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Summary record of the 2794th meeting

Topic:
Diplomatic protection

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77. As for draft article 26, he had no objection to the saving clause envisaged, or to a general saving clause, but any such clause should be carefully drafted so as to preserve the right of a State other than the State of nationality to invoke under international law the responsibility of the State in respect of a wrongful act.

78. Lastly, in relation to the assertion by Mr. Momtaz that, in cases where a Government paid the salary of an official of an international organization, the question of functional protection did not apply, he said that the question was not that simple. The position of an official ultimately depended on the agreement between the host State and the international organization. Most such agreements extended functional protection to their officials.

79. Mr. MOMTAZ said the crucial point was that an official was sometimes not only paid but also appointed by a member State. The question was whether the basis for functional protection was the immunity granted to the agent or his or her independence. In the *Reparation for Injuries* advisory opinion of 1949, ICJ had put forward an extremely broad definition of the word “agent”. More thought should be given to the issue.

The meeting rose at 1 p.m.

2794th MEETING

Thursday, 6 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Diplomatic protection¹ (continued) (A/CN.4/537, sect. B, A/CN.4/538,² A/CN.4/L.647 and Add.1)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. RODRÍGUEZ CEDEÑO, focusing his comments on article 26, said that it was very important to stress once again that a clear-cut distinction should be made between the various interpretations of the word “protection”, with their legal implications and different applicable regimes.

¹ For the text of articles 1 to 10 of the draft articles on diplomatic protection provisionally adopted by the Commission at its fifty-fourth and fifty-fifth sessions, see *Yearbook ... 2003*, vol. II (Part Two), pp. 34–35, para. 152.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

Those forms of protection had in common that they were exercised on behalf of the individual, but the applicable legal regimes and available remedies differed.

2. Diplomatic protection, as understood by the Commission, was basically the exercise of the right of the State of nationality of a company or its shareholders to lodge a complaint, in certain circumstances, on their behalf for an internationally wrongful act by another State, as clearly defined in article 1, which had been adopted. The legal regime applicable to the protection of human rights was much broader because it encompassed various regimes for the protection of persons who were in the territory of a State or who moved within that territory or to another State, either because of a situation of violence or for other reasons. Human rights norms also differed in that they were imprescriptible and could constitute peremptory norms of international law whose violation could give rise to action by the international community as a whole. Consequently, the legal interest was different. Under diplomatic protection, the exercise of protection was limited to the State of nationality of the injured person, although a State other than the State of nationality could also exercise protection in certain circumstances, whereas in the case of human rights protection the legal interest was much more far-reaching. Diplomatic protection and the protection of individuals in a human rights context also differed from protection in the context of diplomatic and consular law, which was also governed by specific rules, as several members of the Commission had pointed out in their comments.

3. The saving clause in article 26 was too broad and might give a State other than the State of nationality of the injured person the possibility of exercising diplomatic protection in a way that was relevant to the Commission. The Special Rapporteur cited several important examples with which he tried to demonstrate that a State could also protect its nationals under a number of international human rights instruments. In those instruments, however, the question of the State’s acceptance of the claim, which characterized the exercise of diplomatic protection, did not arise. A State party to those instruments acted within the framework of the functioning of the monitoring bodies. Thus, under article 41 of the International Covenant on Civil and Political Rights and article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a State which believed that another State was not giving effect to the provisions of an instrument could bring the matter to the attention of a monitoring body in accordance with the rules of procedure generally provided for in those texts. Such actions were part of treaty relations between the States parties to a treaty. Article 26 merely referred, without further detail, to an internationally wrongful act; that could open up other possibilities which might well be incompatible with the diplomatic protection mechanism being discussed by the Commission.

4. He was not certain that it was necessary to include a saving clause along those lines, but he would have no objection if most of the members deemed it appropriate. The two systems of protection did not have to be linked, although they could supplement one another to some extent and even coincide, also to some extent, when their

purpose was the protection of the individual. The State could try to exercise that protection at any time regardless of any other rule, and that also held for the individual concerned. Those were thus two additional procedures, both permitted by international law. The fact remained, however, that such a provision must be clearly drafted to avoid any misinterpretation and must be explained in the commentary to prevent any confusion as to the States entitled to exercise diplomatic protection. It was important to include a more detailed reference to norms whose violation could constitute an internationally wrongful act, namely international human rights norms.

5. Mr. GALICKI said that, as usual, the ideas presented by the Special Rapporteur in his fifth report (A/CN.4/538) were based on a thorough knowledge of the subject and an in-depth analysis of specific problems. With regard to the chapter of the report entitled "Protection by an international organization and diplomatic protection", which contained proposals for three new articles, namely articles 23, 24 and 25, he noted two main aspects of the Special Rapporteur's approach. Firstly, as seen in the chapter's title, the approach was based on a distinction between, or even a counterpositioning of, two kinds of protection: "protection by an international organization" and "diplomatic protection". Secondly, all three proposed articles were presented in the form of a "without prejudice" clause. Although that formulation might be applicable to the situations described in articles 23 and 24, he had the impression that it did not go well with the subject of article 25.

6. Article 23 made a useful distinction between "functional protection" as exercised by international organizations and "diplomatic protection" as exercised by States. Basing that distinction on the 1949 advisory opinion of ICJ in the *Reparation for Injuries* case, the Special Rapporteur rightly pointed out that, despite certain similarities, "protection of an agent by an international organization is inherently different from diplomatic protection" (paragraph 18 of the report). Furthermore, in the case of "functional protection" exercised by international organizations, he stressed (para. 17) that there were many unanswered or not fully answered questions. One of those questions was especially interesting and dealt with the possibility of exercising functional protection against the State of nationality of the injured agent. Although ICJ had ruled out that possibility in the advisory opinion in the *Reparation for Injuries* case, other views had also been expressed, including by Judge Krylof in his dissenting opinion (pp. 218–219). In actual fact, at issue was the need to distinguish between functional protection and diplomatic protection, something that was not always easy to do. Although he fully agreed with the opinion expressed earlier by the Commission and by the Sixth Committee that the protection of an agent by an international organization did not belong in the draft articles on diplomatic protection, he thought that article 23 as proposed by the Special Rapporteur should be retained because it underscored the existence of two different areas of international protection which, although often very similar, should remain separate and should be governed by different legal rules and principles.

7. The idea set forth in article 24, namely the right of a State to exercise diplomatic protection against an international organization, might give rise to a number of questions. First of all, in stating that idea, the Special Rapporteur automatically qualified that State activity as belonging under diplomatic protection, although it was exercised not against a State, but against an international organization. He wondered why, at the same time, the Special Rapporteur said that the articles to be drafted by the Commission were "without prejudice" to the said right of the State. He had difficulty following the Special Rapporteur's line of reasoning when he stressed in paragraph 20 of the report that "the present draft articles are mainly concerned with diplomatic protection from the perspective of the claimant State ... and not from that of the defendant State". In his opinion, that point significantly weakened the Special Rapporteur's suggestion that a "without prejudice" clause should be used at that particular place in article 24.

8. In any case, he was not fully convinced that the draft articles should apply only to diplomatic protection against a State, not to diplomatic protection against non-State entities. In his view, it remained diplomatic protection in both cases.

9. With regard to article 25, he shared, on the whole, Mr. Gaja's opinion that the "without prejudice" clause was completely inappropriate as it stood. If the Commission found sufficient reason to retain the substance of the article, it should reformulate it to a significant extent. Such a reformulation should stress the right of a State to exercise diplomatic protection in respect of all its nationals, without excluding, limiting or making conditional such protection in respect of persons who might be simultaneously entitled to functional protection by an international organization. In any case, a State could not be deprived of or limited in its inherent right to exercise its diplomatic protection on the grounds that an international organization was performing functional protection in respect of the same person. The passage in square brackets in article 25 was therefore unacceptable, since it was a confirmation of the priority given to functional protection by international organizations. There could, however, be a parallel entitlement by a State and an international organization to exercise their protection in respect of the same person. Such a situation might be additionally complicated in cases where an organization wished to exercise functional protection in respect of its agent against that agent's State of nationality. The priority of such rights, and the competing claims based on them, seemed to be an open question: it had not been decided in a convincing way by existing law or practice. The "pragmatic approach" adopted by the Special Rapporteur constituted a positive compromise, since it left the question of priority to the "goodwill and common sense" of the parties concerned "to reconcile competing claims by negotiation and agreement" (paragraph 36 of the report).

10. In his view, there was no need to include article 26 in draft articles on diplomatic protection, since, although both were directed at the preservation and protection of the rights of individuals, diplomatic protection and international human rights protection were based on completely different legal backgrounds and used different legal instruments and procedures. Diplomatic protection

was based on customary international law, whereas international human rights protection was based on the obligations deriving from international treaties. That restricted the scope of State action, which could be exercised only to the extent provided for by such treaties. The right to exercise diplomatic protection belonged exclusively to States and depended exclusively on them, whereas the rights and freedoms protected by international human rights law belonged to individuals and could be claimed internationally not only by States, but also—and principally—by the persons concerned. Although it might sometimes happen that, in a given situation, a given State had a choice between bringing a claim either in exercise of its right of diplomatic protection or on the basis of the appropriate human rights treaty, the differences between the two systems were so obvious that they did not require a specific article, even in the form of a saving clause.

11. Mr. CHEE congratulated the Special Rapporteur on the quality of the report. On the whole, he endorsed the Special Rapporteur's approach in defining the scope of the draft articles in his introduction to the report, where he identified matters that should not be included in the draft articles. With regard to the delegation by one State to another of the right to exercise diplomatic protection, and the transfer of claims, he noted that such practices were not unknown to the Commission. It might be, for example, that a State which no longer had diplomatic relations or was in a state of war would delegate the right to protect its nationals to a neutral State.

12. He endorsed the Special Rapporteur's comments on articles 23, 24 and 25 for the reasons given in paragraph 14 of the report. He had greatly enjoyed the Special Rapporteur's analysis of the ICJ advisory opinion on *Reparation for Injuries*. He was in favour of deleting the passage in square brackets in article 25, which seemed to give priority to functional protection by international organizations. He endorsed the Special Rapporteur's conclusion with regard to cases in which there were competing claims between functional protection and diplomatic protection. As for the issue covered by article 26, he believed that the matter related rather to article 48 of the draft articles on responsibility of States for internationally wrongful acts.³ He saw no harm in its inclusion, however, in order to emphasize the State's *erga omnes* obligations *vis-à-vis* the international community. Lastly, he endorsed the alternative formulation proposed for article 21.

13. Mr. KEMICHA said that he was surprised that several proposals had been dismissed out of hand simply because the Sixth Committee had requested that the study should be completed as quickly as possible and, in any case, before the end of the current quinquennium. Without wishing to disparage in any way the excellent work done by the Special Rapporteur, he considered that there was a strong case for Mr. Pellet's proposal of a study of the effects of exercising diplomatic protection. The proposal had deserved a better reception, particularly since no one had denied its force; any reservations had been concerned rather with the timing. Moreover, some elements of the fifth report could usefully be incorporated in the outline proposed for the chapters on the consequences of ordinary

law and on the effects on other forms of the implementation of international responsibility. In his view, such an addition, with its obvious methodological benefits, would have the worthwhile result of putting the finishing touches to an already remarkable piece of work rather than allowing it to end in a series of saving clauses.

14. He found articles 23 to 26 satisfactory, subject to some adjustments proposed by other members. His understanding was that the Commission was engaged in collective work and that it was not necessarily bound by a rigid timetable. For that reason, he asked that the debate should remain open.

15. Mr. YAMADA supported the Special Rapporteur's view, which was shared by the majority of Member States in the Sixth Committee, that, since all the subjects traditionally belonging to the field of diplomatic protection had been covered, the Commission should conclude its study as soon as possible and, in any case, before the end of the current quinquennium.

16. With regard to articles 23 to 25, he expressed gratitude to the Special Rapporteur for his in-depth analysis of the relationship between functional protection by international organizations of their agents and diplomatic protection. The chapter of the report on protection by an international organization and diplomatic protection was extremely informative and useful. The proposed articles were all saving clauses and, as such, might seem rather harmless. If they were to be incorporated as draft articles, however, they would certainly have some legal consequences and accordingly called for careful examination.

17. Article 24 had nothing to do with the relationship between functional protection and diplomatic protection and he was somewhat perplexed at its location in that chapter. It dealt with the case in which a State of nationality presented a claim against a wrongdoing international organization. It referred to the "right of a State to exercise diplomatic protection against an international organization". Such action by a State against an international organization, however, did not constitute diplomatic protection. It was outside the definition and scope of the diplomatic protection on which the Commission had agreed in article 1. It was a subject more properly dealt with in the context of the topic of responsibility of international organizations. He would therefore prefer not to retain the article.

18. With regard to articles 23 and 25, his understanding was that the Special Rapporteur was prepared to dispense with article 23, but wished to keep article 25, without the sentence in square brackets. He himself supported the deletion of article 23. Functional protection should be excluded from the current work on diplomatic protection and should be the object of a separate, in-depth study. He also supported the deletion of the bracketed phrase in article 25, since it gave priority to functional protection over diplomatic protection. Such rules did not exist in current customary law. The legal consequences of retaining only article 25 while deleting article 23 should also be considered. Those examining the Commission's *travaux préparatoires* might conclude that the Commission gave priority to diplomatic protection over functional

³ See 2792nd meeting, footnote 5.

protection. The ICJ advisory opinion on *Reparation for Injuries* had not specified the criteria for or the means of an adjustment between the functional protection exercised by the United Nations and the diplomatic protection that could be exercised by the State of nationality of the injured person. In the absence of clear rules defining the relationship between the two, it would be unwise to try to formulate draft articles on the subject. He would accordingly prefer that article 25 should not be retained either, although he recognized the practical importance of the relationship between diplomatic protection and functional protection. At the same time, there were certain aspects of the issue that were not contentious. One was that there existed an agreement to entrust the parties concerned with the reconciliation of competing claims through negotiation and agreement. Another was the principle that there should be no duplication of payment of damages by the defendant State. Although it was not appropriate to formulate draft articles on such matters, the Special Rapporteur might consider including them in the commentary.

19. He was not strongly opposed to article 26 in principle, although he felt that, as drafted, it was rather ambiguous. He wondered what right of a State or an individual the Special Rapporteur had in mind. Moreover, if the Commission was truly concerned about human rights, why not say so explicitly? The Special Rapporteur seemed to wish to safeguard the right of any State or individual—no matter what nationality he or she might or might not have—to invoke the procedures for the human rights protection prescribed in human rights treaties. Such treaties formed an independent corpus of international law. They stood on their own. He found it difficult to see how a draft article on diplomatic protection could prejudice human rights treaties. Having said that, he would not object to an article on human rights if it was more clearly spelt out.

20. He understood that the Special Rapporteur favoured the alternative formulation for article 21 rather than article 26. The alternative formulation, however, posed some conceptual problems. The original article 21 was the *lex specialis* clause relating to special arrangements for foreign investment dispute settlement. Such special arrangements were a *lex specialis* of diplomatic protection. Yet the Special Rapporteur had introduced other arrangements, in particular human rights treaties, which did not constitute a *lex specialis* of diplomatic protection. Mixing heterogeneous elements in a single article only created conceptual confusion. He would prefer to see a general *lex specialis* clause in the draft articles, similar to article 55 of the draft articles on State responsibility,⁴ with a text along the following lines: “These articles do not apply where and to the extent that the content or the exercise of diplomatic protection is governed by special rules of international law”. If it was necessary to have an article on human rights treaties, such an article should be separate from the *lex specialis* clause.

21. Mr. PELLET said that he did not understand why the provisions under which an international investment mechanism could be directly invoked should be dealt with any differently than those relating to human rights.

⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26–30 at p. 30, para. 76.

Diplomatic protection was one way that a State could secure respect for one of the rights which it enjoyed through its nationals and which had been violated by a State in respect of the individual concerned. Whether it was human rights or investments that were involved, the mechanisms that allowed for direct referral to a court or quasi-judicial body had the same purpose, which was in fact to bypass diplomatic protection. Apart from a human rightist ideology, which he did not favour in a legal context, he saw no intellectual, logical or technical justification for the position taken by Ms. Escameia and Mr. Yamada, which involved making a special case out of human rights.

22. Ms. ESCARAMEIA said that she agreed with Mr. Yamada about the distinction between *lex specialis* and human rights law. The Commission had studied bilateral investment treaties from the standpoint of the protection they afforded investors. They thus appeared as a *lex specialis* that might preclude diplomatic protection. When speaking of human rights, however, one spoke not of special rules, but of *lex generalis*. Human rights did not derive from treaties, contrary to what Mr. Galicki had said, but from customary international law. The Universal Declaration of Human Rights⁵ was not a treaty but it had the force of law and it would be very hard for a State that was not party to the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to prove that it was not bound, as a State, to respect those Conventions. That being said, they were only procedural mechanisms for the implementation of those rights. Her concern lay in making sure that it was not the case that those mechanisms became operational only if all others were not. That was precisely what happened with bilateral investment treaty mechanisms: they were triggered only if other mechanisms were not. That was not the case with human rights and that was why it was important that article 26 should be included in the draft, for it provided that human rights mechanisms would apply, regardless of the circumstances. Of course, it could be said that such mechanisms applied only to the parties to a treaty or only under certain previously agreed conditions. In her view, however, human rights procedural law was not customary law, but substantive law. That was why she agreed with Mr. Yamada that human rights constituted a separate category from bilateral investment treaties.

23. Mr. PELLET said that he thought that substantive issues were being confused with procedural ones. In terms of substance, there were international rules designed to protect human rights that were also considered to be general rules of customary law that all States must respect. However, he did not see why the same would not also hold true in the case of investments. There were general rules governing international trade and international financial relations: intellectually, they operated in the same way. At the end of her statement, Ms. Escameia had conceded that there were mechanisms that made it possible to ensure that those rules were observed. Those were specific mechanisms that could be triggered only if a treaty existed. The distinction between human rights and

⁵ General Assembly resolution 217 A (III) of 10 December 1948.

international law was artificial and was based solely on a confusion of substance with procedure.

24. Mr. YAMADA, referring to the settlement of disputes relating to foreign investment and human rights, said that bilateral investment treaties and the mechanisms of ICSID were specifically designed to modify, or more precisely, not to follow the traditional mechanism of diplomatic protection. In that sense, they constituted a *lex specialis*. In his view, however, human rights instruments were entirely different and constituted an important corpus of international law. To consider them to be special rules where diplomatic protection was concerned would be to weaken them.

25. Mr. ECONOMIDES said that Mr. Pellet was right about the substance of the matter. What was in fact important was that any remedy exercised under an international treaty by a State (national or non-national) or by an individual to obtain reparation for an injury suffered by an individual following an internationally wrongful act was necessarily a *lex specialis* in relation to diplomatic protection. Diplomatic protection was an ancient customary institution that did not take precedence over special procedures existing in international law, which were much faster and more focused. Moreover, international treaties always took precedence over custom or general law. A treaty was always a *lex specialis*, even if it was of a very general type, as in the case of human rights treaties. Thus, if diplomatic protection was compared with all international remedies having the same purpose, the remedies exercised under specific treaties always constituted a *lex specialis vis-à-vis* diplomatic protection.

26. Mr. KOSKENNIEMI said that he, too, was surprised at the distinction that Mr. Yamada had drawn between bilateral investment treaties and human rights instruments. He fully shared the view of Mr. Pellet. Special procedures in the economic field were always dealt with in the same way as such procedures in other fields, such as the law of the sea or human rights. The commentary to article 55 of the draft articles on State responsibility drew a parallel between two types of *lex specialis*, one relating to certain types of remedy and reparation of WTO and the other to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The fact that a human rights mechanism was termed a special rule did not make it any less important. In drafting *lex specialis* clauses, it was precisely that kind of mechanism that the Commission had had in mind. The question of special rules was extremely complex and could not really be dealt with from the standpoint of substance, but only in terms of procedure. That was why procedures in the areas of human rights, economic rights, the law of the sea and humanitarian law had all been designated as *lex specialis*. If the Commission wished to include a *lex specialis* clause in the draft articles, there was no reason whatsoever to differentiate between the various types of mechanisms in terms of their end. To say that an area of law was a *lex specialis* did not mean that it should be considered less important than other areas. In fact, the opposite was true. The *lex specialis* would apply while the *lex generalis* vanished into the background.

27. Mr. BROWNLIE said that article 26 was a source of considerable distraction; that distraction, however, was neither useful nor entertaining. The content of article 26 was self-evident and its deletion would not adversely affect the text. One could in fact argue, as Mr. Yamada had done, that the very incorporation of a saving clause made it look like the human rights elements were more vulnerable than they really were. Moreover, the psychology of saving clauses could act against them. It was absurd if things had reached the point where Commission members' attachment to human rights should be judged in terms of their position on article 26. In fact, anything drafted by the Commission was open to saving clauses. It made much better sense to deal with some of those questions in the commentary, perhaps to article 1. The normative significance of a loosely drafted saving clause could be exaggerated and different people could give it different weights. That was a source of ambiguity that the Commission did not need.

28. Ms. ESCARAMEIA said that her concerns were quite concrete. The types of special arrangements that she was talking about, especially bilateral arrangements, normally precluded other arrangements. As a rule, the parties agreed that they would not use other mechanisms. In the case of human rights, however, the situation was different. Such agreements between parties did not exist and it was impossible to know whether recourse to other mechanisms was precluded or not. That could lead to divergences of view as to whether a country exercising diplomatic protection in respect of a national could also make use of human rights mechanisms. Could other countries or individuals make use of them? No means of solving the problem existed. Opinions might have been stated on the subject, but there were no treaties that solved the problem. The question that arose was whether such mechanisms precluded others and not whether the question was one of *lex specialis* or *lex generalis*. It was therefore important to say clearly that human rights mechanisms were not precluded by the mechanisms of diplomatic protection. That would clarify matters and that was why it was better to retain article 26.

29. Mr. CANDIOTI said that article 23, which had the advantage of defining the limits between functional protection and diplomatic protection in the classic sense, was useful. So long as the work of the Commission on the responsibility of international organizations had not advanced any further, it would be premature to decide at present whether the question of diplomatic protection should be considered in that framework or should constitute a separate topic. In any case, it would seem that functional protection, or the right of an international organization to bring a claim for direct injury caused to it in the person of its agent, was no different from diplomatic protection. Article 24 was another useful saving clause, although that did not preclude consideration of the problem in the context of the responsibility of international organizations or in a separate study. Article 25 was acceptable if the bracketed phrase was deleted, for it would seem premature to provide for such a reciprocal exclusion between the diplomatic protection exercised by a State in respect of a national who was also the agent of an international organization and functional protection, if functional protection was not more clearly defined.

30. Article 26, which provided for the possibility of resorting to other mechanisms to protect the injured person, could be retained, in accordance with the decision taken by the Commission in 2003 as reflected in the report on the work of the Commission's fifty-fifth session.⁶ He would still prefer the alternative version of article 21 without the phrase in brackets. It should be noted in the commentary that, barring any agreement to the contrary, there was no principle of priority or exclusion between other mechanisms of protection and diplomatic protection; in other words, that the State of nationality could, all other conditions being met, exercise diplomatic protection even if other remedies had not been exhausted.

31. Lastly, he believed that the Commission should refer articles 23 to 26, together with the alternative version of article 21, to the Drafting Committee. Like the Special Rapporteur, he thought that it was necessary to complete the first reading of the draft articles at the current session in order to conclude the work on the topic during the current quinquennium.

32. Mr. MANSFIELD, summarizing his positions on the issues dealt with in sections A to D of the report, said that he agreed with the Special Rapporteur that the question of diplomatic protection by an administering State could be left aside, as could the question of the delegation of the right of diplomatic protection. On the latter point, the Commission might note that the delegation of the right of diplomatic and consular protection under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, which was not the delegation of the right of diplomatic protection in the strict sense, was common practice. He could also agree to a draft article spelling out the need for the consent of the State in whose territory such protection was exercised. No special rules were required to deal with the transfer of claims or subrogation, although those were important questions on which the Commission could have done useful work if it had taken them up earlier. However, lines must be drawn somewhere and the Sixth Committee had clearly expressed itself on the need to bring the work to a rapid conclusion.

33. With regard to articles 23 to 25, he said that, while article 23 could be justified by the fact that it stated that the Commission was not attempting to deal with functional protection in the articles, the same case could not be made for article 24 or article 25 without the phrase in brackets, and those articles should be deleted. Lastly, with regard to the issue dealt with in the following chapter (human rights, diplomatic protection and a general saving clause), he believed that a saving clause would be useful; at the very least, the matter could be dealt with in the commentaries. It would be up to the Drafting Committee to decide whether that clause should take the form of one or two articles.

34. Mr. BROWNLIE said that he disagreed with Mr. Candiotti and Mr. Mansfield as to the usefulness of articles 23 to 26, which trespassed on the mandate of other special rapporteurs. He was therefore opposed to referring those

articles to the Drafting Committee without providing clear guidance.

35. Mr. CANDIOTTI said that he recommended referring the articles to the Drafting Committee because that would make it possible to define the scope of diplomatic protection more precisely.

36. Mr. FOMBA said the question was whether the report dealt with the whole topic and nothing but the topic. The Commission and the Sixth Committee had apparently answered that question in the affirmative, but, according to certain opposing viewpoints, particularly that of Mr. Pellet, there were gaps in the boundary lines around the topic. He himself believed that the Commission should deal with certain important issues such as the "clean hands" doctrine and, particularly, the legal consequences of diplomatic protection. If the majority of members of the Commission thought that in order to meet the Sixth Committee's expectations the current structure should be retained, he could go along with that, but he also thought that the limitations of a draft focusing on the conditions for the exercise of diplomatic protection would quickly become apparent. It seemed to him that an approach based on, for example, a careful analysis of customary international law, a clear definition of the analytical framework and a diagnosis of the real problems represented by the exercise of diplomatic protection would lead to good results. He had no firm opinion on whether the structure of articles 23 and 26 should be retained.

37. Mr. SEPÚLVEDA said that he appreciated the Special Rapporteur's report for its quality and that it was important to put forward a range of options for each legal situation, as the debate over the previous few days had shown. He supported the idea of rapidly completing the study of the topic, the main points of which had matured sufficiently. The Commission could thereby demonstrate its competence and effectiveness by submitting well-made and tangible results within the established time limit.

38. Like the Special Rapporteur and other members of the Commission, he thought that there was no reason to deal with the question of diplomatic protection of persons living in a territory controlled, occupied or administered by a State or an international organization because the type of law applicable in each situation had to be determined: was it the law of war or international humanitarian law or the right to diplomatic protection? He was also not in favour of drafting rules on the delegation of the right to exercise diplomatic protection, as there was no adequate legal foundation for the codification of that question. He was likewise opposed, but for different reasons, to the codification of rules relating to the transfer from one person to another of a claim to diplomatic protection, since it was obvious that nationality did not suffice to justify such a transfer.

39. The drawbacks of saving clauses such as articles 23 to 25 had been exposed during the debate; it would be preferable, as the Special Rapporteur proposed, to leave the codification of such matters to the text on the responsibility of international organizations. Those articles should not be referred to the Drafting Committee until they had been considered as to substance in plenary. The saving

⁶ *Yearbook ... 2003*, vol. II (Part Two), p. 33, para. 139.

clause in article 26 was to be found in a better worded version in the articles on responsibility of States for internationally wrongful acts. The right to invoke the responsibility of a State other than the State of nationality could be exercised only in the event of a serious breach of a rule of international law. Article 26 contributed no added value, but, on the contrary, was likely to create confusion. As had been said during the debate, the legal basis for diplomatic protection was different from that of human rights instruments and the two areas had different procedures. The alternative proposed for article 21 was unnecessary. Bilateral investment treaties usually stipulated that an investor who claimed diplomatic protection from his State could not at the same time make use of the international arbitration measures provided for in the treaty, just as he could not request arbitration after having gone to the local courts. The two remedies were mutually exclusive.

40. Mr. MANSFIELD, referring to his position on the saving clauses, said that it was true that saving clauses were a difficult problem, which was why some preferred as a matter of principle to deal with the issues in commentaries. That had not been the Commission's practice, however, and it had to decide which matters needed to be the subject of a saving clause. He thought that there was a case for retaining article 23, but that it would be preferable to delete article 24 and article 25 which, without the bracketed part, was no longer justified. As to article 26, his view was that a saving clause on the subject to which it referred would be useful and that it could be left to the Drafting Committee to find appropriate wording.

41. Mr. DUGARD (Special Rapporteur), summing up the discussion on the first two chapters of his report and on what he had described as the "negative" section, in that it contained provisions that should not, in his opinion, be included in the draft articles, pointed out that the majority of the members of the Commission were in favour of limiting the study to its present parameters and that several of them had felt that an effort should be made to complete the draft articles during the current quinquennium.

42. Ms. Escameia had pointed out that the protection exercised by international organizations was not always the same as functional protection. Since the draft articles focused on States and not international organizations, the Special Rapporteur believed that it was preferable not to deal with that distinction. As for the provision of the Treaty on European Union (Maastricht Treaty) cited in paragraph 8 of the report, some members had expressed the view that a State could not delegate the right of diplomatic protection without the consent of the respondent State. That seemed to be a statement of the obvious which was superfluous.

43. With regard to the two suggestions by Mr. Pellet, he said that the "clean hands" doctrine was generally raised in the context of the admissibility of claims, as Mr. Brownlie had indicated. However, he did not think that it should be included in the draft articles. The question of the consequences of the exercise of diplomatic protection was covered to some extent by the articles on responsibility of States for internationally wrongful acts. It would therefore be preferable not to go into that matter.

44. He noted that the majority of the members of the Commission considered that articles 23 to 25 should not be included in the draft articles; that was particularly the case with articles 24 and 25, some members having stated their support for article 23. For his part, he would prefer to exclude articles 24 and 25 and to deal with the issues raised in article 23 in the commentary. He therefore proposed that the three articles should not be referred to the Drafting Committee.

45. Article 26 had received strong support from certain members of the Commission, but it had also given rise to some objections. Some felt that the wording of article 21 which the Commission had adopted the year before was preferable. He therefore suggested that article 26 should be referred to the Drafting Committee for consideration in conjunction with article 21.

46. Mr. PELLET said he deplored the fact that the Commission's wish to respect the timetable it had set itself should take precedence over a desire to carry out an in-depth review of the law. He was likewise a little disappointed at the cavalier treatment given by the Special Rapporteur to the question of "clean hands". Contrary to what the Special Rapporteur had said, the matter was the subject of settled case law, and he rejected the idea that there was only one precedent. If the Special Rapporteur refused to devote a provision to that question, it should be referred to in the commentary.

47. With regard to the legal consequences of diplomatic protection, he regretted that the only reason given for not including it in the draft articles was lack of time. If the Commission wished to complete its consideration of the draft on first reading at the current session, he would suggest that it should concern itself with the question after the adoption of the draft articles on first reading, taking its cue from the study on nationality in relation to the succession of States. He insisted that the matter must be considered because it would be intellectually untenable to base its exclusion on lack of time.

48. As to articles 23 to 25, he said he would certainly not press for articles 24 and 25 to be retained, but it might have been worthwhile to think about a general saving clause on the topic's relationship with that of international organizations; in fact, it might be necessary to specify in the title that the topic was diplomatic protection as exercised by a State. Lastly, with regard to the referral of article 26 and article 21 to the Drafting Committee, he wished to receive assurances that the Committee would try to combine the two provisions and not retain them both.

49. Mr. BROWNLIE said that he was in favour of excluding articles 23 to 25, while article 26 could be revised and combined with article 21.

50. Mr. ECONOMIDES said that he shared the Special Rapporteur's view about article 26 and article 21, which he presented as an alternative. Like Mr. Pellet, he thought that the two provisions should be considered together.

51. He was likewise in favour of deleting articles 24 and 25, but not article 23, which seemed to have received sufficient support. That provision set out the important idea

that, in addition to diplomatic protection, functional protection also existed. He accordingly requested that article 23 should be referred to the Drafting Committee, which would decide whether it should be retained or whether the matter should be dealt with in the commentary.

52. Mr. GALICKI said that, like Mr. Economides, he was in favour of retaining article 23, which emphasized the existence of another system of protection.

53. Mr. SEPÚLVEDA said that he endorsed the idea of referring articles 26 and 21 to the Drafting Committee together, but that the Committee must be given guidance on how to proceed. He proposed that the Chairperson of the Commission should be given that task.

54. Mr. MANSFIELD said that he was in favour of retaining article 23.

55. Ms. XUE said that, if the purpose of article 23 was to indicate that diplomatic protection did not cover functional protection, the article should be included in the general part of the draft articles, since it dealt with the scope of the topic. Article 1, however, already stated that the draft covered relations between States, to the exclusion of relations between States and international organizations or between international organizations. Moreover, the words “without prejudice” were not appropriate because, in practice, there could indeed be prejudice. Consideration should be given to that aspect of the matter before article 23 was referred to the Drafting Committee.

56. Mr. CANDIOTI said that he was in favour of referring article 23 to the Drafting Committee because it was necessary to have a better understanding of the nature of diplomatic protection and to distinguish it from other types of protection.

57. He agreed with Mr. Pellet that it would be useful to mention the legal consequences of diplomatic protection—for example, in the introduction—and indicate that it was one way of giving effect to international responsibility. The matter should be dealt with either in the introduction or in the commentary, if only for the sake of consistency with the Commission’s earlier work.

58. Mr. PELLET said that he did not agree with Mr. Economides’s proposal. He did not understand why article 23, the provision that was least relevant to the topic, should be retained.

59. Mr. MOMTAZ said that, like Ms. Xue, he thought that the issue in article 23 related to the scope of the draft articles, which was already defined in article 1. He therefore agreed with Mr. Pellet’s view that there was no need to refer to it in the draft articles.

60. Mr. CHEE said that he agreed with the position taken by Mr. Economides on article 23.

61. Mr. DUGARD (Special Rapporteur), replying to Mr. Pellet, said that he was prepared to give further consideration to the possible inclusion of a provision on the “clean hands” doctrine. As to the consequences of diplomatic protection, he had had the impression that the

Commission was not interested in taking up the matter, but he was prepared to accept the proposal by Mr. Candiotti.

62. Since opinions seemed to be very divided on article 23, he proposed that the Commission should vote on it.

63. Mr. BROWNLIE asked why the Special Rapporteur had reversed his position: if the “clean hands” doctrine had nothing to do with the topic under consideration, he saw no reason why a provision should be devoted to it.

64. Mr. DUGARD (Special Rapporteur) explained that he had not proposed to devote a provision to the subject, but he was prepared to think about the matter.

65. The CHAIRPERSON suggested that, if there was no objection, articles 24 and 25 should be excluded from the topic.

It was so decided.

66. The CHAIRPERSON said that, if he heard no objection, he would take it that article 26 should be referred to the Drafting Committee for consideration in conjunction with article 21.

It was so decided.

67. The CHAIRPERSON invited the Commission to vote by show of hands on whether article 23 should be referred to the Drafting Committee.

By a vote of 16 to 9, the Commission decided not to refer article 23 to the Drafting Committee.

68. The CHAIRPERSON suggested that he might hold informal consultations on the questions of “clean hands” and the consequences of diplomatic protection to determine whether the Commission should concern itself with them. If he heard no objection, he would take it that the Commission wished him to do so.

It was so decided.

The meeting rose at 1 p.m.

2795th MEETING

Friday, 7 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.
