

Document:-  
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**Summary record of the 2759th meeting**

Topic:  
**Diplomatic protection**

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30. Second, the nature and consequences of the injury could vary considerably. The draft articles on State responsibility for internationally wrongful acts<sup>4</sup> created a special category of offences, namely, serious breaches of peremptory norms of international law. Without going so far as to transpose that type of provision, it would be useful, perhaps in the Special Rapporteur's commentary, to mention that there was such a thing as particularly serious injury. For example, confiscation of the property of a company carried out with no view to the public interest, in violation of the law and without appropriate compensation, could not be placed on the same footing as the pressure that might be brought to bear by a host country on a company to compel it to appoint someone of a given nationality to an executive position. Hence the usefulness of differentiating between injury arising from a serious and systematic breach of an international obligation and injury which was comparatively less serious. Obviously, the consequences of such a classification would also have to be specified, particularly with regard to compensation.

31. Third, the nature of the injury could differ radically depending on whether it was to a legal person (economic loss, for example) or to a natural person (the violation of a fundamental right or an attack causing bodily harm, for example). A natural person could also suffer economic loss, although evaluating the non-material damage done to a legal person would be more difficult.

32. It was important to retain the two criteria stated in article 17, paragraph 2, namely, that the corporation must both be incorporated and have its registered office in the territory of the State that granted it nationality, so as to avert artificial situations such as flags of convenience and the use of tax havens. True, it was difficult to establish the existence of a "genuine link", and that was why the Special Rapporteur might give examples in his commentary of particular instances such as the payment of taxes to the State where the office was located or the employment of nationals of that State.

33. As far as terminology was concerned, it would be more accurate to use the words *está facultado para ejercer* rather than the words *tendrá derecho a ejercer* in the Spanish text of draft article 17.

34. He fully endorsed the introductory part of draft article 18 and the first exception provided for in subparagraph (a), but he thought that the second exception should not be retained because, as was indicated in paragraph 5 of the report, there was a clear-cut distinction between the shareholders and the company: a legal relationship was established solely between the company and the State that granted it nationality, and, according to a general principle of law, that State could not bear responsibility for damage caused to its own nationals. It could also not be said that the only relief available to a company on the international plane was action by the State of nationality of the shareholders, and it was wrong to say, as Mervyn Jones did in the quotation in paragraph 65 of the report, that if the normal rule was applied, foreign shareholders were at the mercy of the State in question; they might suffer serious

loss and yet be without redress.<sup>5</sup> That would imply that there was no domestic legal system and that the rule of law had given way to power-based rule. That system did exist in many countries, of course, and a number of examples could be given, but it must be borne in mind that the investor must assume some responsibility for risk assessment. Concern to ensure equitable treatment to nationals and foreigners should be reason enough to do away with the exception in draft article 18, subparagraph (b).

35. In conclusion, he said that bilateral or multilateral investment treaties usually provided that recourse to international arbitration ruled out all other recourse procedures. In order to shed new light on the Commission's work, the Special Rapporteur might review the major arbitral awards which related to foreign investment and in which diplomatic protection was frequently mentioned.

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

[Agenda item 2]

36. The CHAIR said that he had completed his consultations on the subject and suggested that Mr. Koskenniemi should be appointed Chair of the Study Group on the Fragmentation of International Law. If he heard no objection, he would take it that the Commission agreed with that suggestion.

*It was so decided.*

*The meeting rose at 11.30 a.m.*

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## 2759th MEETING

*Tuesday, 20 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

<sup>4</sup> See 2751st meeting, footnote 3.

<sup>5</sup> See M. Jones, "Claims on behalf of nationals who are shareholders in foreign companies", *BYBIL*, 1949, p. 225, especially p. 236.

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

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ADDO, commending the Special Rapporteur on a comprehensive and scholarly report (A/CN.4/530 and Add.1), said he agreed entirely with the comments concerning draft article 17, which in his view represented *lex lata* and must be codified. He also concurred with the statement in paragraph 47 of the report that, despite much criticism, *Barcelona Traction* enjoyed widespread acceptance on the part of States. Draft article 17 should therefore be referred to the Drafting Committee.

2. Draft article 18, however, posed problems. As to its subparagraph (a), perhaps the Special Rapporteur would clarify why, at the mere demise of a corporation in its place of incorporation, the State of nationality of the shareholders would automatically have to exercise diplomatic protection on their behalf. He would have thought that the shareholders had the right to share in the residual or surplus assets of the corporation in liquidation and that the company's liquidator would take care of matters following its demise. Shareholders could and should have direct access to the liquidator to settle any residual issues. Indeed, shareholders could bring action against the liquidator and vice versa. If the shareholders directly affected in their right to share in the surplus assets of the corporation in liquidation could approach the liquidator themselves to take care of such matters, he saw no need for the State of nationality of the shareholders to exercise diplomatic protection on their behalf. Only when the shareholders had unsuccessfully exhausted whatever remedies they might have at the hands of the liquidator could their State of nationality step in on their behalf.

3. Like Mr. Brownlie, he was opposed to including draft article 18, subparagraph (b), which was far too controversial to be codified and lacked a firm foundation. In paragraph 73 of his report, the Special Rapporteur cited a number of cases as supporting intervention by the State of nationality of the shareholders, yet those cases had been shown not to be authoritative. According to Moore's *Digest of International Law*, the *locus standi* of the claimants in the *Delagoa Bay Railway* case had been conceded by Portugal in the *compromis* and the award had therefore been based on the corresponding agreement and not on international law.<sup>3</sup> Since the *El Triunfo Company* case had been one of protection of shareholders directly affected in their rights, it too could not be invoked in support of draft article 18, subparagraph (b). Jiménez de Aréchaga, writing in Sørensen's *Manual of Public International Law*, had cited several arbitral awards expressly rejecting

claims on behalf of the shareholders against the State of nationality of the company.<sup>4</sup>

4. The Special Rapporteur himself said in paragraph 66 of his report that the existence of such a rule was not free from controversy. In paragraph 68 he affirmed that there was evidence in support of such an exception before *Barcelona Traction* in State practice, arbitral awards and doctrine, but went on to say that State practice and arbitral decisions were far from clear. In paragraph 69, after citing several disputes in which the United Kingdom and/or the United States had asserted the existence of such an exception, he commented that none of those cases provided conclusive evidence in its support and concluded, like Jiménez de Aréchaga, that no certain argument could be made on the basis of such limited and contradictory State practice. In paragraph 70, a number of judicial decisions were cited as being likewise inconclusive, but the summing up in paragraph 72 averred that, while the authorities did not clearly proclaim the right of a State to take up the case of its nationals, as shareholders in a corporation, against the State of nationality of a company, the language of some of those awards lent some support, albeit tentative, in favour of such a right.

5. Given the limited and contradictory State practice, inconclusive judicial decisions and uncertain arbitral awards, it was rather bewildering to find in paragraph 87 of the report that the Special Rapporteur supported the exception in draft article 18, subparagraph (b), because it enjoyed a wide measure of support in State practice, judicial pronouncements and doctrine. Personally, he disagreed with that assessment. Rather than attempt to codify the exception, the Commission should leave States to pursue bilateral investment treaties, as well as multilateral treaties. He concurred with Kokott's assertion, quoted in paragraph 17, that the analysis of the bilateral investment treaty regime, as well as multilateral approaches, had shown that diplomatic protection did not play a major role among the available means of dispute resolution.<sup>5</sup> That was a reality: investment promotion and protection treaties were a feature of current international practice.

6. In 1981, writing in the *British Year Book of International Law*, Mann had cited Germany, Switzerland, France and the United Kingdom as countries that had concluded bilateral investment treaties which allowed investors to settle their investment disputes with the host State before *ad hoc* arbitration tribunals or ICSID.<sup>6</sup> As of October 1995, the United Kingdom had concluded BITS with some 35 States, most of them developing countries. At the same time, the Multilateral Investment Guarantee Agency (MIGA) offered investment guarantee mechanisms that provided insurance protection for private investments abroad, its main task being to guarantee investments against non-commercial risks in host countries. Four categories of risk were mentioned in the Convention Establishing the Multilateral Investment Guarantee Agency: (a) transfer of risk, which occurred when the host country

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>3</sup> See J. B. Moore, *Digest of International Law*, vol. VI (Washington, D.C., U.S. Government Printing Office, 1906), pp. 647 *et seq.*

<sup>4</sup> See E. Jiménez de Aréchaga, "International responsibility", M. Sørensen, ed., *Manual of Public International Law* (London, Macmillan, 1968), p. 531.

<sup>5</sup> See J. Kokott, *loc. cit.* (2756th meeting, footnote 5), p. 276.

<sup>6</sup> F. A. Mann, "British treaties for the promotion and protection of investments", *BYBIL*, 1981, p. 241.

decided to impose restrictions on currency conversion and transfer; (b) expropriation, which deprived the investor of ownership or control; (c) breach of contract; and (d) war or civil disturbance in the host country. MIGA currently had 161 members, 139 of them developing countries, and was open to all members of the World Bank. That showed there was another way of approaching the issue that might not entail codification.

7. Mr. Kamto had cited the *Biloune* case to explain his support for draft article 18, subparagraph (b). However, after reading the case himself, he could say that it was not one of diplomatic protection. It was an investment dispute that had been submitted to the Permanent Court of Arbitration. The important fact that Mr. Kamto had lost sight of in that case was that the investment agreement between the Marine Drive Complex Ltd. company and the Ghana Investment Centre had included a dispute settlement and arbitration clause. Article 15 of the agreement had provided for an amicable settlement procedure and, failing that, for recourse to arbitration in accordance with UNCITRAL rules. Ghana's Investment Code had contained similar provisions. It was wrong, therefore, to assume that Mr. Biloune and his company had been left without a remedy. Consequently, the case could not be used to buttress the argument for including draft article 18, subparagraph (b). On the contrary, it justified its exclusion. In his view, State practice inclined overwhelmingly towards bilateral investment agreements accompanied by multilateral investment guarantee mechanisms. Finally, the Special Rapporteur's claim that the exception in subparagraph (b) enjoyed a wide measure of support in State practice was based on two States, the United Kingdom and the United States, yet even those countries had, in certain significant cases, rejected claims based on that exception.

8. In summing up, he would echo Kokott's conclusion, cited in paragraph 17 of the report, that the more realistic option was to accept that, in the context of foreign investment, the traditional law of diplomatic protection had been to a large extent replaced by a number of treaty-based dispute settlement procedures. For the reasons he had given, he could not support draft article 18, subparagraph (b).

9. Mr. KAMTO said that, as far as he was aware, Mr. Addo had known nothing of the *Biloune* case until he himself had mentioned it. He had never denied that the case had been settled by arbitration or that dispute settlement procedures had been available. His sole purpose in citing the facts of the case had been to show what could happen to a shareholder if he did not have some kind of safety net.

10. Mr. MOMTAZ, noting Mr. Addo's suggestion that there was another way of approaching the issue of exceptions that might not entail codification, asked what approach Mr. Addo was suggesting.

11. Mr. ADDO said that he had not suggested another approach. All he had said was that the Commission should abandon the exceptions it was attempting to codify since States were more likely to use bilateral investment treaties and multilateral agreements to solve any problems that might arise.

12. Mr. DUGARD (Special Rapporteur) asked whether Mr. Addo was suggesting that what was currently *lex specialis* should become *lex generalis* and that the issue should be regulated simply by bilateral investment treaties.

13. Mr. ADDO said that, in his view, it was sufficient to codify draft article 17. Draft article 18, subparagraph (b), had no firm foundation that could be codified and should be abandoned. He might be able to accept draft article 18, subparagraph (a), if he received an explanation concerning the role of the liquidator.

14. Mr. RODRÍGUEZ CEDEÑO, congratulating the Special Rapporteur on his introduction of an excellent report, said the basic issue facing the Commission was whether it should follow *Barcelona Traction* in particular and, if so, to what extent. Despite subsequent criticisms, including those reflected in the separate opinions of some judges and detailed in paragraphs 8 *et seq.* of the report, that judgment had been a milestone in the consideration of the issue of the protection of legal persons.

15. In drafting rules, account must be taken of developments since 1970 in international economic relations in general and in the matter of foreign investments and their protection in particular. The internal legal system created in response to those developments had a major influence on international legal relations, as reflected in bilateral and multilateral protection agreements. Such agreements had become important and in some cases indispensable for attracting capital to developing countries, although such countries were no longer the only recipients of foreign investment. As investments in the United States by the Venezuelan corporation CITGO demonstrated, investments could flow in either direction.

16. There was an important relationship between the internal legal system and investment protection agreements on the one hand and the general rules of diplomatic protection on the other. Unlike other members, however, he believed that the relationship should not be residual, since that would give a greater role to internal legal systems and bilateral agreements in establishing norms for the protection of foreign investments. Instead, the relationship should be complementary. The development of treaty mechanisms to protect foreign investors should not replace diplomatic protection, which was still the overall legal framework.

17. The Special Rapporteur was proposing several options on which the Commission might base the draft articles. The most acceptable, option 1 reaffirming the *Barcelona Traction* principle that only the State of nationality was entitled to exercise diplomatic protection, was reflected in draft article 17, paragraph 1, which could be referred to the Drafting Committee. The Committee could incorporate into the Spanish version the change proposed by Mr. Sepúlveda, namely, to replace the words *tendrá derecho a ejercer* by *está facultado para ejercer*. Paragraph 2, which should be placed in a future article on definitions, was also acceptable. The State of nationality of a corporation was the State in which it was "incorporated", rather than "registered". The two words might appear to be synonymous, but ICJ had rightly used the former in various paragraphs of the *Barcelona Traction* judgment.

He believed that the square brackets in paragraph 2 should be removed, although that would not resolve the important issue of whether the criteria of incorporation and registered office were cumulative or alternative. The Special Rapporteur believed that they were cumulative, but other members of the Commission, such as Mr. Momtaz, had suggested that they were alternative. Clearly, the matter needed to be given more thought.

18. The issue of the diplomatic protection of shareholders, discussed in paragraphs 57 *et seq.* of the report, differed significantly from that of the protection of the corporation as a legal person. The relevant general principles of international law, confirmed by widespread practice, did not allow the State of nationality of the shareholders to exercise diplomatic protection on their behalf. Draft article 18, paragraph 1, reproduced that principle and was based on the ruling by ICJ in the *Barcelona Traction* case that the Belgian Government could not intervene on behalf of Belgian shareholders in a Canadian company, even though the shareholders were Belgian. To accept, as a principle, the possibility that the State of nationality of the shareholders might intervene on their behalf, thereby paving the way for a multiplicity of competing claims, could create a climate of confusion and uncertainty in international economic relations. The principle could be subject to exceptions, however. In *Barcelona Traction*, the Court had considered whether an exception could be made for the Belgian Government on grounds other than the legal personality of the corporation. In the present case, the proposed exceptions were based on bilateral agreements between the investor and the host State, or between the latter State and the State of nationality of the corporation, agreements that contained provisions on jurisdiction and on the settlement of disputes arising from the host State's treatment of corporations that invested in it.

19. The Court had clearly stated that the first exception, reflected in draft article 18, subparagraph (a), was when the corporation had ceased to exist or been rendered economically defunct, a significant expansion of the criterion. The second exception envisaged in the *Barcelona Traction* decision was when the corporation's State of nationality was not entitled to act on its behalf. Subparagraph (a) was generally acceptable, although a corporation's "ceasing to exist" should be construed in a broad sense, namely, as going beyond bankruptcy to include situations in which it could no longer act for other reasons, and that should be specified in the commentary.

20. Like others, he favoured doing away with the second exception, despite the recommendation in paragraph 87 of the report. He did not agree with the Special Rapporteur's statement in paragraph 65 that the only relief for a company on the international plane lay in action by the State of nationality of the shareholders. It was in the context of a company under internal law, governed by a domestic legal regime, that claims and compensation should be envisaged. To open the door to the possibility that a State might intervene in such cases would be dangerous, even though some conclusions could be drawn from international judicial decisions like the *ELSI* case, in which the shareholding companies were foreign companies. Nevertheless, he had trouble accepting the usefulness of such an exception, especially in the context of foreign investment in developing countries.

21. Mr. GALICKI congratulated the Special Rapporteur on a report addressing one of the most controversial problems connected with the topic of diplomatic protection. Draft article 17, paragraph 1, formulated the principle that States had the right to exercise diplomatic protection for corporations that held their nationality, and that principle was largely uncontested, but there was a lack of unified State and judicial practice to support a similar principle of non-exercise of such protection on behalf of the shareholders of corporations, or possible exceptions from such a principle.

22. In paragraph 22 of the report the Special Rapporteur underlined the fact that the *Barcelona Traction* decision was not sacrosanct, but in paragraph 3 admitted that the decision dominated all discussion of the topic and no serious attempt could be made to formulate rules without a full consideration of the decision, its implications and the criticisms to which it had been subjected. Paragraph 96 of the decision contained the crucial point that, by "opening the door to competing diplomatic claims", the adoption of the theory of diplomatic protection of shareholders could "create an atmosphere of confusion and insecurity in economic relations" [p. 49].

23. In paragraph 70 of the decision, the Court stated that the right of diplomatic protection of a corporate entity was traditionally attributed to the State of incorporation and in which it had its registered office, two criteria that had been confirmed by long practice and numerous international instruments. It also admitted, however, that "further or different links are at times said to be required in order that a right of diplomatic protection should exist" [p. 42]. The Special Rapporteur had presented a broad review of the possible options regarding which State could be entitled to exercise diplomatic protection in respect of injury to a corporation. The choice of the State of nationality criterion, reflected in draft article 17, paragraph 1, seemed fully justified. Indeed, the Commission's article 3 on the diplomatic protection of natural persons, in the second part of the draft articles,<sup>7</sup> designated the State of nationality as the State entitled to exercise diplomatic protection. Logically, the same criterion of a legal bond of nationality should be applied to any legal person directly affected by an injury arising from an internationally wrongful act. Such a unified approach would make it possible to apply other rules to be formulated by the Commission to both natural and legal persons in respect of diplomatic protection.

24. The definition of the State of nationality of a corporation proposed in draft article 17, paragraph 2, seemed acceptable, with perhaps one correction. The bracketed phrase mentioning the State in whose territory the corporation had its registered office should be retained, in addition to the State in which it was incorporated: in *Barcelona Traction* ICJ had used both those criteria on an equal basis. As part of the progressive development of international law, however, the conjunction "and" could be replaced by "or". To require that both criteria be fulfilled together seemed impractical, especially in the light of the different internal legal regulations of States on the basis of which such incorporation or registration was usually carried out. In addition, as Mr. Sreenivasa Rao had correctly

<sup>7</sup> See footnote 1 above.

noted, the terms “registration” and “incorporation” were often used alternatively.

25. By accepting that the link of nationality between a corporation and the State of its incorporation or registration was sufficient to entitle that State to exercise diplomatic protection, the Special Rapporteur left aside all the other options presented, such as those of the State of genuine link, the State of domicile and the State of economic control. As Mr. Sreenivasa Rao had rightly emphasized, States did not often present claims on behalf of corporations unless conditions other than incorporation or registration were fulfilled. Perhaps all the criteria other than incorporation or registration should not be rejected *in toto*. The possibility of combining criteria was supported by scholars and even some judges in their separate opinions in the *Barcelona Traction* case and would obviate the lack of effectiveness for which the criterion of place of incorporation had been criticized by Mr. Koskenniemi.

26. In the *Barcelona Traction* case ICJ had ruled that a State whose nationals held the majority of shares in a company could not present a claim for damage suffered to the company itself. Draft article 18 followed the Court’s approach, and subparagraphs (a) and (b) reflected the two exceptions, also laid down by the Court, in which the State of nationality of the shareholders was entitled to exercise diplomatic protection. Despite all the criticism of the Court’s position in *Barcelona Traction*, it should still be treated as the foundation for the Commission’s codification work. The opposite stance taken by the Court in the *ELSI* case might be justified for a number of reasons given in paragraph 25 of the report, but should not serve as a basis for a general principle of codification. General recognition of the possibility that the State of nationality of shareholders could exercise diplomatic protection could lead to the serious problem of competing competencies among the two categories of States entitled to exercise diplomatic protection: the State of nationality of a corporation and the State of nationality of its shareholders. The problem might be additionally complicated by the possibility of competing competencies among different States of nationality of different groups of shareholders.

27. Again, the nationality of shareholders or of a majority of shareholders could change and hence could not serve as a stable criterion for granting the right to exercise diplomatic protection. Finally, recognition of the general possibility of the exercise of diplomatic protection by the State of nationality of shareholders would have a strong negative economic and political effect. It could give some categories of persons specific international protection based on economic grounds, namely the ownership of shares, and not on the traditional grounds of nationality. In extreme situations, it could favour the right of the State of nationality of shareholders to exercise diplomatic protection, to the detriment of that of the State in which corporations were incorporated or registered.

28. While the possibility of diplomatic protection of shareholders could be rejected as a general rule, it seemed reasonable and practical to accept the existence of some exceptional situations in which protection could be exercised by their States of nationality. He fully agreed with that stance, reflected in subparagraphs (a) and (b) of draft article 18, which covered two different situations in which

States of nationality of corporations could exercise diplomatic protection of those corporations. The exercise of diplomatic protection in a complementary way by the States of nationality of shareholders that could otherwise be left without any State protection of their just interests seemed fully warranted in such cases. Mechanisms offered by bilateral and even multilateral agreements for the protection of foreign investments might not always be sufficient.

29. The criticism voiced regarding draft article 18, subparagraph (b), was difficult to accept, since it was hard to imagine that a State that had caused injury to a corporation possessing its nationality would be eager to exercise diplomatic protection of that corporation. In the *Barcelona Traction* case, ICJ had signalled its general support for the exception set out in subparagraph (b) by saying that considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. As was said in paragraph 87 of the report, that exception enjoyed a wide measure of support in State practice, judicial pronouncements and doctrine. Even if it was still not fully ripe for codification, the exception should be considered favourably in the context of progressive development of international law.

30. He reserved the right to give a final evaluation of draft articles 17 and 18 once draft articles 19 and 20 had been presented. In no way, however, did that reservation change his favourable opinion about the proposals made by the Special Rapporteur. He was convinced that draft articles 17 and 18 should be referred to the Drafting Committee.

31. Mr. GAJA, referring to Mr. Galicki’s proposal to use the word “or” in the bracketed portion of draft article 17, paragraph 2, thereby transforming the *Barcelona Traction* criterion into two alternative criteria, noted that in that case the State concerned could choose one of the two criteria. Even then, however, the possibility would be open for a corporation to have double protection, thereby creating the situation of conflicting interventions to which Mr. Galicki had referred. A corporation, if it was keen on having diplomatic protection, could then have a registered office in a State that used the registered office as a basis for diplomatic protection but be incorporated in a State that used the place of incorporation for that purpose. The danger of introducing the alternative would be that a plurality of States would be entitled to exercise diplomatic protection on the basis of nationality.

32. Mr. PELLET said he entirely agreed with Mr. Galicki and remained unmoved by Mr. Gaja’s arguments. He was firmly convinced that the single criterion of incorporation was not sufficient. In a draft like the present one, of merely marginal importance in terms of the essential problem of the nationality of corporations, there was no reason to compel States to apply the registered office or the incorporation system. Mr. Gaja’s reasoning could be inverted: if the conjunction currently in the text, “and”, was retained, there was a risk of denial of justice, in that, if a company did not meet the two criteria, it could not receive diplomatic protection.

33. Mr. GALICKI said he endorsed those points. In extreme situations, the cumulative requirement might mean that no State was entitled to exercise diplomatic protection

of a corporation incorporated in one State with registered offices in another.

34. Mr. KAMTO said he was entirely in agreement with Mr. Gaja. In considering the possibility that the criteria might be combined, the Commission had to envisage situations in which a corporation might not be able to benefit from diplomatic protection. One such situation was when a State that had capitalized on its investments in a given country had every interest in establishing its registered office elsewhere, for fiscal or other reasons. As currently formulated, draft article 17, paragraph 2, had the merit of taking a stance against that practice, in which States were engaging more and more frequently. Reliance on domestic legislation did not entirely solve the problem. A State's domestic legislation could proclaim that if a corporation was registered in that State, it had the right to exercise diplomatic protection, while that of the State of incorporation might say the same thing. That was why he believed the Commission was facing a choice based on principle, not merely legal considerations: What signals did it wish to send to countries that were incorporated in Bermuda but had their registered office in London? Personally he thought the *Barcelona Traction* decision could be used as a basis, since it envisaged the combination of criteria, not their application as alternatives.

35. Mr. GAJA said he was one of many who favoured deleting the bracketed words altogether. He was not in favour of combining the two criteria. However, States generally had no obligations under international law with regard to national corporations, so there was no question of denial of justice. One did not necessarily have to identify a State that could in all circumstances exercise diplomatic protection of a corporation.

36. Mr. ADDO said he supported Mr. Gaja's views. If a company, after incorporation in one country, was registered in another, what form should that registration take? The State of registration should not, in his view, be able to provide diplomatic protection to the company.

37. Mr. CHEE commended the Special Rapporteur on a well-organized report containing a wealth of references to authority and precedents. Thirty years had now passed since the ruling in the *Barcelona Traction* case, and it had been held to represent confirmation of the traditional rule of public international law that diplomatic protection should be extended only to the national companies of the protecting State, not to foreign shareholders. As the Special Rapporteur pointed out in paragraph 22 of the report, the decisions of ICJ were not binding on the Commission. The *Barcelona Traction* ruling had been subjected to much criticism, especially by academics. In the meanwhile, international economic relations had greatly developed owing to the free flow of foreign investment.

38. Briggs had rightly pointed out in 1970 that international law had not evolved further in the protection of shareholders' interests, particularly in light of the growth of foreign investments and the activities of multinational holding companies in the past half-century.<sup>8</sup>

<sup>8</sup> H. W. Briggs, "Barcelona Traction: the *jus standi* of Belgium", *AJIL*, vol. 65 (1971), p. 341.

39. Several devices had come into being since *Barcelona Traction* to protect foreign investment and shareholders, for example, bilateral investment treaties, dispute settlement procedures, including arbitration, and ICSID, which provided individuals and corporations with a forum for bringing a suit against a wrongdoing State to enforce a contract. Under the lump-sum settlement procedure, which was another possibility, the individual could settle his claim within national bodies, for example, the Foreign Claims Settlement Commission of the United States. The United Kingdom had a similar arrangement. Other machinery that protected the property of foreigners was a mixed form of arbitration known as the Iran-United States Claims Tribunal, which had functioned much like the General Claims Commission constituted between the United States and a number of Latin American States in the 1930s.

40. The Commission should give serious consideration to choosing one of the Special Rapporteur's seven options set out in paragraph 28 of the report. With regard to the application of the genuine link doctrine to corporations (option 2), the Special Rapporteur had stressed in paragraph 18 of his report that in the particular field of diplomatic protection of corporate entities, no absolute test of genuine connection had found general acceptance. ICJ had ruled out the applicability of the genuine link doctrine to corporations. He drew attention in that connection to the observation of Judge Jennings that the analogy between the nationality of individuals and the nationality of corporations might often be misleading and that those rules of international law which were based upon the nationality of individuals could not always be applied without modification in relation to corporations.<sup>9</sup>

41. He said that he had no objection to draft article 17 and thought that the square brackets at the end of paragraph 2 should be removed. ICJ had added a registration requirement to the requirement of incorporation to prevent fraudulent commercial transactions.

42. As to article 18, he supported the "ceased to exist" test over the "practically bankrupt" test. However, under article 878 of the Spanish Commercial Code, cited by Mann in an article in the *American Journal of International Law*,<sup>10</sup> once bankruptcy had been declared, the bankrupt was to be incapacitated from administering his property, and all his acts of disposal and administration subsequent to the time to which the effects of the bankruptcy were retroactive were to be null and void. Thus, support for the "practically bankrupt" test over the "ceased to exist" test was also justified and should be given due consideration.

43. The *Barcelona Traction* judgment was based on procedural grounds, namely the issue of *locus standi*, and not on the merits. The facts had been sacrificed to the logic of law, and that had been a travesty of justice. The case had involved a large sum of money, and some 88 per cent of the shareholders had been Belgians and had been deprived of their proprietary and other rights on the procedural ground that Belgium lacked *locus standi*. It was

<sup>9</sup> See *Oppenheim's International Law*, 9th ed., vol. I, *Peace*, R. Jennings and A. D. Watts, eds. (Harlow, Longman, 1992), p. 860.

<sup>10</sup> F. A. Mann, "The protection of shareholders' interests in the light of the *Barcelona Traction* case", *AJIL*, vol. 67 (1973), p. 261.

difficult to imagine that Spain had been unaware of the nationality of the Barcelona Traction corporation. He was reminded in that context of a comment by Justice Holmes to the effect that the definition of law depended on the experience of life, not the logic of law. It was thus high time to reconsider *Barcelona Traction* in the light of recent developments. In an article published in *International Law: Theory and Practice* in 1998, in which Dinstein had stressed that in an era of international investments on a massive—and growing—scale, local subsidiaries acted as the long arms of foreign parent companies, that injury to the local subsidiary actually constituted injury to the foreign parent company, that international law must allow the “lifting of the veil” of the local subsidiary in order to give effective protection to the property of foreigners, and that only the “lifting of the veil” exposed the true circumstances in which a local company was owned by a foreign parent company or other shareholders.<sup>11</sup> As he saw it, that point was most appropriate for assessing *Barcelona Traction* in the context of current international economic relations.

44. Mr. ECONOMIDES said that, in an excellent report, although the Special Rapporteur had been quite critical of ICJ for its *Barcelona Traction* judgment, he had fully adopted the principles enunciated there in draft article 17 and sought to introduce exceptions to them, relying chiefly on what the Court seemed to have accepted implicitly in 1970. There was some inconsistency between such criticism and the integral adoption of the Court’s solution, especially since the Special Rapporteur noted in paragraph 27 of his report that *Barcelona Traction* was, 30 years later, widely viewed not only as an accurate statement of the law on the diplomatic protection of corporations but as a true reflection of customary international law. Furthermore, he personally disagreed with the Special Rapporteur’s statement in paragraph 22 of the report that the Court’s decisions were not binding on the Commission. On the contrary, the decisions of the Court, when it ruled on and applied international law, including customary law, bound the Commission as the body responsible for the codification of international law. The Commission could only depart from a particular customary solution in the interest of the progressive development of law; in so doing, it must explain why it was opting in favour of a new rule.

45. For a better assessment of recent trends in diplomatic protection concerning corporations and shareholders, it would have been preferable to have more extensive information than that provided in paragraph 17 of the report on the number of agreements concluded following *Barcelona Traction* and their specific solutions.

46. He endorsed draft article 17, paragraph 2, provided the State in which the corporation was incorporated was the same as the one in which it had its registered office. But in the exceptional case in which a corporation was established in one State and its registered office was in another, that would cause problems, because neither of the two States could meet the two conditions required by paragraph 2, and thus the provision could not be applied.

In such cases, the corporation would not have a State of nationality that could exercise diplomatic protection on its behalf, which would be an unacceptable situation. Replacing the word “and” by “or”, as had been proposed, would confer the right to exercise diplomatic protection on two States simultaneously: the State in which the corporation was incorporated and the State on whose territory its registered office was located. It would not be a wise course, given the reasoning of ICJ in *Barcelona Traction*. He failed to see why virtually all corporations should have only one State of nationality, whereas some, presumably the more clever ones, could have two. The most prudent and convenient solution would be to endorse the Special Rapporteur’s proposal, retaining only the first criterion, and to explain in the commentary that the other criterion was superfluous because a corporation’s registered office was almost always located in the same State. A reference should also be added to the effect that, if a corporation had its registered office in another State, it was the first criterion that took precedence over the second, and hence the State of nationality of the corporation was the one in which it was incorporated and not the State in whose territory it had its registered office.

47. Draft article 18, subparagraph (a), was too narrow. He proposed that the words “*de jure* or *de facto*” should be inserted between “exist” and “in the place of”. The words “*de facto*” would cover the case of a corporation in such dire straits that, although legally speaking it had not yet been dissolved, in reality it was no longer in a position to defend itself as a legal person. On the other hand, he had reservations about draft article 18, subparagraph (b), which did not constitute an exception, but a new rule that came under the heading of progressive development of the law. Such a new rule, which would certainly be applied more frequently than the basic rule in draft article 17, went beyond the proposed aims and could cause trouble; it was controversial and should be deleted, especially since, as Mr. Sepúlveda, Mr. Sreenivasa Rao, Mr. Addo and others had rightly pointed out, the guarantees provided under international arbitration in respect of investments and municipal law were more than sufficient.

48. In his view, the draft articles on diplomatic protection should contain a special clause stipulating that the articles were not applicable if binding international texts for the protection of human rights or of investments existed and provided special avenues of recourse.

49. Draft article 17 could be referred to the Drafting Committee, as could draft article 18 along with draft article 19, for it might be possible to combine the two, and so they should be considered together.

50. Mr. FOMBA said that the Special Rapporteur’s excellent report addressed four substantive issues: the definition and attribution of the nationality of corporations; diplomatic protection for corporations; diplomatic protection for the shareholders of corporations; and the relevance of the solutions proposed in draft articles 17 and 18.

51. With regard to the first point, the basic principle involved was the same as that governing the nationality of natural persons, namely that the territorially sovereign State alone had the power to determine a corporation’s nationality. There were two criteria for conferring nationality:

<sup>11</sup> See Y. Dinstein, “Diplomatic protection of companies under international law”, K. Wellens, ed., *International Law: Theory and Practice* (The Hague, Martinus Nijhoff, 1998), p. 505, especially p. 515.

the place of the registered office, used in civil-law countries, and the place of incorporation, favoured in common-law countries. In *Barcelona Traction*, ICJ had formally recognized the existence of those criteria, but without expressing a preference for one or the other.

52. International law did not consider the effectiveness of the corporation's link to the territorial State; ICJ had thus adopted a different approach from that followed in the *Nottebohm* case. The Court's formal approach in *Barcelona Traction* had been discarded to a certain extent by international law, as well as by the Convention Establishing the Multilateral Investment Guarantee Agency and bilateral treaties on the protection of private foreign investment.

53. On the question of the diplomatic protection of corporations as such, ICJ had introduced the rule that the State in which a corporation was constituted had the sole right to exercise diplomatic protection if that corporation had suffered injury. The rule reflected customary international law, without prejudice to the development of the dialectical link between it and the treaty process.

54. In the *Barcelona Traction* judgment ICJ had ruled out the possibility of diplomatic protection of shareholders, for reasons that were open to criticism in a number of respects. Such protection would appear to be legitimate, not as a principle in itself, but as an exception applicable in certain particular circumstances.

55. Overall, draft article 17 was acceptable. Since *Barcelona Traction* had recognized the two criteria set out in paragraph 2, the square brackets should be deleted and the word "and" replaced by "or", so as to reflect the two alternatives. Draft article 18, too, was acceptable in the main, reflecting the principle of the legitimacy of shareholder protection in exceptional circumstances. Subparagraph (a) should be amended by deleting the words "in the place of its incorporation"; and the exception provided for in subparagraph (b) should be maintained.

56. Mr. Kamto had raised the question of whether it was necessary to provide for time limits. As Mr. Pellet had said, this was a pervasive problem in international law. But in the current context there might be a case for specifying the scope *ratione temporis* of the right to exercise diplomatic protection.

57. In the matter of form, Mr. Melescanu had proposed merging draft articles 17 and 18, as a means of stressing the link between the rule and its exceptions. His own preference would be to retain the provisions as two separate articles. In his opinion, both articles should be referred to the Drafting Committee.

58. Mr. PELLET said he found the reactions to the Special Rapporteur's fourth report very disturbing. Like others, he endorsed all the draft articles submitted and wished to see them referred to the Drafting Committee. That being said, he found that the Special Rapporteur erred on the side of honesty. There could be no doubt that it was the duty of special rapporteurs to provide the Commission with all the necessary information to enable them to form an opinion. In that respect the present Special Rapporteur was beyond reproach, providing all those elements with honesty and rigour. Yet he provided them indiscriminate-

ly, without offering guidance or explaining why he had opted for one solution in preference to another. Thus, for instance, on draft article 17, paragraph 2, the Special Rapporteur proposed that the Commission should endorse the principle adopted by ICJ in the *Barcelona Traction* case. Yet in the process of reaching that conclusion the Special Rapporteur examined no fewer than seven options, considering their advantages and drawbacks, but without justifying his preference—well grounded as that preference was.

59. He would attempt to explain why he shared the Special Rapporteur's preferences. First, he agreed that *Barcelona Traction* was the inescapable starting point for any consideration of the subject under discussion. In its judgment of 1970 ICJ had discussed every aspect of the problem in detail and had even pronounced, by way of an *obiter dictum*, on questions not central to its findings—a commendable approach which, regrettably, it had latterly abandoned. The Court's position had been elucidated by lengthy pleadings dissecting every facet of the case. Like the Special Rapporteur, he considered that the *ELSI* case could throw light on certain particular aspects of *Barcelona Traction*, but that the solution nonetheless rested on a *lex specialis* which made it difficult to generalize.

60. As the Special Rapporteur had explained, in delivering its judgment ICJ had referred to the twofold criterion of the place of incorporation and/or the place of the registered office (the question of "and/or" was one to which he would revert). Quite apart from purely technical considerations, to which he would also revert, the sole genuine competitor to that criterion was the admittedly somewhat formalistic criterion of economic control.

61. And, at first sight, that criterion was defensible. After all, in the modern world, investment—particularly foreign investment—constituted a fundamental component of the wealth of nations. And what counted was economic reality: it mattered little whether a Belgian, French or Nigerian investor used a company registered in Canada or the Bahamas in order to invest in Spain, the United States or Chad. If that investment was the victim of an internationally wrongful act on the part of the host country, it was ultimately the real State of origin of the investment, in other words, the State of the shareholders whose economy would suffer injury, as had been pointed out by ICJ in paragraph 86 of its judgment. Several of the pleadings in the case demonstrated that point strikingly, even though that economically oriented, neoliberal and capitalist line of reasoning had been less prevalent 30 years ago than it had since become.

62. *Pace* the Special Rapporteur's assertion in paragraph 36 of his report, he did not think that the developing and industrialized nations had fundamentally divergent interests in that regard. The real reasons for discarding the criterion of economic control lay elsewhere, and, curiously, those two reasons were not clearly spelled out by the Special Rapporteur, although ICJ had set them forth in the clearest possible manner in its 1970 judgment.

63. The first of those reasons was purely practical and a matter of common sense. In the contemporary capitalist system, it was extraordinarily difficult, if not downright impossible, to "track" the true origins of a company's

capital. Most of the shareholders in Barcelona Traction had been Belgian, but they had not necessarily been natural persons, and the companies participating in the capital of those “Belgian” shareholder companies might well have been French, United States or Indian companies. In paragraph 87 of its judgment ICJ had found that: “it must be proved that the investment effectively belongs to a particular company. This is ... sometimes very difficult, in particular where complex undertakings are involved” [p. 46]. It continued, in paragraph 96: “The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands” [p. 49]. That was even truer now than it had been in 1970.

64. The second reason why economic control should, in principle, be rejected as a criterion was more a political or moral than a practical issue. The Special Rapporteur seemed to express concern, *inter alia* in paragraphs 10 and 21 of his report, that the criterion of incorporation and/or registered office could leave shareholders without protection. That seemed to show excessive scrupulousness. Shareholders, in their capitalist wisdom, could opt to incorporate a company in a State other than their own, with a view to maximizing profits; and, indeed, it was their prerogative to act in their own best interests in the best of all possible capitalist worlds. But they could not have their metaphorical cake (usually in the form of a more favourable tax regime) and at the same time eat it (by benefiting from a “proximity” to their State of nationality that would afford them more active and effective exercise of the right—the *right*, not the obligation—of the State to grant diplomatic protection (*cf.* para. 94 of the *Barcelona Traction* judgment)). As ICJ had also rightly noted in paragraph 99 of the judgment, a passage not cited by the Special Rapporteur:

It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders. [p. 50]

65. It was those considerations, rather than those put forward by the Special Rapporteur, that led him to fully support the Special Rapporteur’s conclusions that had taken concrete form as draft article 17.

66. As to the wording of that provision, he had no difficulty with paragraph 1, with the proviso that the injury must have been caused by an internationally wrongful act. That, however, was presumably implicit and would be spelled out in the commentaries.

67. As for the justification of the wording of draft article 17, paragraph 1, in paragraph 51 of the report the Special Rapporteur referred to “the pessimistic assessment of the situation by Kokott” that “the traditional law of diplomatic protection has been to a large extent replaced by a

number of treaty-based dispute settlement procedures”,<sup>12</sup> a state of affairs also mentioned by ICJ in paragraph 90 of the *Barcelona Traction* judgment. That trend was indisputable, but he could see no reason to characterize it as pessimistic. On the contrary, the conclusion of bilateral agreements clearly establishing the rights of the various participants in international investments and creating effective and efficient dispute settlement mechanisms was a good thing in itself, even if he had ideological reservations regarding some of the rules contained in contemporary investment protection conventions. That reservation, did not, however, affect his approval of draft article 17, paragraph 1, as proposed by the Special Rapporteur.

68. Draft article 17, paragraph 2, also posed no problems of principle. But, as he had already said on several occasions, he was extremely concerned about placing the expression “and in whose territory it has its registered office” in square brackets. Some members of the Commission appeared to see themselves as internal, as opposed to international, legislators—an approach that he found entirely unacceptable. Despite some members’ stated views, determination of the nationality of corporations was essentially a matter within States’ domestic jurisdiction. That was true of natural persons, as ICJ had found in the *Nottebohm* case; and also of corporations, as it had also found in the *Barcelona Traction* judgment, in paragraphs 39 to 43 of which it stated that the legal status of corporate entities was a matter for municipal law and even essentially within domestic jurisdiction. Just as the nationality of individuals was determined by two main alternative criteria, *jus soli* and *jus sanguinis*, referred to in draft article 3, so too the nationality of corporations depended on two alternative systems, namely, place of incorporation and place of registered office, though many States borrowed to varying extents from one or the other system. Despite the Special Rapporteur’s assertion in paragraph 53 of the report, the Court’s insistence on the requirement of a registered office in parallel to that of incorporation had not been “misplaced”. In so doing it had simply respected the legal systems of States, which used one or the other of those two criteria, or a combination of the two. Unlike the Special Rapporteur and other members of the Commission who wished to impose their own system—that of incorporation—on the rest of the world, the Court had also respected the principle set forth in paragraph 38 of its 1970 judgment—which, furthermore, the Special Rapporteur cited in paragraph 54 of his report—that recognition of the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction required that international law must refer to the relevant rules of municipal law.

69. Contrary to what some members wished to believe or to assert, municipal laws were not uniform in that regard. Broadly speaking, the Anglo-Saxon countries and their epigones relied on the system of incorporation, and the civil-law countries tended towards the registered office or the real headquarters system. In passing, it was worth noting that the description in the *Barcelona Traction* judgment was not satisfactory in English, as the term *siège social* would more properly be rendered as “headquarters”. It was true that Italy, under the enlightened in-

<sup>12</sup> Kokott, *loc. cit.* (2756th meeting, footnote 5), p. 377.

fluence of Mr. Gaja, had gone over to the incorporation system; but that was no reason to indirectly oblige other States to align themselves with Anglo-American law. The Commission should leave that question to UNCITRAL, and should take due note that two systems existed, as ICJ had wisely done in 1970.

70. Admittedly, the formulation that ICJ had used in paragraph 70 of its judgment and that the Special Rapporteur cited, albeit only partly, in paragraph 52 of his report posed problems. The Court wrote: "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office" [p. 42]. The conjunction was indeed "and". However, a reading of the passage in which the sentence occurred raised doubts as to whether even the Court might not have had in mind two alternative criteria. That, at any rate, was his own view of the matter.

71. He therefore strongly urged the Special Rapporteur and the Drafting Committee to retain the phrase currently enclosed in square brackets and to eliminate the ambiguity created by the formulation used by ICJ in *Barcelona Traction*, by replacing the conjunction "and" with "or", as Mr. Galicki and others had proposed. That was the only way to respect the essentially national jurisdiction of States in one of the rare domains in which it still existed. And he most emphatically did not see on what grounds his Anglo-Saxonophile colleagues should impose the criterion of incorporation upon States that remained attached to the *siège social* ("headquarters") system, one which, contrary to what Mr. Gaja had just asserted, was much less formalistic than the incorporation system, even if those States were in a minority and were not among the economically strongest; even if technically one could maintain that the incorporation system was preferable—a matter on which he was not able to pronounce and which, as an international lawyer, he dismissed out of hand, as it was not within the Commission's mandate to accord one system preference over another. The Commission's task, like that of the Court in 1970, was to note that States had a measure of freedom in that regard, and he did not see why it should arrogate to itself the possibility of reining in that freedom. The only other possibility would be to say nothing at all, by simply deleting paragraph 2 and stressing in the commentaries that determination of the nationality of corporations was essentially a matter for States' jurisdiction.

72. Draft articles 18, 19 and 20 constituted totally acceptable and endorsable exceptions to the principle of article 17, bearing in mind that it was ICJ itself that had mentioned those exceptions in its 1970 *Barcelona Traction* judgment, relatively cautiously and again in the form of *obiter dicta*, as none of those exceptions was applicable to the circumstances of the case.

73. The exception covered by draft article 18, subparagraph (a), concerned the scenario in which the corporation had ceased to exist in the place of its incorporation. Again he had no problem of principle, but he was somewhat perplexed by the drafting of the provision. Obviously, if the corporation had ceased to exist, the State of which it had the nationality—by virtue either of incorporation or of registered office—could no longer protect it. One could not protect a dead body; at best one could protect

its beneficiaries, who, in the case in point, were, *mutatis mutandis*, the shareholders. That being so, he wondered whether the criterion adopted by ICJ in *Barcelona Traction*, which, as the Special Rapporteur explained in paragraphs 59 and 60 of his report, was stricter than the one applied previously, was not too rigid. Like Mr. Brownlie, cited by Judge Jessup, like Paul de Visscher, cited by Judge Fitzmaurice, like Mr. Riphagen, whose personal opinions on the matter he had reread, he thought it preferable to adhere essentially to the idea of effectiveness of the legal entity. Admittedly, diplomatic protection rested on a fiction: a corporate entity was itself in some respects a legal fiction. But when that fiction no longer corresponded to any reality whatsoever, when the legal entity no longer had any effectiveness, when it was "practically defunct", one had to abandon fiction and revert to reality. The whole question was whether the corporation was or was not still in a position to act in pursuit of its rights and to defend its interests. If it was, there was no reason to abandon the principle laid down in draft article 17. If it no longer was, then the exception under draft article 18, subparagraph (a), was necessary; but as presented by the Special Rapporteur, basing himself on the idea, if not the formulation, of *Barcelona Traction*, that exception seemed decidedly too narrow and formalistic. It would be better to say that diplomatic protection could be exercised on behalf of shareholders when "the possibility of a remedy available through the company" [p. 41, para. 66] was ruled out, or when the company was no longer in fact in a position to act to defend its rights and interests.

74. On the other hand, he had no objection to adding, as proposed by the Special Rapporteur, the words "in the place of its incorporation", thereby making it possible to avoid ambiguities. For instance, in the *Barcelona Traction* case, the fact that that company could not act in Spain should not be taken into consideration, at any rate under the criterion of nationality; that incapacity to act in Spain concerned only the other condition for exercise of diplomatic protection, namely, exhaustion of domestic remedies.

75. He did not share some other members' concerns regarding subparagraph (b) of draft article 18. Admittedly, the Special Rapporteur showed that ICJ had not firmly upheld the rule whereby diplomatic protection could be exercised on behalf of the shareholders of a company if that company had the nationality of the State responsible for injury caused to it. The Special Rapporteur had also shown that the precedents were ambiguous, even though he seemed to have exaggerated the extent of the scope for ambiguity. But the *ELSI* case confirmed that opinion, though the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Italy<sup>13</sup> had not played an exclusive role in the Chamber's reasoning. As the Special Rapporteur stressed in paragraph 84 of his report, and as several speakers had pointed out to further substantiate their criticisms of the Court's *obiter dictum* of 1970 in the *Barcelona Traction* case, the United Kingdom and the United States had pronounced in favour of that exception. But the fact that the United States was in favour of a rule of international law—or of what it allowed to remain of it—did not mean

<sup>13</sup> See 2757th meeting, footnote 6.

that the rule was necessarily a bad one. Furthermore, it was now reflected not, as some members claimed, in a few bilateral investment conventions, but in thousands of such conventions concluded by all States of the international community, regardless of their level of development or ideological orientation. That state of affairs consolidated the principle set forth by the Court in its *obiter dictum*.

*The meeting rose at 1 p.m.*

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## 2760th MEETING

*Wednesday, 21 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

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

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### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KABATSI said that, in his thorough and objective study of the topic of diplomatic protection of legal persons, the Special Rapporteur had rightly raised the question of the nationality of those persons and had opted for a reaffirmation of the centrality of the decision of ICJ in the *Barcelona Traction* case. He proposed that, for the purposes of diplomatic protection, the State of nationality of a corporation was the State in which the corporation was incorporated and in whose territory it had its registered office—the latter condition, however, being enclosed in square brackets. Many bilateral or multilateral investment protection agreements established other arrangements for

the benefit of the corporations, shareholders and other parties concerned, but, in the absence of such an agreement, the *Barcelona Traction* judgment remained the correct expression of the law.

2. On draft articles 17 and 18 specifically, the first posed very few problems and should be referred to the Drafting Committee, although the phrase “and in whose territory it has its registered office” was not very helpful. Admittedly, that was a criterion adopted by ICJ in the *Barcelona Traction* case, but in practice the headquarters was in the place of incorporation and a corporation had the nationality of the State in which it was incorporated. If that phrase was retained with the conjunction “and”, the corporations—perhaps few in number—whose registered office was located in a State other than the State of incorporation were in danger of losing the right to diplomatic protection on the grounds that they failed to meet both of the conditions that would be laid down in draft article 17. If the conjunction “and” was replaced by “or”, that could lead to dual nationality and competition between several States wishing to exercise diplomatic protection. The phrase in question should thus be omitted from draft article 17, paragraph 2.

3. Draft article 18 laid down the principle that the State of nationality of the shareholders of a corporation was not entitled to exercise diplomatic protection on behalf of those shareholders when an injury was caused to the company, but then established two exceptions to that principle which some members of the Commission had considered superfluous—especially the exception provided for in subparagraph (b). Admittedly, as those members pointed out, diplomatic protection was seldom invoked in practice because local remedies were usually sufficient and multilateral or bilateral arrangements could be invoked, but those two arguments were perhaps not always valid for all countries. As the Special Rapporteur said, however rare those cases might be, they should be provided for in the draft articles. Article 18 should thus also be referred to the Drafting Committee.

4. Mr. PELLET reiterated his belief that incorporation and registered office represented two different systems whereby nationality could be conferred on corporations. It was thus incorrect to say that only the first was determining and that the second merely flowed from it. Replacing the conjunction “and” with “or” in draft article 17, paragraph 2, would raise the problem of dual nationality, but international law had ways of dealing with that problem. In the case of natural persons, the Commission had noted the different systems whereby nationality was conferred without seeking to impose one of them—*jus soli*, for example. It could thus proceed in the same way in the case of legal persons. As for the cases, referred to by the Chair, of States that applied neither of the two systems and did not recognize the notion of nationality of corporations, it seemed difficult to imagine a case in international law in which a State refused to let its corporations have a nationality, and, if such were the case, that would call article 17 as a whole into question.

5. Mr. GAJA said that, in the *Barcelona Traction* judgment, a distinction was drawn between the “registered office” (*siège* in French) and the “seat” (*siège social* in French). Paragraph 71 of the judgment also introduced

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).