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Summary record of the 2761st meeting

Topic:
Diplomatic protection

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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.

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.

Diplomatic protection¹ (*continued*) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,² A/CN.4/L.631)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. 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

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

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

no grounds for concluding that any dramatic change in the latter direction had taken place. Accordingly, he favoured an approach based on the philosophy of law, rather than on judicial practice.

5. An analogy could be drawn between the present topic and the topic of the responsibility of international organizations, and between international organizations as subjects of public international law and corporations as subjects of municipal law. In both cases, it was agreed that there was a distinction between collective subjects (international organizations and corporations) and individual subjects (States and natural persons), provided those collective subjects had legal personality and a personality distinct from that of their creators. In his view, the logical conclusion was that the decision in the *Barcelona Traction* case was correct and must be used as the basis for the Commission's work. As ICJ had stressed, companies were characterized by a clear distinction between the company and its shareholders. Consequently, the draft articles should clearly indicate that diplomatic protection in the case of corporations fell to the State of nationality of the corporation and not to the State of nationality of the shareholders. That was the general conclusion emerging from the debate, and he thus supported draft article 17, paragraph 1, as the Commission was faced with a task of codification based on clear judicial practice, namely, the *Barcelona Traction* case.

6. The crux of the debate, however, was how to determine the nationality of corporations. Mr. Pellet had identified the matter, pointing out that the Commission was faced not merely with the task of codifying international law on the basis of the *Barcelona Traction* judgment, but also the task of progressively developing public international law by trying to establish under what conditions a corporation could truly claim the diplomatic protection of a State of which it was a "national". The judgment of ICJ had recognized Canada's right to exercise diplomatic protection, considering that there had been a genuine link between the company and the State inasmuch as the company had been incorporated in the State in question and had had its registered office in that country—cumulative conditions in the *Barcelona Traction* judgment. In that case as in others, reference had also been made to other elements, such as the company's principal place of economic activity, economic control, and the nationality of the majority shareholders. The Commission's task was now to decide how the question of nationality was to be regulated in future.

7. The question of the nationality of corporations, like that of the nationality of natural persons, the regime of foreigners or the territorial sea, was a domain essentially within national jurisdiction. The simplistic solution would be to refer directly to the provisions of municipal law. However, in all such domains international law must lay down guidelines. Accordingly, he did not support the proposal to delete the words "and in whose territory it has its registered office" from draft article 17, paragraph 2. It would be better to list illustrative conditions, rather than a single criterion or cumulative conditions, as State practice was very diverse. For instance, in the United States, for the purposes of diplomatic protection, a corporation was regarded as "national" if it was incorporated in the United States and at least 50 per cent of the shareholders

were United States citizens. In Switzerland, on the other hand, protection was granted to any corporation a majority of whose shareholders were Swiss citizens. On the basis of those considerations, of the debate at the previous meeting, and of the example of the rules adopted on the nationality of natural persons, he would propose that draft article 17, paragraph 2, should read:

"For the purposes of diplomatic protection, the national State of a corporation is the State in which the corporation is incorporated or in which it has its registered office or its domicile, or in which it has its basic economic activity or any other element recognized by international law as reflecting the existence of a genuine link between the corporation and the State in question."

A formulation of that type would allow the courts the flexibility to accept several criteria as a means to establish the existence of a genuine link, the only fundamental criterion of relevance to the nationality of corporations, as indeed to that of natural persons.

8. He had not included among those illustrative elements the criterion of "economic control", one of the Special Rapporteur's possible options. He shared the view expressed in paragraph 33 of the Special Rapporteur's fourth report (A/CN.4/530 and Add.1) that that criterion accorded more with the economic realities of foreign investment. However, its use might destroy the entire logical edifice of the Commission's approach by introducing, as it were through the back door, diplomatic protection based on the State of nationality of the shareholders rather than of the corporation. For, in referring to economic control, one was referring to the State in which the majority of the shareholders resided, because it was they who exercised economic control.

9. The second task was to decide whether shareholders could be afforded diplomatic protection and, if so, when. ICJ had recognized that right in principle, but had considered that in *Barcelona Traction* those conditions had not been met. Despite certain arbitral decisions, such as the *Delagoa Bay Railway* and *Orinoco Steamship Company* cases and certain lump sum agreements, positive international law was silent on that matter. A first possible scenario involving protection of shareholders was the one in which shareholders had suffered direct injury as a result of an internationally wrongful act. In his view, draft article 19 covered that matter in a satisfactory manner.

10. A second possible scenario was one in which the shareholders had suffered injury caused by the corporation itself, as in the case of expropriation or where the corporation had ceased to exist in the place of its incorporation. He was in favour of the exception provided for in draft article 18, subparagraph (a), provided the provision was drafted so as to eliminate the possibility of the shareholders deciding to wind up the corporation as a means of enjoying the diplomatic protection of their State.

11. He also supported the Special Rapporteur's proposal to protect corporations against malpractice and abuses of law on the part of States. Draft article 18, subparagraph (b), was an interesting point of departure in that regard, for without provision for such an exception, the corpo-

ration in question might be entirely without diplomatic protection.

12. Finally, he supported the proposal that draft articles 17 to 20 should be referred to the Drafting Committee, with a view to finalizing acceptable texts as soon as possible.

13. Mr. DUGARD (Special Rapporteur) thanked Mr. Melescanu, Mr. Brownlie and Mr. Economides for their drafting suggestions. He was attracted to Mr. Brownlie's proposal, as he did not think it departed from the spirit of the *Barcelona Traction* decision. However, he was troubled by Mr. Economides' and Mr. Melescanu's proposals, which seemed to revert to the test of the genuine link. In *Barcelona Traction*, Belgium had argued that it had *locus standi* because the majority of the company's shareholders were Belgian, so that there was a more genuine link between Belgium and the company than between Canada and the company. ICJ had not accepted the Belgian argument. Though Mr. Melescanu claimed that he did not wish to introduce the test of economic control through the back door, that was precisely what he was doing because it would then be necessary for a court to examine which State controlled the company, something which would in turn entail its determining who had the majority shareholding. Thus, the Commission must guard against adopting a formulation in draft article 17, paragraph 2, which achieved that purpose. A much more cautious approach was needed, and Mr. Brownlie's proposal, subject to modification, provided an answer to many of the questions raised, including Mr. Pellet's call for a broader test than that of the registered office. In any case, it would be very unwise to introduce the notion of genuine link in that provision.

14. Mr. MELESCANU said he had referred to the notion of genuine link for two reasons, the first of which was logical and the second practical. Regarding the first, if one was to list a series of illustrative criteria in draft article 17, paragraph 2, it would also be necessary to include an indication for the courts as to what relative weight was to be assigned to each criterion. Without an indication of how to choose among the criteria listed, a court might be tempted to place the whole burden of a decision on the shoulders of the judges of ICJ.

15. The second, practical argument was that investors in countries in transition were often foreign companies whose shareholders were nationals of the country in which the investment was made. For example, a company incorporated in Switzerland and with its registered office in Switzerland, but whose sole shareholder was Romanian, might set up a bank in Romania whose activities were conducted solely in Romania. In such a situation, without at least a reference to a genuine link in draft article 17, paragraph 2, the result might be that what was to all intents and purposes a Romanian corporation was protected by another State. That case was applicable not just to Romania but to all the countries in transition, since they had created more favourable regimes for foreign than for national investors. In those circumstances, the temptation for any capitalist worthy of the name would be to cash in on those advantages by incorporating the company in a foreign country. The Commission should not encourage such behaviour. While Mr. Brownlie's proposed formulation was ingen-

ious, it must also be acknowledged that the difference between the "genuine" link he himself proposed and the "appropriate" link proposed by Mr. Brownlie was not very significant.

16. Ms. ESCARAMEIA asked whether Mr. Brownlie's intention in using the word "appropriate" in his proposal was to expand the possibilities of diplomatic protection. In adopting the criteria of incorporation and registered office to determine nationality, ICJ in the *Barcelona Traction* case had recognized the customary international law and treaty law prevailing at the time. Since then, however, national laws had changed dramatically. Mr. Melescanu had even described a situation where the nationality of the majority shareholders was the most important criterion. Had national laws changed so much that the Commission, by using general principles of international law, might arrive at a rule very different from that enunciated in *Barcelona Traction*?

17. Mr. BROWNLIE emphasized that he had deliberately avoided using any wording from the *Nottebohm* principle: that was the whole point. It would be highly problematic to apply *Nottebohm* to the present case and even more problematic to try to codify every possible kind of substantial or effective link. The use of "appropriate" was intended to be constructively vague.

18. *Barcelona Traction* was of no direct assistance, either. The issues raised by the present draft articles had not been central to *Barcelona Traction*, where the statement of ICJ on the nationality of the corporation had been limited to what was sufficient for that case. The Court's reference to the corporation's links with Canada had been descriptive, not normative, and the Commission could not deduce from *Barcelona Traction* what to do in the present instance. Using the word "appropriate" would enable members who disagreed with *Nottebohm* to opt for the necessary flexibility. Municipal legislation was very varied. Even the registered office and other criteria mentioned were not universal. Moreover, to apply *Nottebohm* rigorously, as Mr. Economides had suggested, would in fact limit the possibilities of diplomatic protection. The wording needed to be vague enough to broaden those possibilities and ensure that none of the very diverse cases that might arise was excluded.

19. Mr. ECONOMIDES said that one purpose of draft article 17, paragraph 2, was to define the State of nationality. Under internal law, various criteria were available: the State of nationality could be the State of incorporation, the State of registered office or the State whose nationals controlled the corporation. That meant that a corporation could have three nationalities, and that three States might claim the right to exercise diplomatic protection. The other purpose of paragraph 2, therefore, was to prevent competing claims. There were two possible solutions: either to consider the various criteria under internal law and decide which one was predominant, as the Special Rapporteur had done, in which case the remaining criteria became secondary, or to give all those criteria equal weight while imposing an international criterion of "genuine link", leaving it to the courts to decide, on the basis of that criterion, which State was the State of nationality.

20. Mr. CHEE noted that, in paragraph 70 of the *Barcelona Traction* judgment, ICJ defined how nationality was to be acquired, namely, by incorporation and registration. It also stated that in the particular field of diplomatic protection of corporate entities, no absolute test of the “genuine connection” had found general acceptance. That seemed to rule out the application of the “genuine link” test. In that connection, he agreed with Jennings that the analogy between the nationality of an individual and that of a corporation was often misleading and that rules of international law based on the nationality of individuals could not always be applied to corporations without some modification.³ Jennings had also argued that the “genuine link” test could not be applied to ships, since ships were chattels, not individuals.⁴ In all three cases there were very diverse situations, and he endorsed Mr. Brownlie’s proposal to use the term “appropriate links” in order to take account of that diversity.

21. Mr. MOMTAZ, responding to Mr. Melescanu’s statement, said he disagreed that the territorial sea was a matter essentially for the jurisdiction of States. Coastal States could enact laws relating to the territorial sea, but such laws must conform to international law.

22. In the discussion of draft article 17, paragraph 2, it had been said that States could enact their own laws governing the registration of corporations. States could also enact their own laws for the registration of ships. Under international law, most notably the United Nations Convention on the Law of the Sea, however, in order for a State to be able to authorize a ship to fly its flag, a “substantial link” must exist between the ship and the State (art. 91). Although attempts to clarify the criteria for the existence of such a link under the law of the sea had failed, he felt that the term “substantial link” might be appropriate in the present case.

23. Mr. PELLET said that he supported in spirit the three proposals put forward with regard to the definition of nationality of corporations in draft article 17, paragraph 2. In his fourth report on nationality in relation to the succession of States,⁵ the Special Rapporteur, Mr. Mikulka, had defined clearly the criteria applied with regard to the nationality of corporations and had demonstrated convincingly that States applied a multiplicity of criteria. He understood the Special Rapporteur’s concern about including an express reference to “genuine link”, but felt that the proposals by Mr. Economides and Mr. Melescanu must not be interpreted as reintroducing the criterion of control, which presented more disadvantages than advantages. Instead, their proposals must be interpreted as referring to a genuine “legal” link, which could be established only by internal laws. Internal laws differed considerably and might include the criterion of “preponderant legal interest”. If there was an internal legal provision that referred to such a preponderant legal interest, it could be taken into account internationally. Given the very nature of legal persons, international law could not ignore provisions of internal law.

24. It could be seen from the range of criteria which States apparently applied in granting nationality to legal persons, especially corporations, that the links were, as Mr. Mikulka had said, very diverse. The Commission’s discussion seemed to imply that there were two criteria for according nationality: incorporation and registered office, on the one hand, and effective seat of business, on the other. In the light of Mr. Mikulka’s report, he wondered whether the Commission should in the present case even speak of “nationality”, especially in view of the attitude some countries displayed towards the very notion of nationality. What was important was that a “genuine” or “appropriate” legal link existed between the corporation and the State such that diplomatic protection could be exercised, and it might be going too far to speak of nationality in paragraph 2 when some internal legal systems might object to such a reference.

25. In paragraph 85 of the report, in the commentary to draft article 18, subparagraph (b), Mr. Brownlie was quoted⁶ as criticizing the exception proposed by the Special Rapporteur. Earlier in the present session, however, Mr. Brownlie had considerably reduced the scope of his criticism by explaining that in the passage in question he had been referring to shareholders who were nationals of the State in question, namely, the State of nationality of the corporation. In that case and that case alone, he agreed with Mr. Brownlie that there was no logic in allowing another State to exercise the diplomatic protection of national shareholders. However, in other cases, namely, those involving shareholders who were nationals of the State that committed the internationally wrongful act, it was logical and equitable that diplomatic protection should be exercised on their behalf. For instance, if a company which was a national of State A and whose foreign shareholders were nationals of State B was the victim of an internationally wrongful act on the part of State A, those of its shareholders who were nationals of State A obviously could not be protected by a third State. However, there was no reason why the shareholders who were nationals of State B could not be protected by their own State since an internationally wrongful act had been committed against them. That was not the situation in *Barcelona Traction* where, as ICJ had stated repeatedly in its judgment, the State of nationality of the corporation could exercise diplomatic protection. Unless one accepted the hypothesis in draft article 18, subparagraph (b), one would be deliberately creating a situation where, unlike *Barcelona Traction*, no State could exercise diplomatic protection. Subparagraph (b) was entirely acceptable. Not only did it not contradict the general principles of the *Barcelona Traction* case, but it was in fact in line with the Court’s reasoning in that case, namely, that only one category of international protection was needed, but there must be one. If one generalized Mr. Brownlie’s objection, there would be no protection at all in the event of an internationally wrongful act. When the State of nationality of the corporation committed the internationally wrongful act, the only possible protection was that afforded by the State(s) of nationality of the shareholders. Since that was precisely the situation envisaged in draft article 18, subparagraph (b), he fully supported the drafting proposed by the Special Rapporteur.

³ See 2759th meeting, footnote 9.

⁴ *Ibid.*, p. 732.

⁵ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/489.

⁶ See 2757th meeting, footnote 3.

26. Draft article 19 dealt with another exception envisaged in the *Barcelona Traction* judgment, as cited in paragraph 88 of the report. He had no problem with the analysis in paragraphs 88 to 92 of the report, except that, in his view, the judgement of ICJ in that regard was less relevant than the separate opinions of certain judges, especially Judges Oda and Schwebel in the *ELSI* case. The question was, what were the shareholders' own rights as distinct from the rights of the corporation? According to the Court, such rights could include the right to control and manage the company, an important issue which in his view went beyond the rights of shareholders *per se* to those of managers and directors. That did not have to be specified in the text of draft article 19, but it should perhaps be specified in the commentary. Some shareholders had special responsibilities towards the corporation, and the State of nationality of the manager also had the right to exercise diplomatic protection.

27. The *Barcelona Traction* jurisdiction reflected in draft article 19 was not the only jurisprudence in that regard. Earlier arbitral awards, such as that in *El Triunfo Company*, had taken the same position.

28. Draft article 20 posed more problems than did draft article 19. He agreed with members who were opposed to the rule of continuous nationality of individuals. Since the injury was deemed to be caused to the State rather than to the protected person—by virtue of the very principle of the legal fiction on which diplomatic protection was based—only the nationality of the protected person at the time of the internationally wrongful act was relevant. By the same token, he was opposed to continuous nationality of legal persons. However, the Commission had taken a different position in draft article 4,⁷ cited in paragraph 93 of the report, going so far as to accord an apparent preference to acquired nationality over nationality of origin. Although he disagreed with that position, it would be absurd to adopt a different line of reasoning with respect to legal persons, and he was prepared, regretfully, to defer to that position in the interests of consistency. He was not at all convinced by the Special Rapporteur's arguments in paragraph 95 of his report against extending to legal persons the exception provided in draft article 4, paragraph 2, for individuals. He did not see why the reasons given in paragraphs 6 to 8 of the commentary to article 4 should not apply also to legal persons, including corporations. Extending the exception in article 4, paragraph 2, to legal persons seemed all the more necessary when one considered that the Special Rapporteur's reasoning in paragraph 95 was based essentially on the erroneous belief that the only criterion for determining the nationality of a corporation was its place of incorporation. That belief was based on the abusive generalization of a given legal system, when internal laws differed on that score as they did on the legal personality of individuals.

29. He was, if not in agreement with, at least resigned to referral of the first part of draft article 20 to the Drafting Committee, on the understanding that wording equivalent to that in draft article 4, paragraph 2, would be incorporated. That provision referred to a "person", not a "natural" person or individual, and, as he had suggested in 2001 and 2002, the text should perhaps be revised, especially in

view of the Commission's present efforts regarding corporate persons.

30. He was in favour of retaining the bracketed portion of draft article 20, first because he had been won over by the arguments in paragraphs 98 *et seq.* of the report, and second, because it was the only solution compatible with draft article 18, subparagraph (a), for which he had already expressed support. That support was nonetheless tempered by his conviction that neither in draft article 18, subparagraph (a), nor in draft article 20 was the corporation's having ceased to exist in law the important element. What mattered more was that it should be actually and practically incapable of defending its rights and interests. If the Commission and/or the Drafting Committee agreed with the views he had outlined at the 2759th meeting, draft article 20 could be aligned on the wording, thus corrected, of draft article 18.

31. He agreed with the Special Rapporteur's statement in paragraph 105 of his report that it was unnecessary to draft a separate continuity rule for shareholders, but not with the assertion that the continuity rule in respect of natural persons covered shareholders. That was true only in some cases. In other, much more numerous cases, the shareholders of a corporation were corporate persons and were covered by draft article 17. Just as a door could only be open or closed, a person could only be natural or corporate.

32. Subject to the reservations he had expressed and the small additions he had suggested, he was in favour of referring draft articles 17 to 20 to the Drafting Committee. The French text of the fourth report was inaccurate in many instances, and, although he knew that the translation services worked under intense pressure, he would like to see the errors corrected. To give but one example: the phrase *succession d'État* was used in paragraph 97, but it should always be written *succession d'États*.

33. Mr. BROWNIE said that, because he shared Mr. Pellet's views on many of the major issues of principle and policy, he was surprised to hear his position on draft article 18, subparagraph (b). The *Barcelona Traction* decision was extremely dismissive of the principle enunciated in subparagraph (b), which was described as a "theory" that was not applicable to the case. At the Commission's 2759th meeting, Mr. Pellet had made some very significant remarks about how a corporation attached itself to a State's domestic system, and about the nature of incorporation. That process brought into play the will of the persons who took certain economic decisions. In *Barcelona Traction*, ICJ had emphasized that the incorporation of the company was an act of free choice, which was precisely the subject of article 18, subparagraph (b): when a group of persons decided to invest in State A which required them to form a local company, they took a decision based on free choice. Yet Mr. Pellet did not favour or lend credence to the operation of free choice on the part of a foreign company in the particular context of subparagraph (b).

34. Mr. GAJA said that a central element of Mr. Pellet's argument was the assumption that an internationally wrongful act had taken place and that, unless a State other than the corporation's State of nationality was allowed to

⁷ See footnote 1 above.

intervene, no State would be entitled to give protection. Yet States did not have obligations with regard to their own national corporations under general international law, apart from obligations relating to human rights, which concerned all the other States.

35. As to whether a broad interpretation could be given to the rights of shareholders, such as to include the right to manage, in his opinion paragraph 70 of the *ELSI* judgment yielded little more than an indication that under the relevant treaty provision the shareholders' right to manage might include something more than just a formal right and involved the right to manage the assets of the company, which would be affected by the requisition of the company assets.

36. Mr. KAMTO said the Commission seemed to be straying farther and farther from the substance of the rule in draft article 17, paragraph 2. In paragraph 70 of the *Barcelona Traction* decision, the company's place of incorporation was given as the main criterion, and domestic laws had no bearing whatsoever on the problem. In respect of the nationality of ships, international law left it to the State to choose the criteria under which the ship was registered. For the purposes of draft article 17, paragraph 2, the Commission simply had to decide whether wording that would permit various factors of attachment to be taken into account should be inserted after the word "and". He had been somewhat surprised by the example cited by Mr. Melescanu. The main criterion must be that of the State of registration or incorporation: that was the case for the nationality of ships, and he saw no reason to do anything different with regard to corporations. The phrase "nationality of corporations", which had been used throughout the *M/V "Saiga" (No. 2)* case, was perfectly acceptable and should be retained. Draft article 20 could be improved by replacing the phrase "which was incorporated under its laws" by "which had its nationality", something that would remove all ambiguity and should resolve Mr. Pellet's concern about whether a single criterion or several should be applied.

37. Mr. PELLET, replying to Mr. Kamto's comments, said the fact that something existed under a domestic legal regime was not a good reason for it to be used elsewhere. As to Mr. Gaja's first remark, the existence of an internationally wrongful act was posited by definition in the draft—in draft article 1, paragraph 1.⁸ Perhaps diplomatic protection could be exercised in other contexts, but they fell outside the purview of the draft. Concerning Mr. Brownlie's comments, in *Barcelona Traction* ICJ had declined to pronounce itself on the matter now covered in draft article 18, subparagraph (b). Mr. Brownlie laid great emphasis on free choice, yet the fact that a person chose to travel in a State did not absolve that State from responsibility for an internationally wrongful act that it might commit against that person. If domestic remedies had been exhausted, there was no reason why the State should not be called to account internationally through the mechanism of diplomatic protection. That was why he upheld draft article 18, subparagraph (b), with all his might.

⁸ *Ibid.*

38. Mr. MANSFIELD said he had been prompted to speak because the focus of the discussion seemed to be shifting. The basic issue was who could exercise diplomatic protection for a corporation. The Special Rapporteur's report, and the *Barcelona Traction* case, showed that the only State that could do so was the State in which the corporation was incorporated or perhaps, following Mr. Pellet's comments, with which it had a formal link, a link equivalent in the State's domestic law to the link of incorporation. As Mr. Brownlie had pointed out, in *Barcelona Traction* ICJ had not had to decide which particular element of the formal link had to be present. On the other hand, the Court had made it clear that it was not in the business of lifting the corporate veil and trying to find where the company's essential economic interest lay: it had been looking at the formal links.

39. Where did that leave tax haven companies? That was not much of a problem, in his opinion. If a company decided to incorporate in a tax haven, it was a legitimate choice, but the corollary was that if the company needed diplomatic protection, it was unlikely to receive it from such a State. It could, and many companies did, conclude a bilateral investment treaty to cover it if things went wrong. The Commission could certainly codify on that basis, in which case it would be codifying an essentially residual rule, and it would probably not be particularly relevant to the way companies actually did business.

40. Two other angles seemed to have emerged from the discussion. The first was that the State that could exercise diplomatic protection must be one which had some form of genuine link with the company. Yet if the Commission went in that direction, it would have to attempt to lift the corporate veil in one way or another. That would create difficulties not merely for courts but also for States of investment, which would have to decide whether to receive diplomatic representations or claims from States which believed that a company with which they had a genuine link had been injured. It placed the onus on those States to try to find out whether there was in fact a genuine link. In reality, the genuine link test with respect to ships had done nothing to solve the problem of flags of convenience flown by ships which roamed the world's oceans doing untold damage to endangered fish stocks and changing their registration whenever it looked like somebody might catch up with them.

41. The third position that seemed to be emerging from the discussion was that there was no need to be unduly precise about which State could exercise diplomatic protection in respect of a particular company and that it was acceptable for more than one State to be able to do so. That was fine from the company's standpoint, but for the State of investment it could present the difficulties he had just mentioned: deciding whether to receive diplomatic representations, claims, and the like. Such a State needed to be able to assess its obligations and determine whether there were one or several States that could make representations. Tact was required on the part both of the State making the claim and of the one receiving it, since their relations could be affected. For example, if a country rejected diplomatic representations of a given State, the rejection could have adverse repercussions on relations with the State endeavouring to make the representations.

42. Those three lines in the Commission's thinking had led him to seek guidance from the Special Rapporteur. He had originally thought the Commission was focused very firmly on draft article 17, paragraph 2, and that a formal link, not a lifting of the corporate veil, was being viewed as the basis for deciding who could exercise diplomatic protection. The only issue had been whether actual, formal incorporation was adequate for all circumstances as a test for a formal link. If that was still the trend, then it might be possible to emphasize the formal link of incorporation in a fairly restrictive way, so as to avert the possibility that numerous States might exercise diplomatic protection. If anything other than the formal link of incorporation was taken as the basis, however, then the Commission must take care to preclude a multiplicity of claims. By lifting the corporate veil, it would be opening a rather large Pandora's box, and he was not sure what might pop out of it.

43. Mr. MONTAZ said that, in his view, draft article 19 did not pose problems. As the Special Rapporteur indicated, it was designed to protect shareholders against injury of their direct rights through wrongful acts of States. It was based on the decision by ICJ in the *Barcelona Traction* case, which recognized that shareholders were entitled to diplomatic protection in their own right, independently of the right to recourse of an injured company. The decisions of the European Court of Human Rights went in the same direction.

44. He agreed with the Special Rapporteur that it was not necessary to look into the content of the shareholder's rights, but he would nevertheless be interested in an answer to an interesting question. When a company ceased to exist because it had been nationalized and consequently could not undertake any action on behalf of its shareholders before the local courts, could the rights of the shareholders be considered direct rights? Would article 18, subparagraph (b), of the draft articles apply to that situation, or was it rather article 19 that came into play—in other words, did the shareholders have an independent right of recourse? Unquestionably, international law recognized the right of States to nationalize companies, so the act of nationalization in itself was not wrongful, but the owners of property that had been nationalized were owed compensation in accordance with terms now established under international law.

45. He experienced no difficulties regarding draft article 20, but the arguments made by the Special Rapporteur in paragraph 95 of his report were not very persuasive. There was no reason to adopt an approach other than the one used in article 4 of the draft articles for continuity of nationality of natural persons. The phrase in square brackets at the end of the article should be retained.

46. Mr. GALICKI said that the Commission now had four proposals for draft article 17, paragraph 2: from the Special Rapporteur, Mr. Brownlie, Mr. Economides and Mr. Melescanu. That should be enough to produce a definition. The Commission must define diplomatic protection for legal persons in the same way as it had done for natural persons, namely on the basis of nationality. The problem was how to do so. The definition in *Barcelona Traction* was inadequate, because it did not reflect later developments.

47. He sympathized with Mr. Brownlie's proposal, although it created an additional problem, because the Special Rapporteur cited two criteria, both based on *Barcelona Traction*, whereas Mr. Brownlie's proposal contained three. Were they to be understood separately or jointly? The linkage proposed by Mr. Brownlie was "and/or". He did not see how that would operate in practice. The reference to "other appropriate links" raised the danger of multiple nationality. He took it the Commission agreed that multiple nationality should not be possible in the case of corporations. The adverse impact of such multiple entitlement would outweigh the benefits. If a State exercised diplomatic protection on the basis of place of incorporation, place of registered office or other appropriate links, might that not prevent other States from exercising their diplomatic protection on another basis? The three new proposals all went beyond the Special Rapporteur's, which was based solely on the criterion of place of incorporation and, perhaps, the territory of the registered office. That was very clear, but not realistic. The three new proposals widened the variety of conditions for entitlement to diplomatic protection. Perhaps a sentence should be inserted in paragraph 2 to exclude the possibility of multiple nationality and multiple entitlement to exercise diplomatic protection.

48. Mr. BROWNLIE said that multiple nationality was something of a bugbear. Certainly, a corporation might qualify for diplomatic protection from more than one State. That was real life, and he did not see any rule-making way of avoiding it. It would be far worse if the Commission produced highly restrictive formulations and, in so doing, severely limited the possibilities of diplomatic protection. If by rule-making the Commission sought to ensure that there were no cases of multiple nationality, it would fail and would move in the wrong direction.

49. As to the wording of his proposal, to make it easier to understand he suggested simply removing all the "ands". Putting the "ands" back in did no harm, of course, if the corporation had all those links. But in order to make the proposition clear, both "or" and "and" should be left in. The proposal was meant to be inclusive, not exclusive.

50. Mr. ADDO said that Mr. Brownlie seemed to be advocating multiple nationality for corporations. Did that mean that the Commission was veering away from *Barcelona Traction*?

51. Mr. BROWNLIE said that the judgment in *Barcelona Traction* did not deal with that particular question. ICJ had clearly stated that the question of the company's Canadian nationality had not been disputed by either Belgium or Spain. It had then listed, purely as a matter of fact, all the connections which existed, which went well beyond a corporation's place of registration and head office. In describing all those connections, it happened to use the word "and", but that was not prescriptive; the Court was merely describing the facts which confirmed the Canadian nationality. In analytical terms, it was saying that those were sufficient connections; it left open the question of what were legally necessary connections. That was an area in which the Commission could not simply say that it was following *Barcelona Traction*, because on that point the judgment did not take a legal position.

52. Ms. ESCARAMEIA said she agreed with Mr. Brownlie that *Barcelona Traction* cited other criteria and that the corporation's links with Canada were irrelevant. But apart from rather formal links, such as meetings in a certain place, paying taxes and so on, the more substantive links seemed to have been excluded by ICJ, and that was why the Belgians had lost the case. She referred in that context to a sentence in paragraph 70 of the judgment: "However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance" [p. 42]. Thus, the Court had decided that, in the case in point, the genuine connection was not valid. After all, it had turned down the argument that the capital had been held in Belgium, although that had certainly been a real link. Under Mr. Brownlie's proposal, the Commission would accept the genuine connection, because a genuine link was an appropriate, and even the *most* appropriate, link, because it was the Belgians who had suffered the most. So the decision was a political one: Did the Commission want, or did it not want, to protect the shareholders?

53. If a court could choose from any of a whole range of appropriate links, it would mean that corporations had more protection than individuals. The ownership of property by an individual in the territory of another State was not regarded as an adequate link for the individual to be granted the nationality of that State. Corporations had activities everywhere, any of which might then be considered to be an appropriate link. That would increase the protection of corporations enormously.

54. Mr. BROWNLIE, responding to Ms. Escarameia's comments, said he was not proposing that the Commission should depart from the *Barcelona Traction* judgment. ICJ had not decided on that point, because it had not been required to, and because the two parties had not been disputing the Canadian nationality of the corporation. That was why, in the key paragraph, the Court had noted that in any case there had been numerous links, a matter that had not been in dispute. Since the point had been left open by the Court, there was no question of departing from anything.

55. Mr. ADDO said that, as he understood it, *Barcelona Traction* had rejected dual nationality. If the Commission wanted to allow multiple nationalities, it was departing from the judgment by ICJ. It was important to have a basis as a point of departure. As matters stood, he failed to see what direction the Commission was taking.

56. Mr. ECONOMIDES said he agreed with Ms. Escarameia and Mr. Addo. The crucial issue was whether the Commission believed that a corporation should have one sole nationality or that it could have several nationalities on the basis of various criteria of municipal law. In the latter case, several States would be able to exercise diplomatic protection. Did the Commission intend to regulate the situation, or would it allow a chaotic situation to remain? In *Barcelona Traction*, ICJ had decided that the existence of competing claims was inadmissible. Hence the need to find criteria to ensure that such a situation did not occur. For that reason, the Court had agreed with the Canadian position and rejected the Belgian argument. Notwithstanding Mr. Pellet's opinion, corporations should have no more than one nationality. That question could

be resolved either by reference to certain criteria of municipal law—the *Barcelona Traction* approach—or by making a general reference to municipal law and stressing that, although there could be several criteria, a genuine link was the only valid one. Anything else would be skirting the issue.

57. Mr. KAMTO said the Special Rapporteur had proceeded in draft article 17, paragraph 2, on the assumption that the starting point was the criterion of the company's place of incorporation; only after that assumption had been accepted could the question of the genuine link be posed. The Commission must find a general, flexible formulation which allowed an assessment of factors for establishing the genuine link, such as the *siège social* or the payment of taxes. That was what the *Barcelona Traction* decision said. He disagreed with those who thought that *Barcelona Traction* had mixed everything up while deciding nothing and that the Commission must produce a wording which left everything open.

58. Mr. BROWNLIE, replying to those who were worried about multiple nationality, said that, to a considerable extent, the question was academic, since in most cases of action by means of diplomatic claims, arbitration or litigation on such matters, there was no finding, because no one had any interest in raising the issue that the nationality of the corporation in question was nationality X *erga omnes*. Of course, there were cases in which it was in the interest of the respondent State or respondent party in arbitration to raise the issue of a third or fourth nationality. He was not in favour of multiple nationality, but the Commission should be careful not to make a mess of things. Multiple nationality was very difficult to avoid, especially in regard to corporations. The alternative was to have very restrictive rules in which the *Nottebohm*-type principle acted as a sort of censorship of nationality, cutting it down too much.

59. Mr. MELESCANU said that considerable disagreement clearly remained on the interpretation of *Barcelona Traction*. Even if, intellectually speaking, Mr. Kamto was right, what did he propose to do if real life turned out to be different? In Switzerland, it was not the place of incorporation that counted, but the nationality of shareholders. Some might say that was unfortunate, but Mr. Kamto's position was contradicted by practice. In real life, some States recognized other criteria. ICJ had not ruled that such criteria were invalid; it had simply recognized that they existed.

60. There was no such thing as multiple nationality. There were claims of multiple nationality, but ultimately a court would decide on the basis of one single nationality. He agreed with Mr. Brownlie that it was not possible to prevent a corporation from trying to cite a number of criteria to prove its link to several States. But ultimately, the basis of the *Barcelona Traction* was the recognition that the diplomatic protection of corporations could be exercised only by one State, the State of nationality. The whole debate focused on how to decide what that State was. The Commission should leave aside arguments drawn from *Barcelona Traction* and try to imagine a situation which was consistent with practice in international law; that could probably be done in the Drafting Committee.

61. The CHAIR, speaking as a member of the Commission, said the State that exercised diplomatic protection

on behalf of an entity which, or an individual who, had suffered injury as the result of an internationally wrongful act must have a genuine link with the victim of that act. In the case of a natural person, the most obvious link was that of nationality. For corporate entities, it was also important for there to be a genuine link between the State seeking to exercise diplomatic protection and the victim. The Commission referred to that as nationality, but could also call it something else. The problem was the link between the State trying to exercise diplomatic protection and the victim of the internationally wrongful act. For that reason, he endorsed a flexible formulation such as the one proposed by Mr. Brownlie. The usual wording used to designate that link was “State of nationality”, the State with which, in accordance with its municipal law, the corporation had established a genuine link, whether by virtue of incorporation of the corporation, the establishment of its *siège social* or any other way consistent with international law. In a case in which several States claimed that they had that genuine link, it would be necessary to consider which genuine link took precedence. The Commission could not allow for all the scenarios that might arise. It must remain flexible and produce a wide range of criteria which could then be identified case by case.

The meeting rose at 1 p.m.

2762nd MEETING

Friday, 23 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. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,² A/CN.4/L.631)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. YAMADA, following up on the discussion on draft article 17, paragraph 2, on the definition of the State

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

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

of nationality of a corporation, thanked Mr. Economides, Mr. Brownlie and Mr. Melescanu for introducing the element of a genuine, effective or appropriate link. He recognized that the current trend in international private law was to focus more on the domicile of a corporation than on its nationality as an element indicating its link with a State. However, as Mr. Brownlie had pointed out, the main question in the field of international private law was the applicable law, not the nationality of the corporation.

2. For the purpose of diplomatic protection, however, the Commission must spell out a clear rule of international law which set out criteria for the nationality of corporations. Article 1, paragraph 1, as provisionally adopted by the Commission at its fifty-fourth session, in 2002,³ stipulated the basic principle that it was the State of nationality which was entitled to exercise diplomatic protection both for natural persons and for legal persons. Accordingly, regardless of whether municipal law recognized the nationality of a corporation or not, a rule of international law must be written that defined such nationality.

3. The question was therefore whether draft article 17, paragraph 2, which the Special Rapporteur in his fourth report (A/CN.4/530 and Add.1) had based on *Barcelona Traction* and which set out both “incorporation” and “registered office” as criteria, adequately reflected customary law, or whether there was a legal vacuum which must be filled with a view to the progressive development of international law.

4. While he recognized the rationale for relying on the element of a link between the corporation and the State, whether it was “genuine”, “effective” or “appropriate”, he hesitated to consider it an independent, alternative element. When the Commission had defined the State of nationality of natural persons in article 3, adopted in 2002, it had not introduced the link concept. The Commission should follow the same approach for the nationality of corporations, since introducing the link element would cause complications. For instance, Microsoft, an American corporation incorporated in the State of Washington and with its registered office in Redmond, Washington, earned 27 per cent of its revenue from activities outside the United States and had very close links with 58 other States and territories. Again, the Hong Kong and Shanghai Banking Corporation (HSBC), a British corporation with its headquarters in London, still had its *de facto* headquarters in Hong Kong and, together with Chartered Bank, had even functioned as a central bank of Hong Kong until Hong Kong reverted back to China. It maintained 9,500 offices in 80 States and territories on every continent. All those States could be said to have an appropriate link with Microsoft and HSBC. Furthermore, it was most likely that a corporation would suffer injury as a result of an internationally wrongful act of the State with which it had the closest link and in the territory of that State. If that State was deemed to be the State of nationality of the corporation because of that link, the regime of diplomatic protection ceased to function. He had a problem with Mr. Brownlie’s formulation referring to “an appropriate link”, while the formulation proposed by Mr. Economides relied on municipal law, which did not always recognize the nationality of corporations. Mr.

³ See footnote 1 above.