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Summary record of the 2774th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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shadowed the more important question of the legal effects themselves.

69. Clarification was required on a number of specific points. First, the link between unilateral acts and admission to membership of the United Nations and other international organizations should be established. Following debates in the General Assembly in the 1950s, in an advisory opinion ICJ had reaffirmed the criteria set out in the Charter of the United Nations. The question remained, however, whether States that voted for a given admission were thereby bound or whether an additional, independent act of political will was needed to give legal effect to the vote.

70. Second, State practice concerning recognition of Governments and the establishment or withdrawal of diplomatic or consular relations needed to be determined. Some States maintained diplomatic relations without formally recognizing a government. The question was whether that practice had replaced recognition or whether examples of such non-recognition were isolated.

71. Third, the question of the recognition of belligerency, insurgency and neutrality should be cleared up. The three categories of recognition had been modified and expanded since 1945 through the codification of international humanitarian law, but the nature of unilateral acts in that context needed to be determined.

72. Fourth, in the nineteenth and twentieth centuries a distinction had been introduced between *de jure* and *de facto* governments. He wondered whether that distinction held good and whether the effects of unilateral acts were the same as in the past.

73. More research was required on State practice concerning the recognition or non-recognition of territorial changes. The topic was of particular importance given the radical transformation in the world's borders since 1945. The principles on which States based their practice should be determined, and the inherent contradiction between the permissibility of force and the institution of non-recognition of territorial changes should be examined.

74. Further consideration should be given to the legal basis for unilateral acts: the reasoning that gave States legitimacy to undertake such acts. Again, a survey of the nature and scope of the concept of "good faith" would be welcome. Finally, thought should be given to whether unilateral acts only imposed obligations or whether they also gave rights.

75. Mr. BROWNLIE said that the Commission should not be wasting its time discussing a subject that was not on its agenda. Indeed, recognition of States and Governments, or belligerency, neutrality and other such topics, could not be discussed without a consideration of the substance of the matter to which that recognition related. The General Assembly had not put those topics on the agenda, and their discussion raised a serious question about the conduct of persons who might decide to stay away from plenary meetings when such topics were discussed. Meanwhile, the Commission was moving ever further away from the subject on the agenda.

76. The CHAIR recalled that, at the previous session, the Commission had agreed that the Special Rapporteur would consider the topic of recognition. It was important for all views on the matter to be heard.

The meeting rose at 1.05 p.m.

2774th MEETING

Friday, 11 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,[1] A/CN.4/L.646)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIR invited the members of the Commission to continue their consideration of the Special Rapporteur's sixth report on unilateral acts of States (A/CN.4/534).

2. Mr. KEMICHA said that, with hindsight, the scepticism with which the Commission had welcomed the sixth report on unilateral acts of States seemed exaggerated, to say the least. It could be explained by the newness and complexity of the subject matter, but also possibly by the Special Rapporteur himself, who had initially given the impression in his report that he had some doubts about the feasibility of the topic. He had referred to statements by representatives of States in the Sixth Committee and also by members of the Commission as justification for the approach he had adopted of focusing in the report on a particular type of unilateral act—the recognition of States.

3. By means of that example, the Special Rapporteur had attempted to illustrate, sometimes easily but more often with great difficulty, that the act of recognition lent itself to codification through the simple technique of transposing the Vienna regime on the law of treaties, details of which he had given throughout the sixth report. One could

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

not but be impressed by the number of references in the report to the law of treaties and the Vienna regime. Admittedly, the transposition offered opportunities for codification, but it did have its limits: there was no guarantee that the exercise was applicable to other unilateral acts. Whatever the answer to that question might be, there remained a more basic concern, namely, the risk of losing sight of the specific nature of unilateral acts, whereby the State could assume obligations outside the treaty framework. As various members of the Commission had said, one must be wary of extending the Vienna regime to unilateral acts. Those acts represented an expression of will by States in the same way as treaties, and to question whether or not they were a legal institution was of little importance at present. As Mr. Economides had pointed out, the facts were more important than their classification.

4. Those acts were carried out to produce legal effects and engage the author State, and it should therefore be possible to categorize and even codify them, not only because that was what the Sixth Committee wanted, but also because that would ultimately help bring about legal stability at the State level. It was therefore in the Commission's interest to examine State practice, above all through doctrine and jurisprudence, and to identify characteristic features with a view to the establishment of a set of formal rules, a kind of common language, a code by which each State could measure the legal scope of its acts.

5. Mr. Sreenivasa RAO said that the Special Rapporteur's sixth report was as rich as the previous ones and that the ideas and observations it contained inevitably attracted attention, whether or not they fell within the Commission's immediate purview. Many members had already expressed their views in that regard, and it was now important for the Commission to give the Special Rapporteur guidance on the direction he should take. It was to be hoped that his energetic efforts would be channelled through a collective contribution by the Commission in a more productive framework.

6. While it was wise to focus the report on recognition, as one aspect of unilateral acts as a whole, studying the recognition of States *per se* would be counterproductive. Nowadays, moreover, the recognition of Governments attracted greater attention among the international community than the recognition of States. The recognition of States or Governments was in any case discretionary and not governed by legal criteria.

7. As a reasonable starting point for the drafting of the draft articles, perhaps the Commission might give an initial exposé on positive law—a restatement. In order to do so, it would have to be asked what the legal status of some of those unilateral acts was, how they were undertaken, what expectations they raised and by what combination of factors they could give rise to legal obligations. While there were of course unilateral acts which created obligations by and in themselves, more often than not those obligations were the result of a series of declarations and events, and it was that process, that genesis which the Commission must study.

8. Mr. ECONOMIDES, referring to the comment by Mr. Melescanu at the preceding meeting that the study of the topic should cover not only unilateral acts but also the unilateral conduct of States, including silence, said that, with unilateral acts alone, the Commission's task was already extremely difficult, and he feared that if conduct was also considered, it would become virtually impossible. The members of the Commission must show wisdom, as their predecessors had done when drafting the text which was to become the 1969 Vienna Convention by totally ruling out oral agreements. As a compromise, the Commission might provide for a "without prejudice" clause, according to which the draft articles would not apply to unilateral conduct, which would continue to be governed by customary international law.

9. Mr. MOMTAZ, referring to the statement by Mr. Melescanu implying that the Commission had already partly codified the law applicable to unilateral acts by preparing its draft articles on State responsibility, said that, if that statement was true, it would be a strong argument to put to those who were still sceptical about the existence of unilateral acts as legal institutions. He asked Mr. Melescanu whether he thought that those who had prepared the draft articles on State responsibility had also had unilateral acts in mind when they referred to internationally wrongful acts.

10. Mr. MELESCANU, replying to Mr. Economides, said it was on account of the interest shown by some members of the Commission in studying the conduct of States likely to create legal effects similar to unilateral acts that he had said it would be advisable not to disregard that aspect of the subject.

11. Replying to Mr. Momtaz, he said that his comment had been an immediate reaction to Mr. Koskenniemi's statement that the codification of unilateral acts was difficult, not because the question was complex but because such acts did not exist as a legal institution.

12. Mr. FOMBA recalled that at the preceding meeting, Ms. Xue had said that, unlike other unilateral acts, recognition was subject to a well-established regime. He did not think it could be said that, under current international law, recognition was subject to a clear, strict and universally accepted legal corpus. Attempts to classify unilateral acts according to doctrine seemed to show that recognition was regarded as a discretionary act within the realm of State sovereignty and, thus, as being beyond the scope of international law, subject to compliance with its peremptory norms.

13. Mr. RODRIGUEZ CEDEÑO (Special Rapporteur), summing up the debate on the report under consideration, thanked the members for their constructive, positive and stimulating comments, which had sometimes been justifiably critical, particularly on drafting matters and the fact that some aspects had not been elaborated on in enough detail. The debate had once again highlighted the problems to which the topic gave rise, with regard both to substance and to method.

14. Referring to the existence of unilateral acts as an institution and the advisability and feasibility of codification and progressive development, he, like the vast majority of members, believed that, even though it was impossible to refer to an institution *stricto sensu*, unilateral acts existed nonetheless. International practice showed that

States took action by means of those acts and by means of certain forms of conduct which had specific characteristics and which could sometimes give rise to legal effects. Some members were of the opinion that a study of the topic would not go far enough if it were confined to unilateral acts in the strict sense of the term, as defined by one school of thought.

15. In reply to some members' comments on recognition and the recognition of States, in particular, he explained that he had analysed that unilateral act because, in 2002, the Commission had asked him to do so and that decision reflected the Commission's wish to pause while considering how to proceed with its work. That particular unilateral act had been singled out in order to show what the general features of a unilateral act were, but the intention had not been to carry out a study on the recognition of States. That was why the report under consideration was essentially a reference document.

16. Many excellent works existed on the subject of recognition. There was no doubt that the nature, characteristics and legal effects of recognition varied according to its purpose. The criteria for and rules applying to the recognition of States or Governments were, or might be, different from those applicable to the recognition of belligerency, neutrality or insurrection or to declarations relating to territorial matters. Perhaps the report, which was confined to one form of recognition, had caused some confusion, but he had tried to avoid that by not including the complete legal theory on recognition and not referring to the many and, in other respects, most useful categories of *de jure* or *de facto* recognition, something that a few members of the Commission had regretted. Legal theory and international instruments, such as the resolution adopted by the Institute of International Law at its fortieth session,[2] did, however, refer to full or definitive recognition and to limited or temporary recognition.

17. The main purpose of the sixth report had been to follow the suggestions made by some members in 2002 and to show that the definition of unilateral acts of recognition *stricto sensu* might be similar to the draft definition studied by the Commission in previous sessions.

18. He was not sure that the investigation of unilateral acts one by one, the method proposed by some members, was the best way to proceed. Of course the topic must be considered in depth, and State practice had to be taken into account. A comparative study of the characteristics, nature and legal effects of unilateral acts was crucial and would be considered in future reports. The table recommended by some members might be useful in some respects, if elements taken from previous reports were used, if State practice in respect of unilateral acts was analysed and if an attempt was made to draw general conclusions.

19. The debate had shown that there were still considerable differences of opinion about the scope and even the purpose of the study. Since reference to unilateral legal acts *stricto sensu* might be restrictive and some Governments might demur, it had been suggested that the study should also cover other acts and conduct of States which might produce legal effects. If that were done, the scope of the topic would have to be widened to encompass conduct whereby a State accepted, or could accept, international legal obligations *vis-à-vis* one or more other States or even the international community as a whole. That would certainly have implications for his earlier work, which had disregarded various forms of conduct by States which were outside the framework of the planned codification work. State conduct, including omissions, could have major legal effects, and, as some members had suggested, those questions could probably be discussed at a later stage, hence the need to provide for a saving clause. The Working Group should consider the matter.

20. Other very important, substantive issues had been raised during the discussions, including the criteria for formulating acts of recognition, the discretionary nature of the act, the possibility of attaching conditions to it, the need to give further consideration to recognition, treating admission to the United Nations as an act of recognition and unilateral revocation or suspension of acts, especially acts of recognition.

21. It was generally held that recognition was a discretionary act. In addition, a unilateral act should not usually, in theory, be subject to conditions, for that would be tantamount to creating a treaty-based relationship, if the addressee agreed to the conditions in question, whereas the act of recognizing a State was a very special case and its characteristics were not always similar to those of other acts of recognition.

22. State practice seemed to indicate that States formulated acts of recognition in given circumstances, some of which were provided for by international law relating to the establishment of States, while others were more political in nature. Although it was true that an act subject to conditions implied the reaction of another party, a feature which deprived it of its unilateral character, it was equally true that that situation often occurred in practice. The question therefore deserved careful attention.

23. Collective recognition through a United Nations resolution had given rise to doubts. It had been accepted by some States, such as Spain and Sweden, for example, but not by others. Sometimes the admission of new members to the United Nations was not free from political considerations and the legal consequences could differ according to the way in which the practice was interpreted. In that connection, the admission of new States to the Organization in the 1990s had sometimes been highly controversial, a case in point being that of the Federal Republic of Yugoslavia.

24. Reference had also been made to difficulties arising out of the termination of unilateral acts in general and, in particular, whether a State could unilaterally revoke such an act. The conclusion had been reached that a State did not possess such arbitrary power. Revocation could be subject to limitations, and a restrictive approach taking account of circumstances and possible harm to third parties had to be adopted. If a State could revoke a unilateral act at any time, without giving any reasons, the *acta sunt servanda* rule and the good faith rule would be called into question.

[2] See *Annuaire de l'Institut de Droit International*, Brussels session, April 1936 (Paris, Pedone, 1936), pp. 300 *et seq*.

25. As far as the criteria which might be applicable to the recognition of a State were concerned, recognition was in theory not only a discretionary act of a State, but also an act which was not usually subject to restrictions, save in extreme circumstances (for example, when a Security Council resolution prohibited the recognition of a State, a Government or a particular situation).

26. Legal opinion on the Ihlen declaration[3] was divided; for some writers, it was a unilateral act, mainly of waiver, while others contended that it was a conventional act because it was a reply to a request from the Danish Government. He personally believed that the reasons for the declaration did not necessarily make it conventional. In the *Nuclear Tests* cases, the French declarations, which were usually regarded as a promise, had been made in response to proceedings instituted by certain countries which had believed that they were affected by French nuclear explosions in the South Pacific. ICJ had itself found that there was no denying the unilateral nature of those declarations or of the declaration as a whole, which must be regarded as a single legal act composed of several declarations.

27. As things stood, it was too early to decide on the form of the final product, given the divergence of opinions on the subject, although his work to date had been aimed at the drafting of a set of articles. It was necessary to meet the concerns of the members of the Commission and to find acceptable compromise solutions without a radical change of method. In that connection, he was looking forward to receiving the Commission's instructions.

28. State practice should unquestionably be investigated in greater depth, and he would be at pains to do so in his next report. In his future reports, he would also pay more attention to international precedents and legal theory. He intended to send all members of the Commission the outline of his seventh report so that they could express their opinions and give him a clearer idea of the direction his study should take.

29. Mr. Sreenivasa RAO said that, instead of sending the outline of his study to all members of the Commission, the Special Rapporteur should submit his observations to three or four colleagues or ask the Working Group chaired by Mr. Pellet to work with him.

Diplomatic protection[4] (*continued*)[*] (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,[5] A/CN.4/L.631)

[Agenda item 3]

Fourth report of the Special Rapporteur (*continued*)[**]

30. Mr. DUGARD (Special Rapporteur), introducing the addendum to his fourth report on diplomatic protection (A/CN.4/530 and Add.1), said that the Commission had completed the most important part of the work on diplomatic protection. It had sent draft articles on the diplomatic protection of corporations and shareholders (2764th meeting, para. 19) to the Drafting Committee and adopted the draft articles on the institution of diplomatic protection, the diplomatic protection of natural persons and the exhaustion of local remedies (2768th meeting, para. 38). One substantive issue still had to be considered: the diplomatic protection of crews of ships by the flag State. There was a division of opinion on the subject, both in the Commission and in the Sixth Committee, but in 2004 he would produce a draft article on it.

31. Three questions remained to be considered: the diplomatic protection of legal persons other than corporations, *lex specialis* to cater for bilateral investment treaties, and dual protection of an individual by an international organization and by a State. It was essential to the Commission's reputation that the second reading of the draft should be completed before the end of the current quinquennium.

32. As to *lex specialis*, which was covered in his draft article 21, there was no conflict between the document that Mr. Koskenniemi had prepared on the same subject for the Study Group on the Fragmentation of International Law and his own work. Many of the ideas advanced by Mr. Koskenniemi could even have been included in the addendum, and he thanked him for drawing his attention to the dictum of ITLOS in the *Southern Bluefin Tuna* case, in which the Tribunal had said that the principle of *lex specialis* was a general principle of law recognized in all legal systems and that, if the *lex specialis* contained dispute settlement provisions applicable to its content, the *lex specialis* prevailed over any similar provision in the *lex generalis*.

33. As was indicated in paragraph 106 of the report, foreign investment was largely protected by bilateral investment treaties, which provided two routes for the settlement of investment disputes. They could provide for the direct settlement of an investment dispute either between the investor and the host State before an *ad hoc* tribunal or a tribunal established by ICSID or by means of arbitration between the State of nationality of the investor (a corporation or an individual) and the host State. Where the dispute resolution procedures provided for in a bilateral investment treaty or by ICSID were invoked, customary law rules relating to diplomatic protection were excluded. Those procedures offered advantages to the foreign investor, as they avoided the political uncertainty inherent in the discretionary nature of diplomatic protection. ICJ had acknowledged the existence of such a special regime in the *Barcelona Traction* case.

34. Article 21 aimed to make it clear that the draft articles on the diplomatic protection of corporations and shareholders did not apply to the special regime provided for in bilateral and multilateral investment treaties. They served essentially the same function as article 55 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session[6] and reflected the maxim *lex specialis derogat*

[*] Resumed from the 2768th meeting.

[**] Resumed from the 2764th meeting.

[3] See 2770th meeting, footnote 8.

[4] 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.

[5] See footnote 1 above.

[6] See 2751st meeting, footnote 3.

legi generali. The application of *lex specialis* was justified by the fact that there was a clear inconsistency between the rules of customary international law on the diplomatic protection of corporate investment, which envisaged protection only at the discretion of the national State and only, subject to limited exceptions, in respect of the corporation itself, and the special regime for foreign investment established by special treaties, which conferred rights on the foreign investor, either as a corporation or as a shareholder, determinable by an international arbitration tribunal. That was why a provision along the lines of article 21 was indispensable in order to make it clear that there was a special regime for bilateral or multilateral agreements.

35. Recalling that the fourth report on diplomatic protection was devoted entirely to a particular species of legal person, the corporation, he introduced article 22, which applied the rules expounded in respect of corporations to other legal persons, allowing for the changes that must be made in the cases of other legal persons, depending upon their nature, aims and structure. It must be emphasized that the focus of attention in the draft articles should be on the corporation and that it was not possible to draft articles dealing with the diplomatic protection of each kind of legal person other than the corporation. The members of the Commission were well aware that legal persons could be created by municipal law and that there was no consistency or uniformity among legal systems in the conferment of legal personality. There was today a wide range of legal persons, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all those legal persons provided one explanation for the fact that writers on both public and private international law tended to focus their attention on the corporation. There was, however, another reason, which was that corporations engaged in foreign trade and investment. Thus, it was most often legal persons that were involved in investment disputes and that were most likely to request diplomatic protection. Other legal persons, of course, could require such protection. Several decisions of PCIJ stressed the fact that a commune or a university, for example, could have legal personality. There was no reason why a State should not protect a university if it was injured abroad, provided that it was entirely a private entity, since, in the case of a state-controlled university, it would be the State itself that was directly injured. Foundations, which were also private institutions, did good works abroad and should benefit from diplomatic protection.

36. The same applied to non-governmental organizations. Some authors did not agree, however, and considered that a non-governmental organization had an insufficient link with the State in which it was registered to allow the State to protect it. Thus, Doehring argued that the worldwide membership and activities of a non-governmental organization resulted in a situation in which an injury to it could not be seen as an injury to the State of registration.[7] That was an interesting line of argument which in his opinion paid too much attention to the *Nottebohm* judgment and too little to the *Barcelona Traction* judgment. It certainly illustrated the complexity of the topic of diplomatic protection in respect of legal persons other than corporations.

37. Partnership illustrated that complexity particularly well. In most legal systems, particularly common-law ones, partnerships were not legal persons. In some legal systems, however, they were endowed with legal personality. A partnership might thus be considered a legal person in one system but not in another, something which underlined the total lack of uniformity among States in their approach to conferring legal personality on entities.

38. He had given those examples in order to show that it would be impossible to draft distinct provisions to cover the diplomatic protection of the various kinds of legal persons. The only course was the one already adopted, namely, to focus attention on the corporation, the kind of institution that had been the subject of the decision by ICJ in *Barcelona Traction*, and then to draft a general clause extending to other legal persons *mutatis mutandis* the principles expounded in respect of corporations. That was what the provision in article 22 sought to achieve.

39. Most cases involving the diplomatic protection of legal persons other than corporations would be covered by draft article 17, which was currently before the Drafting Committee in the revised form set out in paragraph 122. The draft article had been extensively debated, but the Drafting Committee had adopted it provisionally. Under article 22, a State would have to prove some connection of the kind described in article 17 between itself and the injured legal person as a precondition for the exercise of diplomatic protection. The language of article 17 was wide enough to cover all types of legal persons, however different they might be in their activities, structure or purpose. Articles 18 and 19, which had been referred to the Drafting Committee and dealt with cases in which shareholders could be protected, would not apply to legal persons other than corporations, while article 20, dealing with the principle of continuous nationality, would apply. In other words, the provisions on diplomatic protection of corporations were being taken as the starting point and applied *mutatis mutandis* to other legal persons. The Commission had often expressed misgivings about the use of Latin maxims. In paragraph 123, he suggested an alternative article 22 in which the words *mutatis mutandis* were replaced by an equivalent but wordier formulation. He himself preferred the Latin phrase, which had the advantage of being more economical and more elegant, and he hoped that the Commission would agree with him.

40. Mr. KOSKENNIEMI said that, as currently drafted, the provision in article 21 dealt only with the protection of corporations and their shareholders. Special arrangements—local, bilateral or multilateral regimes—could well be concluded between States on diplomatic protection in general, however. He therefore wondered where in the draft convention such special regimes should be placed. On the face of it, they should appear at the end of the draft articles in a *lex specialis* clause covering all the kinds of arrangements that might be concluded between

[7] See K. Doehring, "Diplomatic protection of non-governmental organizations", M. Rama-Montaldo, ed., *El derecho internacional en un mundo en transformación:* liber amicorum *en homenaje al profesor Eduardo Jiménez de Aréchaga* (Montevideo, Fundación Cultura Universitaria, 1994), pp. 571–580.

States, and he asked whether the Special Rapporteur had any intention of coming up with a more general provision or whether the exception contained in article 21 was the only one that would appear in the draft convention.

41. Mr. DUGARD (Special Rapporteur) said that he had not considered the matter from the perspective of other forms of *lex specialis*, since in practice the main focus was on bilateral investment treaties. Mr. Koskenniemi was, however, correct in saying that there were other arrangements in which diplomatic protection was included and that it might be wiser to provide for a general *lex specialis* clause outside the chapter dealing exclusively with corporations. The emphasis must be on bilateral investment treaties, but the Commission could well broaden the scope. He hoped that the proposal might be revisited during the general debate, but there was no reason why it should not be approved and referred to the Drafting Committee for the amendment of article 21.

42. Mr. BROWNLIE, endorsing Mr. Koskenniemi's comment, said that he had some reservations about article 21 relating more to the commentary than to the provision itself. He felt uneasy when members of the Commission insisted on putting *lex specialis* provisions in all its texts, since the applicability of such provisions surely went without saying. *Lex specialis* was a general principle. Even if a *lex specialis* provision was included, there was no need to spend a lot of time cataloguing what were regarded as the situations producing *lex specialis*, and especially giving particular prominence to bilateral investment treaties. It was not the usual practice to spell out the cases of *lex specialis*. It would be much safer—as well as being the normal approach—simply to state the principle. Those members of the Commission who worked in the field of arbitration were aware that restrictions on diplomatic protection applied, *inter alia*, to the standards of conduct set out in bilateral investment treaties. It was extremely common for the parties to present arguments on the interpretation of various parts of a treaty, in cases of doubt, by referring to the principles of general international law that were applicable at the time of the conclusion of the treaty; that was an altogether standard way of interpreting treaties.

43. He was concerned that the emphatic language of the commentary might give rise to misunderstandings. That applied in particular to the penultimate sentence of paragraph 112 of the report, which contained the phrase "special regime for foreign investment". While it was generally true to say that the *lex specialis* envisaged by the Special Rapporteur clearly related to what might be termed the procedural regime, the phrase in question encompassed substantive provisions dealing with the standards of conduct of the State playing host to foreign investment. That suggested that there was a total divorce between customary international law and general international law as far as bilateral investment treaties were concerned. And that was not the case, either in principle or in the practice of arbitration. It was perfectly normal for teams of lawyers, whether representing the respondent State or the claimant, to bring in matters of general international law, and, if one team did so, the other automatically did the same. It might therefore be preferable to adopt more cautious language in the text of the commentary. It was unnecessary, since it was not common practice, to specify cases of *lex specialis.*

44. Mr. CHEE noted that the Special Rapporteur spoke of corporations in general. In order to clarify the thinking of the Commission, it might be advisable to define the nature of corporations, whether commercial or not.

45. Mr. NIEHAUS said that, in draft article 17, as revised, the criterion of the "analogous link" was too vague and would only complicate the granting of diplomatic protection. A distinction could be made between a corporation's *siège social* and administrative headquarters, but to speak of an "analogous link" with the State exercising the diplomatic protection gave the impression that reference was being made to the nationality of the shareholders, something that would complicate the concept of the nationality of the corporation. He asked the Special Rapporteur what his intention had been in proposing such wording, which might create additional difficulties.

46. Mr. DUGARD (Special Rapporteur), replying to Mr. Niehaus, said that the question had been debated at length during the consideration of the fourth report and that it would be inappropriate to reopen the debate in the context of the report currently being considered by the Commission. He therefore referred Mr. Niehaus to the summary records of the debate on the matter.

47. He reserved his position on the extremely pertinent comment by Mr. Chee, which related to a question that had already been dealt with, together with the other provisions relating to the nature of corporations. He believed that the question should be dealt with in the commentary rather than in the body of the draft article, but he would return to the matter in greater detail at a later stage.

48. Mr. Brownlie's comments were so substantial that they merited further reflection, and he reserved the right to provide a more detailed response at a later stage. He agreed with Mr. Brownlie that it might be unnecessary to include a *lex specialis* clause in the draft articles, since it was a general principle. That was for the Commission to determine, however. As for the commentary, he had dealt with the question of bilateral investment treaties in detail in order to emphasize the need for a provision of that kind. He had probably overstated the issue in suggesting, in paragraph 112, that customary international law was completely excluded, but there obviously existed circumstances in which it was not included. Mr. Brownlie's comments concerned the wording of the commentary to article 21, should it be adopted, but they should also be considered in the light of the fact that the Study Group on the Fragmentation of International Law was considering the question of *lex specialis*, thus enabling the Commission to debate a most important general principle, which applied to any draft articles it might prepare.

The meeting rose at 11.35 a.m.