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**Summary record of the 2760th meeting**

Topic:  
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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).

the expression *siège statutaire* as a rendering of “registered office”. It could be seen from the use of those terms in the judgment that what ICJ had initially referred to as the “seat” was a formal structure resembling the “registered office”, little more than an address. It thus made little difference whether the criterion of incorporation or the criterion of registered office was adopted, as the former was simply the one more frequently used in practice.

6. Mr. BROWNLIE said that the Commission had run up against two major difficulties. The first, fundamental source of difficulty was that the nationality of corporations was always established by municipal law, with international law coming afterwards, either to recognize the determinations made by municipal law or to apply its own standards. The Commission seemed not to have fully faced up to that problem. The second difficulty related to the application of the *Nottebohm* principle. In the *Barcelona Traction* case, ICJ had not taken a firm grip on the question. It had considered that it could leave the problem aside by adding to the criteria of the incorporation of the company and the place of its registered office a series of other links between the company in question and Canada, so that the Court had in fact decided, but without saying so, that the *Nottebohm* principle applied, *mutatis mutandis*, to companies. With respect to the *Nottebohm* case, the synthesis in paragraph 71 of the Court’s judgment in *Barcelona Traction* was that the element of free choice was very important and that the relevant persons chose with what jurisdiction they wished to establish a connection. It should also be noted that, even in the case of individuals, naturalization was a very strong voluntary link. There was thus no need to apply the *Nottebohm* principle in such a way as to artificially remove the nationality of corporations.

7. Mr. DUGARD (Special Rapporteur) said that the formulation he had proposed for draft article 17, paragraph 2, rested on the idea that the place of incorporation of the company was the most important factor and that the registered office, which was also important, was the natural consequence of incorporation. In Mr. Brownlie’s view the term “registered office” was important in that it indicated the existence of a connection between the company and the State of incorporation. In paragraph 71 of its judgment in the *Barcelona Traction* case, ICJ described the elements constituting that connection (registered office, accounts, register of shareholders). One could thus interpret the term “registered office” in draft article 17 as designating the connection thus described by the Court. More problematic would be, on the other hand, the similarity between the term “registered office” and the term *siège social*. In some legal systems, the *siège social* referred to the “headquarters”, in other words, the place where the company conducted its business. And, in paragraph 70 of the aforementioned judgment, the Court had found against the criterion of the *siège social*, or place where the company had its centre of control. With regard to the problem of dual nationality, the Court’s judgment seemed to be opposed to the notion of dual or secondary protection, considering that only one State could protect the corporation. To change the word “and” to “or” in draft article 17, paragraph 2, would be tantamount to introducing a principle that was not supported by the judgment. Most members of the Commission seemed to favour the

use of the sole criterion of incorporation, but it would be wise to retain the phrase “registered office” so as to give effect to the connection between the State and the corporation that was to be found in paragraph 71 of the Court’s judgment.

8. Mr. CHEE said that the two criteria in draft article 17, paragraph 2, were taken word for word from paragraph 70 of the judgment by ICJ. Was the Commission proposing to challenge the Court’s decision by invoking the municipal law of sovereign States? As for the doctrine of the genuine link referred to by Mr. Brownlie, in paragraph 70 of its judgment, the Court noted the absence of clear criteria. While the Commission should not blindly follow the Court’s decision, when the choice was between the jurisdiction of sovereign States and that of the Court, to whose Statute those States had acceded, since it was an integral part of the Charter of the United Nations, the Commission must clearly decide which choice it must make.

9. Mr. BROWNLIE said it was not fair to say that the Special Rapporteur had departed from *Barcelona Traction*. On the contrary, he had taken it as his general guide. However, ICJ had not really been required to rule on the issue of nationality, which had not been contested by the parties. In the relevant passages of its judgment, the Court had referred to the principles of incorporation and registered office, but also to the company’s other connections with the State of nationality. Also, it must not be forgotten that the concept of nationality of corporations did not exist in the municipal law of some States. That was why a sufficiently broad criterion of international law was needed to cover the various possibilities. Draft article 17 should refer to the State where the company was incorporated and/or in whose territory it had its registered office and/or with which it had other appropriate links.

10. Mr. YAMADA said that he could accept both of the criteria proposed in draft article 17, paragraph 2, on condition that they were cumulative. A company could be incorporated in Japan only if its headquarters were in that country. He asked the Special Rapporteur whether there was any legal system under which a company’s registered office could be located in a country other than that of incorporation. If the two criteria were taken as alternatives, there was a danger that a company might have dual nationality, yet the report seemed to rule out that possibility.

11. Mr. AL-BAHARNA asked Mr. Pellet how French law regarded the situation of a company incorporated in another country that had its headquarters in Paris and whether, in practice, France would accord it diplomatic protection.

12. Mr. DUGARD (Special Rapporteur) emphasized that the question of nationality of corporations was guided by rules of municipal law. The difficulty was that such rules differed, with some countries emphasizing incorporation, others economic control, yet others registered office and still others having no specific criteria. He agreed with Mr. Brownlie and Mr. Yamada that the criteria of incorporation and registration should be combined. A consensus seemed to be emerging on that subject, but he remained concerned about the possibility that diplomatic protection might be exercised by two different States, something which seemed incompatible with *Barcelona*

*Traction*. That would be the case if the company could be protected both by its State of incorporation and by the State where it had its headquarters. However, the concepts of incorporation and registration were indissociable in most systems.

13. The CHAIR, speaking as a member of the Commission, said that the Commission must find a satisfactory definition of nationality that recognized the company's link with the State. In that connection, the Commission could draw on the definition of nationality given in draft article 3, paragraph 2, with respect to individuals. The Special Rapporteur might consider that idea.

14. Mr. KAMTO said that he found Mr. Brownlie's interpretation convincing. In the *Barcelona Traction* case, the influence of *Nottebohm* was clear, in that ICJ listed the elements of fact demonstrating the company's connection with Canada, namely, incorporation and place of registered office. In that spirit, the second criterion should be retained in draft article 17, paragraph 2, preceded by the conjunction "and", and without the square brackets. If the first criterion alone were retained, the nationality requirements for a legal person would be less strict than those for an individual, and that would be a departure from the court's jurisprudence. In order to take account of certain elements of national legislation, however, a formulation such as "with which it has a genuine link" might be inserted. It would then be for the courts to weigh those elements of connection in the event of competing claims by two States.

15. Mr. BROWNLIE said that it would be too restrictive to combine the criterion of registered office with another criterion. Moreover, unlike the Special Rapporteur, he did not think that the question of the nationality of corporations was governed by municipal law. Such law could attribute nationality, but any conflict must be settled by international law. *Barcelona Traction* did not say that nationality should be governed by municipal law. The issue in *Barcelona Traction* was not nationality but the power to exercise diplomatic protection, which was a matter of international law. In *Nottebohm*, ICJ had drawn an enlightening parallel with the issue of territorial waters. The existence of such waters was determined by the legislation of the coastal State, but international law imposed limits on what the coastal State could do in that regard. Accordingly, he felt that a more general principle than the two criteria in the draft article should be used.

16. Mr. CHEE said that, while the municipal law of each State might stipulate conditions for the incorporation of companies, the question was: In the event of a conflict between municipal and international law, which had precedence? Since the Statute of the International Court of Justice was an integral part of the Charter of the United Nations, it was important to comply with the Court's decisions.

17. Mr. PELLET, responding to Mr. Al-Baharna, said that he did not know enough about the applicable law to give a detailed answer, but that, under French law, the criterion of "headquarters" referred to the actual situation and to the corporation's actual activities. France's practice in the area of diplomatic protection was difficult to

ascertain, since such action was necessarily shrouded in secrecy.

18. On the point under debate, he agreed with Mr. Brownlie that *Barcelona Traction* did not provide an answer, since ICJ had not had to rule on the problem of nationality. On the other hand, the Court had stated clearly that the very existence of corporations was not governed by international law and that legal persons were defined by municipal law. That was because, unlike individuals, legal persons were simply creations of internal law. The State attributed a nationality to such persons, but that nationality was not necessarily recognized by other States because, as *Nottebohm* pointed out, there must be a genuine link between the person and the State of nationality. Following that logic, he wondered whether the draft articles should reintroduce the idea of a genuine link that would make it possible to exercise diplomatic protection. Such a link could be determined according to various criteria, such as the place of incorporation, headquarters, registered office and probably others. Satisfactory wording would have to be found to convey that idea.

19. Mr. DUGARD (Special Rapporteur) asked whether that meant that Mr. Pellet had abandoned the idea of dual protection.

20. Mr. PELLET said he believed that there was nothing to prevent several States from being entitled to exercise diplomatic protection on behalf of a corporation if the latter had a genuinely strong link with more than one State. Nevertheless, for the purposes of the progressive development of international law, the Commission could say that only one State—the one with which the company had the strongest link—could exercise such protection.

21. Mr. GAJA observed that *Barcelona Traction* could not be said to have ignored international law. He quoted the first sentence of paragraph 70 of that judgment, in which ICJ noted: "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals" [p. 42]. The judgment referred to municipal law only with respect to incorporation of companies and not with respect to nationality, a concept which did not always exist in municipal law where legal persons were concerned. Since the legislation applied to corporations envisaged a wide variety of criteria, it was necessary to find a criterion under international law while not forgetting the genuine link issue. Place of registered office was not an element of that link.

22. Mr. ECONOMIDES welcomed the turn taken by the debate. He suggested that draft article 17, paragraph 2, should be formulated in more general terms—for instance, by saying that diplomatic protection was exercised by the national State, such State to be determined by internal law in each case, provided that there was a genuine link or connection between the national State and the company concerned. That would obviate the need for the Commission to discuss the various criteria, which could be mentioned in the commentary, yet would retain the "genuine link" condition.

23. Mr. PAMBOU-TCHIVOUNDA requested that Mr. Economides produce his proposal in writing, as it would be of interest as the discussion proceeded.

24. Mr. ECONOMIDES said he could certainly comply with that request, but that Mr. Brownlie might be in a better position to do so.

25. The CHAIR invited the Special Rapporteur to introduce articles 19 and 20 of the draft articles on diplomatic protection.

26. Mr. DUGARD (Special Rapporteur) said that draft article 19 was a saving clause designed to protect shareholders whose own rights, as opposed to those of the company, had been injured. As ICJ had recognized in the *Barcelona Traction* case, the shareholders had an independent right of action in such cases and qualified for diplomatic protection in their own right.

27. The Chamber of ICJ had also considered the issue in the *ELSI* case, but it had failed to expound on rules of customary international law on that subject. The proposed article left two questions unanswered: the content of the right, or when such a direct injury occurred, and the legal order required to make that determination.

28. The Court in *Barcelona Traction* had mentioned the most obvious rights of shareholders, but the list was not exhaustive. That meant that it was left to courts to determine, on the facts of individual cases, the limits of such rights. Care would have to be taken to draw clear lines between shareholders' rights and corporate rights, however. He did not think it was possible to draft a rule on the subject, as it was for the courts to decide in individual cases.

29. As to the second question, it was quite clear that the determination of the law applicable to the question whether the direct rights of a shareholder had been violated had to be made by the legal system of the State in which the company was incorporated, although that legal order could be supplemented with reference to the general principles of international law. He had not wished to draft a rule, but simply to state the one recognized by ICJ in the *Barcelona Traction* decision, namely, that in situations in which shareholders' rights had been directly injured, their State of nationality could exercise diplomatic protection on their behalf.

30. Turning to article 20 on continuous nationality of corporations, he pointed out that State practice on the subject was mainly concerned with natural persons. In that connection, he recalled that the Commission had adopted draft article 4<sup>3</sup> on that subject at its fifty-fourth session in 2002. The principle was important in respect of natural persons in that they changed nationality more frequently and more easily than corporations. A corporation could change its nationality only by reincorporation in another State, in which case it changed its nationality completely, thus creating a break in the continuity of its nationality. It therefore seemed reasonable to require that a State should be entitled to exercise diplomatic protection in respect of a corporation only when the latter had been incorporated under its laws both at the time of injury and at the date of the official presentation of the claim.

<sup>3</sup> See footnote 1 above.

31. If the corporation ceased to exist in the place of its incorporation as a result of an injury caused by an internationally wrongful act of another State, however, the question that arose was whether a claim had to be brought by the State of nationality of the shareholders, in accordance with draft article 18, subparagraph (a), or by the State of nationality of the defunct corporation, or by both. The difficulties inherent in such a situation had been alluded to in *Barcelona Traction*, and some of the judges had considered that both States should be entitled to exercise diplomatic protection.

32. He agreed with that view, as it would be difficult to identify the precise moment of corporate death, and there would be a "grey area in time" during which a corporation was practically defunct but might not have ceased to exist formally. In such a situation, both the State of incorporation of the company and the State of nationality of the shareholders should be able to intervene. He was aware that, in the *Barcelona Traction* case, ICJ had not been in favour of such dual protection, but it seemed that that solution might be appropriate.

33. Finally, he did not think it was necessary to draft a separate rule on continuous nationality of shareholders; since they were natural persons, the provisions of draft article 4 would apply to them.

#### **Reservations to treaties<sup>4</sup> (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,<sup>5</sup> A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

#### DRAFT GUIDELINES ADOPTED BY THE DRAFTING COMMITTEE

34. The CHAIR invited the Chair of the Drafting Committee to introduce the draft guidelines relating to reservations to treaties adopted by the Committee (A/CN.4/L.630).

35. Mr. KATEKA (Chair of the Drafting Committee) said that the Committee had completed its consideration of the 15 guidelines the Commission had referred to at its preceding session.

#### Explanatory note

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

[...]

#### **2.5 Withdrawal and modification of reservations and interpretative declarations**

##### **2.5.1 Withdrawal of reservations**

<sup>4</sup> For the text of the draft guidelines provisionally adopted to date by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

<sup>5</sup> See footnote 2 above.

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

#### 2.5.2 *Form of withdrawal*

The withdrawal of a reservation must be formulated in writing.

#### 2.5.3 *Periodic review of the usefulness of reservations*

1. States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

#### 2.5.4 [2.5.5] *Formulation of the withdrawal of a reservation at the international level*

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without the person's having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and ministers for foreign affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

#### 2.5.5 [2.5.5 bis, 2.5.5 ter] *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

1. The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

#### 2.5.6 *Communication of withdrawal of a reservation*

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

#### 2.5.7 [2.5.7, 2.5.8] *Effect of withdrawal of a reservation*

1. The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

#### 2.5.8 [2.5.9] *Effective date of withdrawal of a reservation*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

#### Model clauses\*

##### A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

##### B. Earlier effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

##### C. Freedom to set the effective date of withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

#### 2.5.9 [2.5.10] *Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation*

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(b) The withdrawal does not add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations.

#### 2.5.10 [2.5.11] *Partial withdrawal of a reservation*

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

#### 2.5.11 [2.5.12] *Effect of a partial withdrawal of a reservation*

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

\*For the commentary see...

36. He drew the Commission's attention to a new section, which would be entitled "Explanatory note" and would be placed at the beginning of the draft guidelines. In considering the model clauses relating to draft guideline 2.5.9, the Drafting Committee had concluded that it would be useful to retain them, but had been uncertain as to where they should be placed: in the text of the Guide to Practice itself, either just after the relevant draft guideline or in a footnote; in an annex to the Guide; or in the commentary to the relevant draft guideline to explain the circumstances in which the clauses could be used. After having eliminated a number of possibilities, and in view of the fact that the Special Rapporteur intended to submit more model clauses for future guidelines, the Drafting Committee had concluded that the best and most practical solution would be to keep the model clauses in the guidelines to which they related and place an explanatory note at the beginning of the Guide to Practice, explaining the function of the model clauses. In addition, a footnote would refer the reader to the relevant commentary. The explanatory note would also be used to explain other issues in relation to the Guide to Practice that might arise in the future. In fact, it would serve as a general introduction to the Guide.

37. Referring to draft guideline 2.5.1 (Withdrawal of reservations), he said the Drafting Committee had made no changes to the guideline originally proposed by the Special Rapporteur.<sup>6</sup> Its wording was identical to that of article 22, paragraph 1, of the 1986 Vienna Convention. The phrase "unless the treaty otherwise provides", which was also found in the Convention, had been maintained, although it was understood that *all* the draft guidelines had a purely residual character and could thus be followed in the absence of any other treaty provisions.

38. Draft guideline 2.5.2 (Form of withdrawal) had been provisionally adopted by the Drafting Committee, as proposed by the Special Rapporteur, without any modification. The wording was identical to that of article 23, paragraph 4, of the 1969 Vienna Convention. On the basis of the debate in plenary, the Drafting Committee had considered whether mention should be made of "implicit" withdrawals, which resulted from the obsolescence of internal legislation or developments in general international law. Reference had been made to the view that a State announcing its intention to withdraw a reservation should be bound to act accordingly even before the reservation had been formally withdrawn. The Committee had nevertheless decided that, for the sake of legal certainty and security of treaty relations as well as consistency with the 1969 and 1986 Vienna Conventions, such "implicit" withdrawals should not be admitted.

39. Draft guideline 2.5.3 (Periodic review of the usefulness of reservations) had received almost unanimous support in plenary. Several observations had been made about the use in English of the term "internal legislation" with reference to international organizations. The possibility of mentioning treaty-monitoring bodies explicitly had also been recalled. The view had been expressed that developments in internal legislation were not the only reason

why reservations should be reconsidered: developments in international law or other factors could also play a role. The Drafting Committee had carefully considered all those views and had decided that the words "in particular" should be inserted before the words "in relation" in paragraph 2 in order to indicate precisely that those developments were a factor among others.

40. The Drafting Committee had replaced the words "internal legislation" by the words "internal law" so that they would be equally applicable to international organizations. The words "rules of the international organization" as used in article 46 of the 1986 Vienna Convention were also recalled, but the Committee had considered that that reference would be better placed in the commentary. In the same paragraph, the word "special" had replaced the word "particular" and the word "retaining" had been added before the words "the reservations", while the word "careful" had been deleted, since it no longer had a *raison d'être* after the addition of the words "in particular" further on.

41. With regard to the treaty-monitoring bodies, it had been agreed that, despite their special role, they should not be singled out in that context, since other legislative bodies (for example, the United Nations General Assembly or the Parliamentary Assembly of the Council of Europe) often made similar recommendations for the withdrawal of reservations. It had been decided, however, that the issue should be addressed in more detail in the commentary. Finally, in the context of that guideline, the fact that all the draft guidelines were recommendations had again been stressed, in order to dispel any fear that, in the context of such a periodic review, States might think that reservations could be made easily.

42. Draft guideline 2.5.4, which dealt with the persons competent to formulate the withdrawal of a reservation at the international level, had originally been guideline 2.5.5, for which the Special Rapporteur had proposed two alternatives, one short and one long. The plenary had preferred the longer version, and, in view of the pedagogic function of the Guide to Practice, it was that version that had been retained by the Drafting Committee. The draft guideline had also needed to be brought into line with draft guideline 2.1.3 (Formulation of a reservation at the international level), to which it corresponded. That was why the title had been changed to "Formulation of the withdrawal of a reservation at the international level". In addition, the square brackets around paragraph 2 (c), which corresponded to paragraph 2 (d) of draft guideline 2.1.3, had been deleted.

43. Draft guideline 2.5.5 was a merger of guidelines 2.5.5 *bis* and 2.5.5 *ter*, as originally proposed by the Special Rapporteur. It corresponded to draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). The Drafting Committee had brought the wording of paragraph 1 (former guideline 2.5.5 *bis*) into line with that of draft guideline 2.1.4 and replaced the words "internal law of each State or international organization" by "or the relevant rules of each international organization". That change, which might seem to be inconsistent with guideline 2.5.3, was deliberate and justified. In the view of the Drafting Committee, the words

<sup>6</sup> For the text of the draft guidelines proposed by the Special Rapporteur in his seventh report, see *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1-3.

“internal law” in guideline 2.5.3 had a broader and more general meaning, whereas, in guideline 2.5.5, the “rules of the organization” referred to a more specific issue, that of competence to withdraw reservations. Another question had been raised with regard to the effect of the withdrawal of a reservation resulting in reduced obligations for all the parties to a treaty. It had, however, been pointed out that that problem related more to draft guideline 2.5.7 and it would be enough to mention it in the commentary. Finally, the title of guideline 2.5.5 was that of former guideline 2.1.4.

44. Draft guideline 2.5.6 (Communication of withdrawal of a reservation) had also been proposed by the Special Rapporteur in two versions, one shorter and one longer. The Drafting Committee had preferred to retain the shorter version, which referred to draft guidelines 2.1.5, 2.1.6 and 2.1.7 dealing with the communication of reservations and the functions of depositaries [already adopted by the Committee at the Commission’s fifty-fourth session<sup>7</sup>]. It would be recalled that the procedure determined for the communication of reservations (draft guideline 2.1.6), including the use of electronic mail or facsimile, was equally applicable to the withdrawal of reservations.

45. Draft guideline 2.5.7 (Effect of withdrawal of a reservation) was the result of the merger of guidelines 2.5.7 and 2.5.8, as originally proposed by the Special Rapporteur. The original text would not have been applicable when one objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization. As currently drafted, paragraph 1 of the new draft guideline 2.5.7 corresponded to the text of the former draft guideline 2.5.7, whereas paragraph 2 corresponded to the former draft guideline 2.5.8.

46. Taking into account observations made in plenary, the Drafting Committee had replaced the words “of the treaty” in the first sentence of paragraph 1 by the words “of the provisions on which the reservation had been made”. The commentary should explain that the plural “provisions” could also refer to a single provision, and it should also refer to draft guideline 1.1.1 (Object of reservations) pertaining to certain specific aspects of reservations to the treaty as a whole.

47. The Drafting Committee had retained the words “whether they had accepted or objected to the reservation” at the end of paragraph 1, which made it clear that the guideline covered two separate cases. For the sake of clarity, it had been thought better to add the words “by reason of that reservation” at the end of paragraph 2.

48. Draft guideline 2.5.8 was the former guideline 2.5.9, as originally proposed by the Special Rapporteur. It closely followed article 22, paragraph 3, of the 1969 and 1986 Vienna Conventions. The Drafting Committee had adopted it with only a minor change in the French version, the word *autrement* having been added in the first line to bring it into line with the text of the provision in the Conventions.

49. That draft guideline was accompanied by model clauses. The Drafting Committee had had an extensive debate on the exact placement and function of such clauses.

It had eventually decided to retain the model clauses in the guideline and to refer to their function in the explanatory note at the beginning. As had been agreed, the model clauses would also be accompanied by a footnote referring the reader to the commentaries, where the appropriate use of model clauses would be explained. The Drafting Committee had placed the general heading “Model clauses” immediately after draft guideline 2.5.8. The text of the clauses followed, preceded by the letters A, B and C. The Drafting Committee had not made any changes to the model clauses themselves, except to move the square bracket before the word “depository” to include, more appropriately, the words “to” or “by”.

50. The text of draft guideline 2.5.9 (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation) was essentially as proposed by the Special Rapporteur. The Drafting Committee had considered the proposal that the words “the situation of the withdrawing State” should be replaced by the words “the content of the obligations of the other contracting States or international organizations”. It had been argued that that substitution was justified because it was not possible to determine unilaterally the effect of the withdrawal of a reservation. Consequently, if the reserving State or organization was allowed to do so, the other contracting parties should be protected from any change (for the worse) of their obligations as a result of that unilateral determination of the effect of the withdrawal. In that context, the view had also been expressed that the obligations mentioned should be those of the withdrawing State rather than those of the other contracting States or international organizations. Those two views were not necessarily the same, since it could be argued that the obligations of the other contracting parties were almost always affected by the withdrawal of a reservation. In order to clarify the guideline further, it had been suggested that the words “in relation to the withdrawing State” should be added at the end of subparagraph (b).

51. According to the first view, however, there could be situations when the withdrawal of a reservation (relating, for example, to legal cooperation in the field of political and civil rights) did not really affect the obligations of the other contracting parties even if it had a retroactive effect. In the course of the debate, it had been felt that, if the content of obligations was mentioned, the content of rights could be included as well. It had then been pointed out that the initial word “situation” covered both rights and obligations. It had been agreed that the best formulation to signal that the withdrawing State did not disadvantage the other contracting parties was the wording adopted, namely, “add to the rights of the withdrawing State or international organizations in relation to the other contracting States or international organizations”. In the final analysis, the withdrawing State or international organization should not be able to put itself in an advantageous position *vis-à-vis* the other contracting parties.

52. There had been no other changes (from the original wording) in that draft guideline. The Drafting Committee had decided to retain the words “withdrawing State” on the understanding that it could be explained in the commentary that that meant the State (or organization) withdrawing a reservation and not the State (or organization) withdrawing from a treaty.

<sup>7</sup> See *Yearbook ... 2002*, vol. I, 2733rd meeting, para. 2.



53. Draft guideline 2.5.10 (Partial withdrawal of a reservation) corresponded to draft guideline 2.5.11 as proposed by the Special Rapporteur. Taking into account comments made in plenary, the Drafting Committee had decided to reverse the two paragraphs for logical reasons and to deal with definition before procedure.

54. The Drafting Committee had replaced the words “modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty” by the words “limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty”. The Drafting Committee had found the word “modification” misleading, since it might also indicate an extension of the reservation. It was therefore preferable to set out clearly what the partial withdrawal of a reservation did—namely, limit the legal effect of the reservation.

55. There had also been a discussion regarding the words “achieves a more complete application of the provisions of the treaty”, which had eventually been adopted because they better reflected the idea that the partial withdrawal of a reservation achieved a more complete application of the treaty by its very existence. As a consequence of that change, the word “withdrawing” had had to be added before “State or international organization”. The title of the draft guideline remained unchanged.

56. Draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation) corresponded to guideline 2.5.12 as originally proposed by the Special Rapporteur. The guideline had been modified to take account of two observations made during the debate in plenary. The first observation had referred to the possibility that an objection to a reservation which was partially withdrawn continued to have its effects to the extent that the objection did not apply exclusively to that part of the reservation which had been withdrawn. The second sentence of the draft guideline had been modified accordingly. The second observation had referred to the possibility that the partial withdrawal of a reservation might have a discriminating effect. In such a case, an objection could be made to the reservation resulting from the partial withdrawal. A last sentence had therefore been added stating exactly that possibility.

57. The first sentence of the draft guideline remained unchanged—only the word “effects” had been changed to the singular “effect”, since the plural had been unnecessary.

58. In closing, he said that the Drafting Committee recommended that the Commission should adopt the draft guidelines before it.

59. The CHAIR thanked the Chair of the Drafting Committee. Noting that the originals of the report of the Drafting Committee were in English and French, he recommended that those members of the Commission who used the other official United Nations languages should examine the translations carefully and communicate any remarks to the Chair of the Drafting Committee.

60. Mr. ECONOMIDES said that he had a number of suggestions to make concerning the French version. In draft guideline 2.5.2, the words *doit être formulé* were

wrong. Either the *request* was *formulated* in writing or the *withdrawal* was *made* in writing. At the end of draft guideline 2.5.3, it would be preferable to replace the words *qu’il a subies* by the word *intervenues*, which was more neutral. In paragraph 1 (b) of draft guideline 2.5.4, the word *pertinentes* should be inserted after the word *circonstances*. In draft guideline 2.5.9, he failed to see how the withdrawal of a reservation could add to the rights of the withdrawing State or international organization.

61. The CHAIR, speaking as a member of the Commission, said that the title of draft guideline 2.5.4 should be changed to read “*Compétence pour retirer une réserve au plan international*” (Competence for the withdrawal of a reservation at the international level), which seemed to him to be more in line with the content. He also had a number of comments on the Spanish version which he would communicate to the secretariat in due course in the appropriate manner.

62. Mr. GAJA, referring to a point of grammar, said that, at the end of the first paragraph of the English version of draft guideline 2.5.7, it would be preferable to say “whether they had accepted the reservation or objected to it”.

63. Mr. MOMTAZ said that, in paragraph 1 of the French version of draft guideline 2.5.10, the words *assurer plus complètement l’application* should be replaced by the words *assurer une plus large application*.

64. Mr. ROSENSTOCK suggested that a comma should be added after the words “international organization” in the introduction to draft guideline 2.5.9 of the English version.

65. Mr. PELLET (Special Rapporteur) reminded members that the consideration of the report of the Drafting Committee was not meant as an opportunity to catch up on substantive matters. With regard to draft guideline 2.5.2, its wording was perfectly in line with that of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, as the Chair of the Drafting Committee had pointed out. As to draft guideline 2.5.4, he reminded the Chair that he himself had proposed using the word *compétence* in connection with draft guideline 2.1.3, but his suggestion had not been followed up. It therefore seemed inevitable that draft guideline 2.5.4 must be brought into line with draft guideline 2.1.3. He did not object to adding the word *pertinentes* after the word *circonstances*, although he regarded it as superfluous.

66. In respect of draft guideline 2.5.8, he said that, in the French version of model clause A, the square brackets should be placed between *notification* and *au* and not before *dépôt*.

67. In formulating his comment on draft guideline 2.5.9, subparagraph (b), Mr. Economides had reopened a very long discussion which had taken place in plenary and in the Drafting Committee during the previous session. At that time, Mr. Gaja had put forward the idea of the possibility of a discriminatory withdrawal. If he thought about that, Mr. Economides should easily be able to see the real scope of subparagraph (b).

68. With regard to paragraph 1 of draft guideline 2.5.10, he said that he was not enthusiastic about the words *une plus large application* because they might suggest problems of either interpretation or territorial application. In his view, the word *complètement* was more appropriate.

69. The CHAIR, speaking as a member of the Commission, pointed out that the French and English versions of paragraph 1 of draft guideline 2.5.10 were not identical. There was a difference between “limits” and *visé à atténuer*; it would be preferable to say “aims at limiting”.

70. Mr. PELLET (Special Rapporteur) proposed “purports to limit”.

71. Mr. KATEKA (Chair of the Drafting Committee) said that he had no objection to the title “*Compétence pour retirer une réserve au plan international*” (Competence for the withdrawal of a reservation at the international level), but he agreed with the Special Rapporteur that the wording of draft guidelines 2.5.4 and 2.1.3 should be consistent.

72. The CHAIR, speaking as a member of the Commission, said that he understood the need for consistency, but, on second reading, the title of a draft guideline could at least be brought into line with its content.

73. Mr. DAOUDI, referring to the differences between the French and English versions, asked which of the two the other language versions should follow.

74. The CHAIR and Mr. PELLET (Special Rapporteur) said that the French version was to be followed.

75. Mr. PELLET, speaking as a member of the Commission, said he hoped that the Chair would not press for the amendment of the title of draft guideline 2.5.4 because draft guideline 2.1.3 would then have to be amended as well.

76. The CHAIR, speaking as a member of the Commission, said that he would not insist any further. Speaking as Chair of the Commission, he said that, if he heard no objection, he would take it that the Commission adopted the draft guidelines submitted by the Chair of the Drafting Committee, subject to the comments and changes made during the debate.

*It was so decided.*

*The meeting rose at 1.10 p.m.*

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## 2761st MEETING

*Thursday, 22 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. 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. MELESCANU said that diplomatic protection of corporations and their shareholders was the most interesting aspect of the topic from the intellectual and practical standpoints. Diplomatic protection dated back to the last decades of the nineteenth century, but most investments were now made through corporations, rather than by natural persons—the situation covered by the *Nottebohm* case.

2. No more important problem confronted the developing countries and countries in transition than the problem of attracting investment, and one of the key aspects was providing the requisite guarantees for foreign investors. The debate on regulating the issue was more political than legal, tending to favour corporations, even multinational corporations, rather than the interests of the developing countries and countries in transition. It needed to be acknowledged, however, that those countries were currently engaged in a harsh struggle to attract foreign investment. Accordingly, they could benefit from the development of an internationally applicable regime governing investment. Without such a regime, there would be no alternative but to fall back on bilateral agreements negotiated with economically powerful countries, agreements that would inevitably grant less favourable terms to the countries seeking to attract investment.

3. Furthermore, paradoxically, despite the fact that most investment was now made through corporations, corporations were less well protected than were natural persons, who were able not only to seek diplomatic protection but also to invoke their human rights. Corporations, on the other hand, had no such protection, as *lex mercatoria* was a field of law still in its infancy.

4. The debate on the subject under consideration thus crystallized around one issue: Should the Commission confine itself to codifying existing international law on the basis of *Barcelona Traction*, or should it decide in favour of a new approach encompassing not only corporations but also their shareholders? In his view, there were

<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).