asked Mr. Gaja what State, other than the host State, could cause injury to shareholders. From his own experience—for instance, with the Agreement between the Government of the Republic of Korea and the Government of the Hungarian People's Republic for the Encouragement and Reciprocal Protection of Investments—it

seemed that the practice was for the parties to go directly to arbitration if there was a disagreement over interpretation, making diplomatic protection unnecessary.

69. Mr. GAJA, responding to Mr. Chee, agreed that in most, although not all, cases it was the host State that caused the injury. Mr. Kamto hoped to discourage companies from incorporating in countries with which they had no ties. However, the establishment of a registered office was entirely formal. If the Commission were to admit diplomatic protection on the part of States where companies were actually based and from which they were effectively controlled, it would be applying the opposite criterion from that identified in *Barcelona Traction*. If a company could be protected by the State of nationality of its shareholders, the host State would not gain much by requiring the company to take its nationality. A host State's interest would be to impose the condition that the company must not be incorporated in the State of nationality of the shareholders. Again, a company might feel that an action for diplomatic protection was sufficiently remote for it to stand to gain more from a taxation standpoint by incorporating in a country that was friendly to it.

70. Mr. MANSFIELD thanked the Special Rapporteur for his very thorough report and excellent introduction. The report made it clear that the *Barcelona Traction* judgment must be the starting point for any codification exercise. The criticisms made of that judgment, as detailed in paragraphs 14 to 21 of the report, were certainly important factors. In essence, the rule expounded in the judgment had become increasingly divorced from how States actually behaved, because companies continued to incorporate themselves, for tax reasons, in places with which they had little or no connection. They had effectively decided that tax advantages were more important to them than the possibility of recourse to diplomatic protection and had found it more useful to rely on the arrangements established through their States in bilateral investment treaties.

71. That situation confronted the Commission with a dilemma: either it codified rules on the basis of *Barcelona Traction*, knowing that such rules were irrelevant to current State practice, or it tried to develop a new or supplementary basis for the exercise of diplomatic protection of corporations and shareholders, but without there being any firm grounding for such a new rule in current State practice or any indication that such a rule would make diplomatic protection more relevant to the lives of States and companies or would even be desirable.

72. He agreed with the Special Rapporteur's conclusion that the wisest course was to draft articles based on the principles of *Barcelona Traction*. If future changes in the commercial world prompted corporations to attach more importance to diplomatic protection than they did at present, it would be for them and their shareholders to choose to incorporate in a country with which they had a genuine link and which might be willing to exercise diplomatic protection on their behalf. If, however, they preferred to obtain tax advantages by incorporating in countries with which they had little or no connection, and to rely on the protections available under bilateral investment treaties, that was their choice. If Governments themselves saw advantages in changing the basic rule of *Barcelona Traction*, they could always consider a multilateral treaty

to that effect. One advantage of basing the Commission's draft articles on *Barcelona Traction* was that it might encourage Governments to consider whether they wanted to propose a change based on the wide variety of bilateral investment treaties in existence. Thus far, the debate in the Sixth Committee seemed to suggest that they did not.

73. As to the draft articles, his initial reservations about the exception envisaged in draft article 18, subparagraph (b), had been strengthened by what Mr. Brownlie and other members had said. On the face of it, as the Special Rapporteur noted in paragraph 87 of the report, there was a basis in equity for such an exception where a company had been compelled to incorporate in the wrongdoing State. However, investors had a choice as to whether they accepted such a requirement. He was not sure that there was a significant point of equity underlying the issue, and he was still not fully persuaded of the need for the exception. That point aside, he was in favour of referring draft articles 17 and 18 to the Drafting Committee. For the reasons given in paragraph 56 of the report, he thought there was a strong case for deleting the words in square brackets in draft article 17, paragraph 2. However, the Drafting Committee could consider whether, in terms of the different possibilities under civil and common law, there was merit in including both criteria.

74. Mr. KATEKA said that, in introducing a stimulating report, the Special Rapporteur had asked the Commission to decide whether or not it wanted to follow the *Barcelona Traction* judgment. He personally felt that the *Barcelona Traction* judgment should be the starting point for the Commission's discussion of draft articles on diplomatic protection of corporations and shareholders. Despite the many criticisms of that judgment, most notably that it established an unworkable standard, that it overlooked policy considerations such as dual protection and multiplicity of claims and that ICJ had mishandled the relevance of the *Nottebohm* case, he shared the view expressed in paragraph 27 of the report that *Barcelona Traction* was an accurate statement of the law on the diplomatic protection of corporations and was a true reflection of customary international law.

75. The *Barcelona Traction* judgment also reflected the ideological and cultural differences among the eight judges who had given separate opinions. The judges from capital-exporting countries had supported the right of the shareholders' State of nationality to invoke diplomatic protection, while the judges from developing countries had contended that it was not the shareholders who needed protection, but the poorer or weaker States where the investment took place. Such States needed protection from powerful financial groups or against unwarranted diplomatic pressure from governments of the economic North.

76. In that connection, he acknowledged that globalization was inevitable and that, as a result, the situation had changed since *Barcelona Traction*. That did not alter the fact that globalization was inequitable for weak countries, however. To take foreign direct investment as just one example, sub-Saharan Africa received less than 2 per cent of global foreign direct investment, and 80 per cent of that went to South Africa and Nigeria. Globalization could not

be halted, but it was essential to make sure that no one was left behind.

77. Support for capital-exporting countries had also been expressed by Bederman and by Kokott, who was quoted in paragraph 17 of the report as having concluded that diplomatic protection had been sidelined by bilateral investment treaties because investors distrusted its political uncertainty and discretionary nature and preferred to opt for international arbitration. He felt that investors' fears were misplaced. Bilateral investment promotion and protection agreements, coupled with national legislation on investment guarantees, continued to attract investors, and recourse to international arbitral proceedings under those arrangements need not supplant diplomatic protection. He was concerned, therefore, that Kokott was quoted in paragraph 51 of the report as saying that, "in the context of foreign investment, the traditional law of diplomatic protection has been to a large extent replaced by a number of treaty-based dispute settlement procedures".⁷ He disagreed that treaties replaced custom: the two existed side by side. In any case, ICJ had held in *Barcelona Traction* that investment treaties belonged to the realm of *lex specialis*, a subject on which the Special Rapporteur had said he would produce a separate report.

78. In paragraph 22 of his report, the Special Rapporteur appeared to be inciting the Commission to rebel against ICJ by saying that decisions of the Court were not binding on the Commission and that the Commission had severely limited the scope of one decision by the Court and expressly rejected another. He suspected that the intention of the Special Rapporteur's punchline—"Barcelona Traction is not sacrosanct, untouchable"—was to see how the Commission reacted. His own view was that paragraph 22 might have overstated the case. The limitations suggested by the Commission had been mainly in the form of commentaries, and the Special Rapporteur's apparent frontal attack on the Court reminded him of Judge Fitzmaurice's lament that the drafters of the Charter of the United Nations, and hence of the Court's Statute, had been wrong to label judicial decisions, including those of the Court, as subsidiary means for the determination of the rules of law in Article 38 of the Statute. If judicial decisions had been put on a par with treaties and customary law, the Court might have been shown more respect. Notwithstanding Mr. Brownlie's comments about the Court and how it took decisions, he felt that it was inappropriate for the Commission to openly challenge the Court.

79. In his report the Special Rapporteur had suggested seven options for the proposed articles, some of which—2 and 5, for instance—overlapped. He welcomed the Special Rapporteur's focus on option 1, involving the State of incorporation, which was based on the rule in *Barcelona Traction*. He had no problems with paragraph 1 of draft article 17 and would prefer to delete the wording in square brackets in paragraph 2. His preference was not influenced by the Commission's debate on civil versus common law, however. With regard to the exception in draft article 18, subparagraph (a), it was to be hoped the Special Rapporteur would make it clear in a commentary that the interpretation of "ceased to exist" was that given in paragraph 67 of the *Barcelona Traction* judgment, namely, that, a

⁷ *Loc. cit.* (2756th meeting, footnote 5), p. 277.

company continued to exist even if it was in receivership; it ceased to exist only when it went into liquidation. The Special Rapporteur considered the exception in draft article 18, subparagraph (b), to be the most important one, and it was the one that three judges in *Barcelona Traction* had said reflected customary international law. He wondered how two contradictory rules of international law could be said to exist, and he was therefore opposed to including that exception in the draft articles. Presumably the third exception, covering cases in which the direct rights of shareholders were infringed, was addressed in an article that had yet to be introduced. Draft articles 17 and 18 could be referred to the Drafting Committee.

80. Mr. DUGARD (Special Rapporteur) confirmed that the third exception was dealt with in draft article 19.

81. Mr. CHEE, expressing surprise at Mr. Kateka's preference for deleting the wording in square brackets in draft article 17, paragraph 2, said it was his understanding that the wording was drawn directly from the *Barcelona Traction* judgment.

82. Mr. DUGARD (Special Rapporteur) confirmed that that was so, but said that the Commission needed to decide whether or not it wanted to follow that judgment in the present draft articles.

The meeting rose at 1 p.m.

2758th MEETING

Friday, 16 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.

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

[Agenda item 2]

1. The CHAIR invited the Chair of the Planning Group, Mr. Melescanu, to announce the composition of the Group.

2. Mr. MELESCANU (Chair of the Planning Group) said that the Planning Group would be made up of the following members: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Koskenniemi, Mr. Mansfield, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda and Mr. Yamada. He urged the special rapporteurs and the Rapporteur of the Commission to take part in the Group's work.

Diplomatic protection¹ (*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*)

3. Mr. KOSKENNIEMI said that the fourth report of the Special Rapporteur (A/CN.4/530 and Add.1) examined in depth two rather contentious issues, the first one being that of the nationality of a corporation. On that point, the Special Rapporteur urged the Commission to adopt the *Barcelona Traction* principle, namely, that the State of nationality of a corporation was the State in which it was incorporated. The second issue related to the case covered in draft article 18, subparagraph (b): when the corporation had the nationality of the State responsible for causing injury to it. One's position on those problems depended on one's view of corporate activity today and the particular situation in question. The more he thought about big multinational corporations with global strategies, the more he was in favour of ensuring that the host State was not beset by a large number of claims from foreign shareholders. On the other hand, if he looked at the case of small companies in developing economies, he was inclined to say that the shareholders needed protection. As big corporations dominated today's global economy, he tended to prefer the first position, perhaps to the detriment of the protection of the shareholders of small companies. He would have liked to find language to introduce the ideas of "equity" and "reasonableness" in draft article 17 or 18, but, as the Special Rapporteur pointed out, such rules were largely covered by bilateral investment treaties, so that the rules being considered by the Commission were merely residual in nature. He did not believe that the Commission was bound by the decisions of ICJ and, in particular, by the *Barcelona Traction* judgment. Those judgments had only the value that the Court's reasoning in them had. He also

* Resumed from the 2751st meeting.

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).