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A/CN.4/3260

Summary record of the 3260th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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international organizations' constituent instruments. He agreed *grosso modo* with the Special Rapporteur that article 5 of the 1969 Vienna Convention confirmed the applicability of articles 31 and 32 to the interpretation of the constituent instruments of international organizations, without prejudice to the relevant rules of the organization. The definition of subsequent agreements and subsequent practice incorporated in draft conclusion 4, provisionally adopted by the Commission at its sixty-fifth session,¹³⁸ clearly delineated three separate means of interpretation of treaties. However, there was some inconsistency in the way the Special Rapporteur applied them to the interpretation of the constituent instruments of international organizations. In one instance, for example, a General Assembly resolution was deemed to constitute a subsequent agreement under article 31, paragraph 3 (a), while another General Assembly resolution was categorized as subsequent practice under article 31, paragraph 3 (b), or article 32. The same discrepancy showed up in draft conclusion 11, paragraph 2.

48. The delimitation of the scope of the third report, in paragraphs 13 to 18, seemed somewhat artificial. In paragraph 13, the Special Rapporteur said that the interpretation of decisions by organs of international organizations was not within the scope of the report, yet in paragraph 15, he announced that the effect of such decisions was to be considered. Yet how could the act of interpretation be separated from its effect? Since the 1990s, for example, the Security Council had evolved towards a broader interpretation of a "threat to peace" than in the past. That constituted an act of interpretation of the Charter of the United Nations by an internal organ of the United Nations and could be seen as subsequent practice. Similarly, organs of international organizations often adopted decisions or recommendations under their constituent instrument, but it would be difficult to determine which of those acts should be excluded from, or included in, the scope of the topic.

49. Despite the Special Rapporteur's assurances to the contrary, the third report seemed to deal with the question of whether the manner in which a resolution was adopted by an international organization's plenary organ had any bearing on the resolution's value with respect to the interpretation of the organization's constituent instrument. In paragraph 18, the Special Rapporteur said that the report was not concerned with the decisions of conferences of States parties, yet in paragraph 60, he admitted to the difficulty in determining whether States parties to the constituent instrument of an organization acted in that capacity or in their capacity as members of a plenary organ of the organization.

50. The slight variations in terminology in relation to practice in paragraphs 27, 30, 50, 52, 53 and 79 made it hard to follow the reasoning in the report. Those variations might explain why the Special Rapporteur drew an untenable distinction among the resolutions of international organizations in different cases. In paragraph 49, one resolution was given the status of subsequent practice, whereas another was denied that status in paragraph 54. The Special Rapporteur should have explained precisely

why a given resolution or decision of an international organization constituted subsequent practice or subsequent agreement. For example, why did the decisions mentioned in paragraphs 63 and 64 constitute subsequent agreement rather than subsequent practice?

51. The classification of forms of conduct set out in paragraph 31 was of great importance when determining the value of practice for the interpretation of constituent instruments. One criterion for assessing the weight of acts within an international organization might be the position of member States when voting on a resolution or the reaction, including tacit acceptance or opposition, of other non-voting States. The subsequent practice of the World Health Organization and the Lake Chad Basin Commission could not be deemed to have the same value, because the former had 194 member States and the latter only 6. What did the Special Rapporteur mean by "possibly beyond" in paragraph 51? Similarly, what did "relevant" signify in the penultimate sentence of paragraph 73?

52. He supported draft conclusion 11, paragraph 1, because it was consonant with the 1969 Vienna Convention. Paragraph 2 made no mention of the classification of the three types of conduct. The content of that paragraph should be fleshed out with the addition of some unambiguous criteria along the lines he had just suggested. It would also be necessary to deal with the extent to which the acts of the organs of international organizations could be considered to be subsequent agreements under article 31, paragraph 3 (a), subsequent practice under article 31, paragraph 3 (b), or other subsequent practice under article 32. As it stood, paragraph 2 was too vague to offer any guidance. Paragraph 3, which simply appeared to note a general principle, should be amended by clarifying the meaning of "relevant practice". As the established practice of an international organization was directly related to the "relevant rules" to which reference was made in article 5 of the 1969 Vienna Convention, it would be logical to recast paragraph 4 and to incorporate it in paragraph 1.

The meeting rose at 12.30 p.m.

3260th MEETING

Tuesday, 2 June 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

¹³⁸ *Ibid.*, pp. 28 *et seq.*

Protection of the atmosphere (concluded)*
(A/CN.4/678, Part II, sect. C, A/CN.4/681, A/CN.4/L.851)

[Agenda item 9]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) introduced the Drafting Committee's first report at the sixty-seventh session of the International Law Commission, on the topic of the protection of the atmosphere (A/CN.4/L.851). It consisted of a preamble and three draft guidelines. Following the debates, the Commission had decided to refer to the Drafting Committee draft guidelines 1, 2, 3 and 5, contained in the Special Rapporteur's second report (A/CN.4/681), but not draft guideline 4, which it would reconsider at its next session. In the same constructive and cooperative spirit that he had shown throughout the discussions, the Special Rapporteur had proposed amendments to the draft guidelines in question, as well as draft preambular paragraphs, based on the comments made by Commission members.

2. Regarding the title of the report, he said that it would be necessary to correct the language versions that referred to draft "conclusions", as they were in fact draft "guidelines".

3. With respect to draft guideline 1 (Use of terms) provisionally adopted by the Drafting Committee, it was understood that the definitions it contained were for the purposes of the guidelines. The definition of the atmosphere proposed by the Special Rapporteur in draft guideline 1, subparagraph (a), included a physical and a functional aspect, the latter to highlight the fact that the atmosphere was a dynamic system within which the transport and dispersion of degrading substances occurred. However, that second aspect had given rise to discussions in the Drafting Committee as to what those substances were and what was meant by dispersion. Furthermore, although the transcontinental transport of polluting substances was recognized as one of the major problems of the present-day atmospheric environment, some members had been concerned that the inclusion of that element might unduly restrict the definition of the atmosphere and that it might suggest that the transport and dispersion of degrading substances were in certain respects desirable or at least acceptable. It had thus been agreed to delete that element. The question of whether it was necessary to define the atmosphere had been raised again, especially since some members considered the concise definition that remained after deleting the functional aspect so basic that they questioned its usefulness. It was true that, in comparable situations such as the law of the sea, the latter had not been defined. Nonetheless, some members of the Drafting Committee had given other examples of when the Commission had considered it worthwhile to define certain terms, such as "aquifers" in the context of its work on the law of transboundary aquifers. It had thus been decided to opt for a short definition, focused on the substance of the atmosphere and setting aside its functional aspects to be dealt with at a later stage, most likely in a preamble.

4. With regard to draft guideline 1, subparagraph (b), it had been decided to use the term "atmospheric pollution" rather than "air pollution", which had been proposed by the Special Rapporteur, in order to keep within the framework of the draft guidelines, which was protection of the atmosphere. Generally, the members of the Drafting Committee had noted that it was not easy to draft definitions at the current stage, before the content of the substantive provisions of the draft guidelines had been decided. They had suggested that it was difficult to know, for example, whether the definition of atmospheric pollution should cover pollution from both natural causes and human activities. They had ultimately reached the conclusion that it was both possible and necessary to provide a definition; the draft guidelines should be centred on sources of pollution caused "by humans", and those words had been added to draft paragraph (b).

5. The debates had also addressed in detail whether the definition of atmospheric pollution should be limited to transboundary pollution, as in the 1979 Convention on long-range transboundary air pollution, or whether atmospheric pollution within a single State should be included in the scope of the draft guidelines. While it was agreed that such pollution could certainly be a matter for concern, some members had stressed the fact that international law had not yet dealt with it. It had been proposed to establish a threshold for the gravity of atmospheric pollution within a State by incorporating a reference to "significant" effects or damage, but the Drafting Committee had not been able to come up with an appropriate formulation. In the end, it had been decided to limit the definition to pollution whose effects extended beyond the State of origin, of such a nature as to endanger human life and health and the Earth's natural environment.

6. On the definition of atmospheric pollution, there had also been a discussion concerning the reference to "energy", in addition to "substances", as a source of atmospheric pollution. Some members believed that this reference could be taken to mean nuclear energy, despite the fact that it could be considered among the least polluting forms of energy compared to coal and oil. Other members believed that energy, including nuclear energy, fell within the scope of the draft guidelines. Some members were concerned that excluding energy would leave a major gap, as it was mentioned in article 1, paragraph (a), of the Convention on long-range transboundary air pollution and in article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea. Consideration had also been given to replacing the term "energy" with "emissions and releases", which was used in other international instruments, such as the Minamata Convention on Mercury, but that idea had been abandoned because, for the draft being discussed, it had not yet been decided which emissions or releases would constitute atmospheric pollution. The proposed definition thus simply mentioned "substances", on the understanding that this term would be defined in the commentary, which would specify whether it covered energy or other elements, taking into consideration the fact that some members had been strongly opposed to a definition covering nuclear energy. The words "resulting in" had been replaced by "contributing to" in order to emphasize the fact that atmospheric pollution was due to the overall cumulative effect of the emission and release of substances into the atmosphere.

* Resumed from the 3249th meeting.

7. With regard to draft guideline 1, paragraph (c), which contained a definition of atmospheric degradation, it had again been agreed that, although such degradation could be the result of a natural phenomenon such as a volcanic eruption, the draft guidelines should apply only to alterations of the atmosphere caused, directly or indirectly, by humans. For that definition, it had also been decided to draw upon the structure and wording provisionally adopted for the definition of atmospheric pollution. However, since atmospheric degradation was a global phenomenon—and not a transboundary one—the Drafting Committee had not considered it necessary to limit the definition to deleterious effects extending beyond the State of origin. Nonetheless, given that the definition could apply to actions that took place within a single State, it had been considered necessary to establish an appropriate threshold for its application. The word “significant” had thus been added before the words “deleterious effects”, following the precedent set in article 1, paragraph 1, of the United Nations Framework Convention on Climate Change.

8. There had been a discussion in relation to draft guideline 2 (Scope of the guidelines) as to whether the draft guidelines should establish “basic principles”, as had been proposed by the Special Rapporteur, and whether the use of that expression implied that the guidelines laid down legal obligations for States. It had been recognized that the word “basic” was unnecessary and might even give rise to confusion. Some members had been of the view that the words “guiding principles” would better reflect the purpose of the guidelines and could usefully be included in draft guideline 2, paragraph 1, since paragraph 2 of that guideline sought to expressly exclude certain principles from the scope of the guidelines. Furthermore, in order to emphasize the fact that the draft guidelines were not intended to be exhaustive, the reference was to “guiding principles” rather than “the guiding principles”. Other members of the Drafting Committee, who were concerned that the word “principles” could be understood as having a certain legal connotation, considered that the word should be deleted, especially as it would be misleading to give the impression that the draft guidelines only contained “principles”. As the difference of opinion on that point had not been resolved, draft guideline 2, paragraph 1, contained two phrases in square brackets reflecting the two points of view, as well as a footnote explaining that they would be subject to further consideration on the basis of the final content of the other draft guidelines to be adopted in the coming years. The other paragraphs of draft guideline 2 had been adopted without a great deal of discussion, as they were based on a proposal by the Special Rapporteur that contained some of the content of the 2013 understanding concerning the scope of the topic.¹³⁹ In paragraph 2, it would be necessary to add the words “and technology” after “transfer of funds” in some of the language versions.

9. The numbering of the draft guidelines, as it appeared in document A/CN.4/L.851, would be reviewed at a later stage. With regard to draft guideline 5, subparagraph (a), on international cooperation, the debates had focused on whether the guideline should be drafted in such a way that it imposed an obligation on States to cooperate or whether

a less binding formulation should be used. Some members had been of the view that, in the field of the environment, general responsibilities tended to be formulated in non-binding terms, using the conditional tense (“should”), as in article 3, paragraph 5, of the United Nations Framework Convention on Climate Change. Conversely, some more precisely defined State responsibilities were formulated in a binding manner or in the form of obligations.

10. The members who wished to avoid a binding formulation had said that the formulation to be used would depend on which of the texts in square brackets was selected in draft guideline 2, paragraph 1: if it was decided to indicate that the guidelines contained “principles”, they would favour adopting a more restrictive approach in draft guideline 5, subparagraph (a), in order to avoid imposing any new obligations on States. If the other option was chosen, however, a more flexible approach could be adopted in subparagraph (a).

11. Other members considered that States had a general duty to cooperate, arising from the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,¹⁴⁰ which could be mentioned at the beginning of the paragraph, before adding a phrase indicating more specifically that States “should” cooperate for the protection of the atmosphere. That interpretation of the Declaration had not been accepted by other members of the Drafting Committee.

12. Draft guideline 5, subparagraph (a), had been provisionally adopted after having been reworded by the Special Rapporteur in such a way that States had the obligation to cooperate, “as appropriate”, with each other and with international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The reference to “good faith” had been considered to be implicit in all international obligations and had thus been deleted.

13. Draft guideline 5, subparagraph (b), had been amended by the Special Rapporteur on the basis of comments made by the members of the Drafting Committee.

14. Regarding the preamble, the Special Rapporteur had submitted a revised version of draft guideline 3, in the first paragraph of which it was indicated that the atmosphere was essential for sustaining human life and health and aquatic and terrestrial ecosystems and that its protection was a common concern of humankind. Some members had been concerned that the expression “common concern of humankind” might have legal consequences for States, which was not the desired result of a set of guidelines. Others had seen it as a statement of fact, an expression of concern about a global phenomenon, which did not necessarily involve any legal consequences. Other members had had no objection if the use of that expression might suggest that the guidelines contained legal principles for the protection of the atmosphere, since they believed that this was not contrary to the Commission’s 2013 understanding on the scope of the topic.

¹³⁹ *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

¹⁴⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

15. The discussion on the preamble had also addressed the second part of the initial definition of the atmosphere proposed by the Special Rapporteur, which dealt with the “functional” element—the transport and dispersion of degrading substances. The Special Rapporteur had revised the formulation to ensure that it did not unintentionally give the impression that the transport and dispersion of pollutants could in some way be considered desirable or positive for the atmosphere and that they were part of the definition of the atmosphere. The new approach had met with the support of the Drafting Committee.

16. Following the debates, the first two paragraphs of the Special Rapporteur’s revised proposal had been restructured into three paragraphs, which had then been added to the preamble. The expression “pressing concern of the international community as a whole” in the third paragraph had been proposed by the Special Rapporteur in response to the concerns of members who wished to avoid the formulation “common concern of humankind”. The expression had already been used by the Commission as one of the criteria for selecting topics to include in its programme of work, and was thus mentioned in the 1997 and 1998 *Yearbook of the International Law Commission*,¹⁴¹ and the members of the Drafting Committee had agreed that it did not, in itself, give rise to any legal consequences.

17. The fourth preambular paragraph reflected another part of the Commission’s 2013 understanding concerning the scope of the topic. The discussion on that subject had addressed whether it would be appropriate to reformulate the paragraph, given that the formulation proposed by the Special Rapporteur was a faithful reflection of the understanding reached by the Commission.

18. Some members had believed that it was essential to reword the paragraph, as it was the result of a compromise among the members of the Commission and did not belong in an international instrument that might be adopted by States. Others had been of the view that reopening the debate on the formulation of that paragraph would call into question the decision taken by the Commission in 2013, something which should be avoided. They had also noted that the paragraph in question could be included in draft guideline 2 on the scope of the guidelines. In the end, the members of the Drafting Committee had agreed to retain the formulation of the 2013 understanding in that preambular paragraph, but to add a footnote indicating that the terminology and location of the paragraph would be revisited at a later stage, once all of the draft guidelines had been adopted.

19. Other paragraphs might later be added to the preamble, which would be finalized after the first reading.

20. The CHAIRPERSON invited the members of the Commission to adopt, one by one, the draft guidelines and preambular paragraphs provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.851.

Preambular paragraphs

The preambular paragraphs were adopted.

Draft guideline 1. Use of terms

21. Mr. VÁZQUEZ-BERMÚDEZ said that, in his second report, the Special Rapporteur had indicated that “atmospheric pollution” was taken to mean the introduction into the atmosphere by human activities, directly or indirectly, of substances or energy that had deleterious effects on human life and health and the Earth’s natural environment.

22. The Drafting Committee had decided to keep only the word “substances” and to delete the reference to “energy”, on the understanding that the Special Rapporteur would indicate in the commentary that the former concept encompassed the latter. However, that interpretation could give rise to errors from both a scientific and a legal point of view. The Special Rapporteur had in fact noted in his second report that it was important to retain the term “energy”, which included radioactive emissions (not only the emission of radioactive substances, but also radiation, for example the gamma rays emitted following a nuclear accident), as well as other types of energy, including the release of heat and light into the atmosphere from large cities.

23. The Special Rapporteur had also made it clear that the use of that term did not mean that the draft guidelines would in any way entail interference with States’ nuclear energy policies, which fell within the purview of their domestic affairs.

24. The definition of atmospheric pollution adopted by the Drafting Committee would cover only the introduction or release by humans into the atmosphere of energy that contributed to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth’s natural environment.

25. Furthermore, energy was mentioned as a potential source of pollution in various instruments, such as the United Nations Convention on the Law of the Sea and the Convention on long-range transboundary air pollution.

26. He therefore considered that it would be illogical to exclude the concept of energy from the definition of the term “atmospheric pollution” in draft guideline 1, and that it was a substantive issue that should be decided upon by the Commission in plenary. He asked that an indicative vote be taken on the matter.

27. Mr. NOLTE, noting that, according to the Chairperson of the Drafting Committee, the members of that Committee had agreed that the formulation “pressing concern of the international community as a whole” did not in itself entail any legal consequences, said that it was his understanding that they had agreed that the formulation would not, in itself, create any separate legal obligation, but that this did not preclude it from being taken into consideration as an expression of the object and purpose of the draft guidelines.

¹⁴¹ *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238; and *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553.

28. Mr. PARK, noting that energy was mentioned in several international conventions, said that the concept should be clarified in the context of the topic. With regard to nuclear energy in particular, a distinction must be made, which was not done in paragraph 13 of the Special Rapporteur's second report, between normal nuclear emissions and those that were linked to disasters and were situations of *force majeure* in international law. The Special Rapporteur should clarify what was meant by "substances" and also whether he wished to retain the term "energy", bearing in mind that the peaceful use of nuclear energy was recommended by the IAEA and was appropriately regulated by States.

29. Mr. SABOIA said that he shared Mr. Vázquez-Bermúdez's views and would support his proposal to have a vote. Although draft guideline 1, subparagraph (b), did provide, *in fine*, for a certain threshold of gravity applicable to the proposed purposes and the terminology used, in the light of the concerns expressed by Mr. Park, explanations should be included in the commentary concerning the regulation of the commercial use of nuclear energy. He also supported the comments made by Mr. Nolte.

30. Mr. NIEHAUS said that he, too, supported Mr. Vázquez-Bermúdez's proposal and was in favour of the term "energy" being expressly mentioned in the definition of atmospheric pollution.

31. Mr. HMOUD recalled that he had clearly and consistently spoken, both in the plenary and in the Drafting Committee, in favour of expressly including the concept of energy in the definition of atmospheric pollution. The question of the scope of the expression "pressing concern of the international community as a whole", meanwhile, had not been debated either in the plenary or by the Drafting Committee, and the Drafting Committee had clearly agreed to include it in the preamble on the understanding that it would not have any legal effect, not even with respect to the object and purpose of the project: those points would have to be clarified in the commentary.

32. Sir Michael WOOD said that the Chairperson of the Drafting Committee had correctly outlined the Committee's position on the issue raised by Mr. Nolte with regard to the pressing concern of the international community as a whole; he himself reserved his position on that subject. As to the proposal to hold an indicative vote on the energy issue, although Mr. Vázquez-Bermúdez had announced in the Drafting Committee his intention to make a statement on that point, he had not mentioned the possibility of holding a vote. It seemed a strange course of action at the current stage and could have unwanted effects. The Commission could not take the risk of establishing a precedent that would permit elements of the Drafting Committee's report to be put to a vote in the plenary, as otherwise a large number of issues raised in the statement of the Chairperson of the Drafting Committee could give rise to indicative votes. He was therefore opposed to holding such a vote and would not participate if the Commission decided to go ahead with one.

33. Mr. PETRIČ said that if, as he had understood during the debates in the plenary and in the Drafting Committee, both emissions from the normal use of nuclear

energy and radioactive emissions arising from accidents such as Fukushima were excluded from draft guideline 1, subparagraph (b), the only remaining form of energy pollution was light pollution generated by large cities. Unless it was to be implied that cities should be plunged into darkness at night, he did not see what the purpose of referring to energy in that paragraph would be. He was not in favour of having an indicative vote on the matter, as he himself had often been in the situation where his views had not been endorsed by the Drafting Committee, yet he had not requested a vote in the plenary. If, however, the majority of the Commission members were in favour of a vote, he would not participate and asked that his position be reflected in the summary record.

34. Mr. MURPHY said that the debates in the plenary had given rise to a very marked division among the members of the Commission on the issue of whether a reference to energy-related pollution should be included in subparagraph (b). He himself had reservations, as the term "energy", as interpreted in the context of international instruments such as the Convention on long-range transboundary air pollution, did not have the same meaning as that ascribed to it by the Special Rapporteur in his second report, since neither light pollution nor radioactive emissions were covered by the protocols to that Convention. He therefore did not consider it appropriate to mention it in the draft guidelines on the protection of the atmosphere, particularly as the Commission's work on the topic largely consisted of codifying existing law. Although Mr. Vázquez-Bermúdez was perfectly entitled to come back to the issue in the plenary, and he had in fact announced in the Drafting Committee his intention to do so, he himself nonetheless considered that it would not be appropriate to hold a vote and that it would be preferable to include, in the commentary, the arguments of the members who had been in favour of adding an express reference to energy in the definition of atmospheric pollution.

35. Mr. ŠTURMA said that the wording proposed by the Drafting Committee was the result of a hard-fought compromise and that it would be unfortunate to reopen the debate now. Mr. Murphy's proposal not to hold a vote but to reflect the differences in opinion that had been expressed on the matter would be a good way out of the impasse.

36. Mr. KITTICHAISAREE, supporting the comments made by Mr. Petrič, Mr. Murphy and Mr. Šturma, said that the Commission should carry out its work with its characteristic spirit of camaraderie rather than falling out with one another. Several of his own proposals had not been accepted by the Drafting Committee, but he hoped that they would be reflected in the commentary that was to be adopted by the plenary.

37. Mr. NOLTE, supporting Mr. Kittichaisaree's call for a spirit of camaraderie, said that he was one of the members who believed that energy-related pollution should be dealt with under the topic, but that he recognized that other members of the Commission were opposed to its inclusion. Although it was certainly not unusual for members of the Drafting Committee to raise substantive issues in the plenary—former Commission member Mr. Pellet used to do so frequently—it was important to make appropriate use of that procedure. An indicative vote at that

stage of the work would not be a good idea; it would be better to wait until the commentary was being considered to decide on whether to vote on the matter. Nonetheless, bearing in mind that the topic was not focused on energy but on climate change, he hoped that the Commission would retain a sense of proportion and some constructive ambiguity, including in relation to the extent to which an important element of the object and purpose of a text, although not mentioned expressly, could be taken into consideration for the purpose of interpreting the text.

38. Mr. CANDIOTI said that the text submitted by the Drafting Committee to the Commission had numerous shortcomings, in terms of both form and substance, but that, in the interest of the spirit of camaraderie mentioned by previous speakers, he would abstain from listing all of the reasons for which he could not support the proposed document. As to whether to include a reference to energy in the definition of atmospheric pollution, he was of the view that the discussion on the matter was utterly surreal, as it was not a legal or a policy issue but a technical one, which should have been discussed with scientific experts. Conversely, he did not understand why the definition in draft guideline 1, subparagraph (a), merely described the atmosphere as an envelope of gases when the scientists who had spoken before the Commission had clearly stated that the atmosphere was composed of gases and particles. In his view, the consensus rule which appeared to have become established in recent years as the only means of settling disagreements was a major step backwards and could seriously hinder the Commission's work and undermine its capacity to truly engage in progressive development.

39. Mr. MURASE (Special Rapporteur) thanked Mr. Forteau, who had masterfully conducted the Drafting Committee's work, as well as all the members of the Committee for the spirit of cooperation and consideration they had shown. In response to Mr. Candiotti, he said that he had not mentioned particles in the definition of the atmosphere because, according to one of the scientists he had consulted, it was not necessary to mention them expressly as they were mixed in with the gases. Both the heat emitted by cities and light pollution and radioactive emissions were under discussion by various international bodies. It would thus be strange if the Commission's work on the protection of the atmosphere made no mention of them. The Drafting Committee had accepted the idea that the word "substances" encompassed energy. He would thus draft the commentary to the draft guideline to that effect, but would welcome the guidance of the other members of the Commission on how to reflect their respective positions. Mr. Park had drawn attention to the difference between nuclear emissions from normal activities and nuclear emissions caused by accidents such as Fukushima. It was clear that the former were not covered, but the latter should not be neglected. He thanked Mr. Vázquez-Bermúdez for having raised the very important issue of energy, which he also believed should be dealt with under the topic. However, he was not in favour of holding a vote at that stage and would rather give the Commission the opportunity to continue the discussion in plenary later, when it considered the commentaries.

40. Mr. KAMTO said that he had been a member of the Commission for long enough to know that members were

perfectly entitled to raise in the plenary any points they considered essential and that had not achieved consensus in the Drafting Committee. In fact, indicative votes had been held in that context on several occasions in the past. While he was not himself always in favour of that practice, he was of the view, as he had noted previously, that the Drafting Committee could not take the place of the plenary and that certain issues could only be decided upon by the plenary. When, as Mr. Vázquez-Bermúdez had done, a member raised an important issue and put forward their point of view, the best way forward was to identify how to take account of their concern without compromising the majority opinion that had emerged from the Drafting Committee. In the case at hand, one solution might be to reflect Mr. Vázquez-Bermúdez's position in the commentary. If, however, Mr. Vázquez-Bermúdez did not consider that satisfactory, perhaps he could consult with the members who had commented on his proposal to try to find some common ground.

41. Mr. NIEHAUS said that, until very recently, substantive issues that had given rise to disagreements in the Drafting Committee had frequently been raised in the plenary and put to an indicative vote. He shared Mr. Candiotti's concerns about the negative effects of systematically avoiding a vote and instead trying to reach a consensus, which meant that, in effect, a right of veto was introduced that could be exercised by some members every time an issue was up for debate. In the case at hand, he would be inclined to agree with the Special Rapporteur's constructive approach and to rule out holding a vote, but it was important that the Commission reflect on how to deal with disagreements in the future and the need to ensure that, in keeping with democratic practice, in cases of diverging opinions, the majority opinion prevailed, and not the wishes of a minority.

42. The CHAIRPERSON said that, taking account of the diverging views that had been expressed concerning whether energy should be expressly mentioned in the definition of atmospheric pollution and Mr. Vázquez-Bermúdez's proposal to hold an indicative vote, he suggested that the Commission should leave draft guideline 1, subparagraph (b), in abeyance and proceed with the adoption of subparagraphs (a) and (c).

Draft guideline 1, subparagraphs (a) and (c), were adopted.

Draft guideline 2. Scope of the guidelines

Draft guideline 2 was adopted.

Draft guideline 5. International cooperation

Draft guideline 5 was adopted.

43. The CHAIRPERSON proposed that the meeting be suspended in order to allow the members of the Commission who had expressed diverging views concerning draft guideline 1, subparagraph (b), to continue their deliberations with a view to reaching a consensus.

*The meeting was suspended at 11.30 a.m.
and resumed at 12.05 p.m.*

44. The CHAIRPERSON said that, following the consultations among the members concerned, it had been decided not to hold an indicative vote and to follow the approach, proposed by the Special Rapporteur and supported by several members, of reflecting the various points of view expressed, particularly on the importance of the issue of energy, in the commentary to the draft guideline. If he saw no objection, he would take it that the Commission wished to adopt draft guideline 1, subparagraph (b), on that understanding.

Draft guideline 1, subparagraph (b), was adopted.

The report of the Drafting Committee on the protection of the atmosphere, as contained in document A/CN.4/L.851, was adopted.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/678, Part II, sect. B, A/CN.4/683, A/CN.4/L.854)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

45. The CHAIRPERSON invited the members to resume their consideration of the third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/683).

46. Mr. ŠTURMA commended the Special Rapporteur on his third report, which dealt with the interpretation of the constituent instruments of international organizations. As usual, the report was very well structured and supported by considerable international case law and relevant literature on the subject. The Special Rapporteur had rightly noted that international organizations were entirely different from States. They had a separate international legal personality and their constituent instruments were, in a sense, a particular type of treaty. However, their particularity should not be overestimated for the purpose of interpreting treaties. Article 5 of the 1969 Vienna Convention (as well as article 5 of the 1986 Vienna Convention) clearly established that the rules on treaty interpretation set out in articles 31 and 32 of the 1969 Vienna Convention also applied to the constituent instruments of international organizations. As that point was correctly reflected in draft conclusion 11, paragraph 1, he fully supported it.

47. The situation was more difficult when it came to the specificity of certain international organizations, in particular the European Union, and the conduct of organs of international organizations. In that respect, he agreed with other members that the autonomy of European Union law was somewhat exaggerated, something that was not the fault of the Special Rapporteur but rather that of the Court of Justice of the European Union. However, as an organ of the United Nations, the International Law Commission had a duty to promote international law. It should not submit to the opinion of particular courts and could even criticize the Court of Justice of the European Union if it disregarded well-established rules of international law, in particular the rules on treaty interpretation, under the pretext that the European Union treaties were special.

After all, if the European Union institutions, such as the Commission or the Court of Justice, could be called “guardians of treaties”, the member States (represented in the Council) were the masters of the treaties, as they had adopted them and could change them or even circumvent them by falling back on intergovernmental agreements.

48. The situation was not the same if an international organization replaced its member States in the exercise of membership rights, or became one of the parties to the constituent instrument of another organization. The organs of the first organization acted in the same way as other members of the other organization and directly contributed to the agreements and practice, in accordance with articles 31 and 32 of the 1969 Vienna Convention. Such a scenario was, however, different from the usual situation in which the practice of the organs of an organization was not the same as the practice of States and could thus contribute only indirectly to the relevant practice for the purpose of treaty interpretation. Having said that, he could generally support the distinction between the three forms of conduct presented in paragraph 31 of the third report.

49. He also supported draft conclusion 11, paragraph 2, according to which the conduct of an organ of an international organization in the application of the constituent instrument of that organization could give rise to a subsequent agreement or subsequent practice. However, as the conclusion appeared very categorical, it should be specified that the organ in question was not just any organ, but a “competent”, “intergovernmental” or “plenary” organ. While he could also accept paragraph 3, he proposed clarifying that the conduct of an organ or an international organization was not State practice but could constitute other relevant practice for the interpretation of the constituent instrument. He supported paragraph 4, according to which the established practice of an international organization should be taken into account in the interpretation of its constituent instrument. In conclusion, he recommended that draft conclusion 11 be sent to the Drafting Committee.

50. Sir Michael WOOD said that, as the Special Rapporteur’s third report demonstrated, a large number of cases and writings shed light on the question of subsequent agreements and subsequent practice in the interpretation of treaties that were constituent instruments of international organizations; it was well-trodden ground. He had three general comments on the matter.

51. First, as Mr. Tladi had noted, the Commission should continue to be careful not to elevate subsequent agreements and subsequent practice to a more central position in treaty interpretation than they were accorded by articles 31 and 32 of the 1969 Vienna Convention. The Commission had made that clear in formulating draft conclusion 1, which placed the topic squarely within the context of those articles, and it was also clear from the opening words of draft conclusion 11 proposed in the report. He felt strongly that the expression “means of interpretation” conveyed entirely the wrong sense, as if subsequent agreements or subsequent practice alone would suffice for interpretation. “Element of interpretation”, the expression most often used by the Commission in the 1960s in its work on the interpretation of treaties, would be preferable.

Having said that, the focus of the topic should remain the role of subsequent agreements and subsequent practice, and should not be expanded, as the Special Rapporteur had had a tendency to do in his third report, to more general questions of treaty interpretation.

52. Second, some Commission members had welcomed the Special Rapporteur's tripartite division, in paragraph 31 of the third report, of the subsequent practice of the parties to the constituent instrument, the subsequent practice of organs of international organizations, and a combination of the practice of organs of international organizations and of parties, and had suggested that the tripartite division be reflected in the draft conclusion. He was not convinced, as he did not think that it was really possible, or helpful, to seek to systematize the case law in that way, and there were at least two reasons for that. First, even if one were to accept for the purposes of the topic a distinction between the practice of the parties and the practice of organs, it was not helpful to postulate a separate category combining the two types of practice: the two types of practice might in principle be considered in a particular case, but that would not mean that they coalesced to form a third category. In the example given in paragraph 52 of the third report, the International Court of Justice's advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court had essentially relied on the practice of States, the practice of the members of the Security Council and the general acceptance by States Members of the United Nations. According to Thirlway's explanation, cited in the first footnote to paragraph 53, "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is ... a recognition ... by all member States by tacit acceptance, of the validity of such resolutions".¹⁴² The passage from the *Whaling in the Antarctic* case cited in paragraph 54 likewise highlighted the support, or lack thereof, of States for the resolutions that were relied upon.

53. Second, and more importantly, if the category of "practice of organs, as such" were relevant to treaty interpretation, it would be relevant not as subsequent practice under article 31, paragraph 3 (b), but on some other basis lying outside the scope of the topic at hand. Article 31, paragraph 3 (a) and (b), was concerned with agreements and practice of the parties and not of organs as such. What organs did could give indications as to the practice of the parties, but it was that practice that was relevant for the purposes of article 31, paragraph 3 (b). Any relevance for the interpretation of constituent instruments of the "practice of organs, as such" must lie elsewhere. In his view, such practice fell outside the scope of the topic, at least as it had been understood in the draft conclusions adopted thus far. That was clear from the analysis in paragraphs 68 to 74 of the third report under the heading "How to conceive

various uses of subsequent practice and subsequent agreements in terms of the Vienna rules of interpretation".

54. His third general comment concerned the Special Rapporteur's choice of examples. As others had said, some of the examples did not appear to relate to constituent instruments: only certain provisions of the United Nations Convention on the Law of the Sea could be viewed as a constituent instrument; most were concerned with the substance of the law. The same was true of Part XI on the international seabed area. The example concerning article 5 of the Convention on International Civil Aviation did not seem to have anything to do with a constituent instrument.

55. Some of the most interesting examples mentioned in the report were taken from European Union law, but it was necessary to be particularly careful in that regard. The European Union had its own legal order, rather like the legal order within a State. Much of the case law of the Court of Justice of the European Union concerned that legal order; in that respect, the Court acted more like a national court and its case law thus needed to be approached with some caution. For example, he was not sure how far the Court's approach to subsequent practice, which according to the Special Rapporteur departed from article 31, paragraph 3, of the 1969 Vienna Convention, should be seen as a "relevant rule of the organization" within the meaning of the "without prejudice" clause in article 5 of the Convention.

56. More generally, it was sometimes not clear whether the examples given in the third report were being used to illustrate article 31, paragraph 3 (a), article 31, paragraph 3 (b), article 32, or some other element of treaty interpretation. He hoped that this would be made clearer in the commentary, because in order for the Commission's conclusions to be useful, they must explicitly refer back to the rules of treaty interpretation found in the 1969 Vienna Convention. They should be simpler and more concise and use established terminology.

57. Turning to draft conclusion 11 proposed in the third report, he said that he agreed with the first sentence of paragraph 1, which rightly picked up the language of article 5 of the 1969 Vienna Convention, noting that most constituent instruments were "treaties" between States within the definition in that Convention. Whether a treaty between States ceased to fall within that definition if an international organization became a party to the constituent instrument, as was the case with the 1982 United Nations Convention on the Law of the Sea, was an interesting but somewhat theoretical question, at least for the purpose of the topic at hand, but the issue should probably be reflected in the commentary.

58. The second sentence of paragraph 1 was more problematic. It seemed to glide over the "without prejudice" clause of article 5 of the 1969 Vienna Convention: the word "may" was hardly sufficient. Perhaps it was simply a matter of drafting.

59. Paragraph 2, on the other hand, raised several questions. The expression "conduct of an organ of an international organization" was very broad. Did it cover the

¹⁴² H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989: Part Two", *The British Year Book of International Law*, vol. 61 (1990), pp. 1–133, at p. 76.

conduct of all organs, whether composed of States or not? Did it cover the conduct of a secretariat, or a body like the Commission, whose members acted in their personal capacity? The term “conduct” was also unclear in that context. More seriously, the statement in paragraph 2 that the conduct of an organ of an organization, as opposed to that of States acting within an organ, “may give rise to” a subsequent agreement or subsequent practice within the meaning of article 31, paragraph 3 (a) and (b), namely an agreement between the States parties to the treaty or a practice in the meaning of article 32, seemed questionable, as it was not supported by the case law cited in the report. He was not sure what was meant by the word “articulate” in the context of paragraph 2—perhaps “reflect” or “express” might be better—or how “conduct” could “articulate” a subsequent agreement or subsequent practice. The practice of an organ might indicate or reflect the practice of the parties to the treaty, but in that case it was the practice of the parties that mattered for the purposes of the topic.

60. Furthermore, it was not clear why in paragraph 3 of the draft conclusion the Special Rapporteur used the term “relevant practice” rather than “subsequent practice”, unless the intention was to indicate that paragraph 3 fell outside the scope of the topic. If that was the case, he wished to know what idea was intended to be expressed in that paragraph, and wondered whether it belonged in the draft conclusions. If, however, paragraph 3 was meant to be a contrast to paragraph 2, in the sense that the practice of the organ as such was not as important as the conduct of States parties acting in that organ, then the paragraph would make more sense, although even if that was the case, the concept of relevance needed to be clarified.

61. Paragraph 4, in which the expression “the established practice of the organization” was used, raised similar doubts. That expression was used in instruments adopted on the basis of the Commission’s work, namely the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the 1986 Vienna Convention and the draft articles on the responsibility of international organizations, but in those instruments it was an element in the definition of “rules of the organization”. If it was to be considered a “relevant rule of the organization” in the meaning of article 5 of the 1969 Vienna Convention and draft conclusion 11, paragraph 1—and there was no reason why it should not be—then it seemed confusing to have a separate paragraph devoted to it later, in the quite different context of subsequent agreements and subsequent practice as an element in the interpretation of constituent instruments. The explanations given in the third report were not entirely convincing, and certainly did not justify the sweeping assertion in paragraph 4. Paragraph 79 of the report stated that “an established practice of an organ [not, incidentally, of an organization] which is accepted by the whole membership amounts to a subsequent practice of the parties under article 31 (3) (b)”. That might be true, but it was not what was said in paragraph 4 of the draft conclusion. Paragraph 82 of the report added to the difficulties related to established practice, as it indicated that it was “a means of interpretation of the constituent instrument of an international organization which shall be taken into account as it is based on the agreement

of the membership or follows from the institutional character of the organization”. As had been seen, established practice was not necessarily based on the agreement of all the parties to the constituent instrument, which was a requirement under the topic at hand. Nor was it clear how “the institutional character of the organization” could transform an established practice into a subsequent practice within the meaning of article 31.

62. Overall, draft conclusion 11 should be simplified and made more concise and should focus more clearly on the subject matter of the topic. The key points from the Special Rapporteur’s analysis and his main examples could be included in the commentary. He would not support changing the title of the draft conclusion to “Interpretation of constituent instruments of international organizations”, as the Commission was not dealing with that general issue, but only with the role of subsequent agreements and subsequent practice in the interpretation of such instruments. In conclusion, he supported sending draft conclusion 11 to the Drafting Committee.

63. Mr. KAMTO welcomed the excellent third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which was well argued and supported by relevant case law. In general, the subsequent agreements and subsequent practice of the member States of an international organization could be relevant for the purpose of interpreting its constituent instrument in accordance with article 31, paragraph 3 (a) and (b), and article 32 of the 1969 Vienna Convention, but the key question was whether the subsequent practice of the organs of an international organization could play the same role. In that regard, he shared the views expressed by the Special Rapporteur in paragraphs 43 to 48 of the third report, as well as the conclusion he drew in paragraph 49, based in particular on what he referred to as the “presumption” in the advisory opinion of the International Court of Justice on *Certain Expenses of the United Nations*. However, he did not agree with the Special Rapporteur’s conclusion that “the practice of organs of international organizations may, in itself, constitute a means of interpretation for the constituent instrument of the organization, and that the presumptive effect according to the *Certain Expenses [of the United Nations advisory] opinion is merely an example for such a role in the process of interpretation*”. It was not clear to him which provision of the 1969 Vienna Convention would serve as the basis for an autonomous role of a subsequent practice that was not based on either article 31, paragraph 3 (b), or article 32 of that Convention.

64. Still in paragraph 49 of the third report, the Special Rapporteur stated that “[b]y also referring to acts of international organizations which were adopted against the opposition of certain member [S]tates, the Court has recognized that such acts may constitute subsequent practice for the purposes of interpretation, but not a (more weighty) practice that establishes agreement between the parties regarding the interpretation”. That assertion raised an important and sensitive issue, which could not be addressed in a single sentence. Given that in paragraph 16 of his third report, the Special Rapporteur stated that the report “does not address the question of whether the conduct of different organs of international organizations

may have different weight regarding the interpretation of constituent instruments” and that “these questions will be dealt with in the next report”, he himself suggested that the issue of the possible effects of the way in which the instruments of an international organization had been adopted be considered at the same time.

65. Paragraph 28 of the third report stated that the Court of Justice of the European Union had developed its own practice of interpreting its founding treaties because of the specificity of the organization. While recognizing that specificity, he did not believe that the rules of interpretation followed by the Court of Justice of the European Union, or any other community court, applied as rules of interpretation for international courts outside the community concerned. Nor did he believe that, if the International Court of Justice was called upon to interpret the constituent instrument of the European Union, it would apply rules of interpretation that differed from those it usually applied, namely the rules set out in articles 31 and 32 of the 1969 Vienna Convention. Although the European Union, like other community integration organizations, had a special nature by virtue of its object and purpose, the fact remained that its constituent instruments were classic multilateral treaties. In fact, the statement in paragraph 29 of the third report—namely that the Court of Justice of the European Union itself considered that the interpretation of treaties concluded between the Union and third States was governed by international treaty law—to some extent confirmed that analysis.

66. With regard to subsequent practice “which establishes the agreement of the parties”, the example from the *Land and Maritime Boundary between Cameroon and Nigeria* case was absolutely relevant. In his view, its impact could not be downplayed on the grounds that the Lake Chad Basin Commission was a small international organization with only six member States. What mattered was not the number of members of the international organization, which in any case was relative, but rather the way in which subsequent practice was formed that could serve as a means of interpreting the organization’s constituent instrument. In that respect, it was interesting to note that in the case of the organization in question, subsequent practice had even greater weight, in that it consisted of a sort of agreement between all of the member States to entrust the organization with duties that had not been provided for in its constituent instrument. Indeed, in paragraph 65 of its 1998 judgment in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court had stated that “[m]ember States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts. Further to incidents between Cameroon and Nigeria in 1983 in the Lake Chad area, an extraordinary meeting of the Commission was convened from 21 to 23 July 1983 in Lagos on the initiative of the Heads of State concerned, in order to entrust to the Commission certain boundary and security matters”.

67. At the previous session, Mr. Kamto had argued that in international law there were no agreements without legal effects, a point also made by Mr. Forteau. It was therefore regrettable that draft conclusion 9 had been adopted with a legal anomaly which, it was to be

hoped, would be corrected prior to the adoption of the draft conclusions as a whole on first reading: it would be a mistake for the Commission to retain such an understanding of agreements in the final outcome of its work on the topic. With regard to draft conclusion 11, the formulation “and other subsequent practice under article 32” in paragraph 1 was problematic, as article 32 did not expressly mention “subsequent practice”. It would therefore be more accurate to use the wording: “and other subsequent practice covered under article 32”. The same was true in paragraph 2, the wording of which was questionable for the same reason. Again, it would be more appropriate to use the wording: “or to other subsequent practice as an additional means of interpretation under article 32”. Furthermore, he did not see what paragraph 3 added to the preceding paragraph, as it even seemed to introduce a distinction between subsequent practice under article 31, paragraph 3 (a) as opposed to paragraph 3 (b), and, secondarily, between subsequent practice covered under article 32, on the one hand, and “relevant practice” on the other, as though all practice taken into account in the interpretation of a treaty was not necessarily relevant practice for the organ responsible for interpretation. The same was true for paragraph 4, as the reference to “established practice” added to the variety of terms used. While those terms were, no doubt, taken from international case law, the Special Rapporteur should have specified whether his analysis had shown that the expressions “subsequent practice”, “relevant practice” and “established practice” referred to different legal practices. In any case, he supported sending draft conclusion 11 to the Drafting Committee.

68. Mr. MURASE thanked the Special Rapporteur for his excellent third report and said that he would only make brief comments on a point which had not yet been discussed and which he considered extremely important for the consideration of the topic. In paragraph 8 of the third report, it was stated that “[a]n international organization, by definition, possesses a separate international legal personality and it exercises its powers (competences) and functions through its organs”. In his view, competence was a crucial aspect in the context of the interpretation of the constituent instruments of international organizations because, unlike States, which possessed the same legal characteristics regardless of their form of government, international organizations were very diverse. While it was generally accepted that States had general competence, each international organization, including the United Nations, had specific competence defined by its constituent instrument. It was therefore important to take competence into account in the interpretation of the constituent instrument of an international organization under article 31, paragraph 3 (b), and article 32 of the 1969 Vienna Convention.

69. The jurisprudence of the International Court of Justice mentioned in the report should be read in that light. For instance, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court had emphasized the “conventional and at the same time institutional” character of constituent instruments by concluding that “the imperatives associated with the effective performance of its functions, as well as its own practice ... may deserve special attention ...”

(para. 19 of the advisory opinion). That opinion also addressed the question of whether it could be said that the World Health Organization had received a mandate under its Constitution to address the legality of the use of nuclear weapons (para. 27 of the advisory opinion). In its judgment in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court had found that the Lake Chad Basin Commission was an international organization exercising its powers within a specific geographical area, but that its purpose was not the settlement at a regional level of matters relating to the maintenance of international peace and security and thus did not fall under Chapter VIII of the Charter of the United Nations (para. 67 of the judgment).

70. In the Court's advisory opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, the main issue was precisely the competence of the General Assembly. In its advisory opinion on *Certain Expenses of the United Nations*, the Court had made it clear that "each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'" (p. 168 of the advisory opinion).

71. Thus, regardless of the term used—"competence", "function", "power", "jurisdiction", "mandate" or "authorization"—the Court always considered the competence of an organ or an organization to be the determining factor in the interpretation of the constituent instrument of the international organization in question. The Special Rapporteur might have thought that "competence" was covered by the expression "own practice" of an international organization. However, given that the Court referred to both "function" and "own practice" in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, he believed that it was necessary to address them both. He therefore proposed adding the phrase "provided that this conduct is within the competence of the organization" at the end of draft conclusion 11, paragraphs 2 and 3. Lastly, he did not consider the term "conclusions" appropriate to refer to the final outcome of the Commission's work on the topic. While the term might be used to refer to the "common understanding" reached by the members of a study group, it was not suitable for the Commission's work, which was intended to give guidance to practitioners, experts, researchers and students. For that reason, he would suggest using the term "draft guidelines", which had been used in the Guide to Practice on Reservations to Treaties.¹⁴³

The meeting rose at 12.50 p.m.

¹⁴³ The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

3261st MEETING

Wednesday, 3 June 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/678, Part II, sect. B, A/CN.4/683, A/CN.4/L.854)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/683).
2. Mr. MURPHY said that he endorsed the Special Rapporteur's decision in his third report not to address the interpretation of treaties concluded by international organizations. However, he disagreed with the prediction in paragraph 12 that the rules on interpretation set forth in the 1986 Vienna Convention would someday be regarded as customary international law. Given the lack of analysis or substantiation of that prediction, he presumed that it would not be included in the commentary to the draft conclusions.
3. He had understood that, in its work on the topic, the Commission was explaining the rules set forth in article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention. He therefore had doubts about expanding the scope of the topic to include article 31, paragraph 3 (c), or any other part of article 31. In addition, since the 1969 Vienna Convention applied only to treaties between States, draft conclusion 5 on attribution of subsequent practice was accurate and did not need to be revisited.
4. With regard to the organization of the third report, he proposed that the Special Rapporteur's cautionary notes in paragraphs 8 to 11 be included in the commentary to the draft conclusions. However, the tripartite approach described in paragraph 31 was somewhat artificial and not obvious from the cases cited, and the lines between the three categories were less sharp than what was suggested. The resulting draft conclusion 11 neither reflected that tripartite approach nor separated subsequent practice from subsequent agreements, thereby making it difficult to evaluate the four paragraphs of draft conclusion 11 as sustainable propositions of law.