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Held at the Palais des Nations, Geneva, on Friday, 27 May 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Protection of the atmosphere (agenda item 8) (A/CN.4/692)

The Chairman invited the Special Rapporteur to introduce his third report on the protection of the environment (A/CN.4/692).

Mr. Murase said that he wished to thank the members of the Commission for participating actively in the informal dialogue with atmospheric specialists held on 4 May 2016. He had sent members electronic copies of the digital slide presentations made by those scientists along with a brief summary of the meeting. He wished to thank the many academics and researchers who had provided him with valuable suggestions and advice for the preparation of his third report. He also thanked the secretariat for its very helpful comments and welcomed the opportunity he had had over the previous two years to meet with researchers and graduates from the China Youth University of Political Studies School of Law in Beijing, where he taught, as well as those from Renmin University and Peking University.

He had submitted his third report in February, a preliminary version of which had been distributed to members shortly thereafter. It was unfortunate that the translation services' significant workload had prevented them from translating the report more quickly, even though it did not exceed the specified page limit. He wished to draw attention to two errors in the annex to the English version of the third report: the words "special situations" should be replaced with "special situation" and, in draft guideline 7, the phrase "with caution and prudence" should be replaced with the words "with prudence and caution".

The most important development since the Commission's previous session had unquestionably been the adoption of the Paris Agreement on Climate Change, which, significantly, provided that "climate change is a common concern of humankind". The international community had come back to that concept 23 years after the Rio Conventions; the Commission might wish to reconsider his original proposal in due course.

The third report dealt with two important issues: the obligation of States to protect the atmosphere, which included the duty to assess environmental impacts; and obligations relating to the sustainable and equitable utilization of the atmosphere, which would require studying the legal limits on intentional modification of the atmosphere, commonly known as "geoengineering activities".

With regard to the obligation of States to protect the atmosphere, he recalled that at the Commisssion's previous session he had proposed a draft guideline entitled "General obligation of States to protect the atmosphere", which was modelled on the language of article 192 of the United Nations Convention on the Law of the Sea. As some members had found that title too open-ended and general, he had decided not to ask that the draft guideline should be referred to the Drafting Committee. In part II of his third report he proposed to differentiate between two types of duties: the duty to prevent transboundary atmospheric pollution and the duty to mitigate the risk of global atmospheric degradation. That division corresponded respectively to the definitions provisionally adopted by the Commission in draft guideline 1 (b) and (c).

States' duty to prevent transboundary atmospheric pollution was a firmly established rule of customary international law, reflected in the maxim *sic utere tuo ut alienum non laedas*, which had been confirmed in the decisions of international courts and tribunals, including the *Trail Smelter* case (1941), the *Gabčíkovo-Nagymaros Project* case (1997), the *Iron Rhine Arbitration* (2005), the case concerning *Pulp Mills on the River Uruguay* (2010), the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (2011), the *Indus Waters Kishenganga Arbitration* (2013) and *Construction of a Road in Costa Rica along the San Juan River* (2015), to name only a few. The principle of *sic utere tuo* had been reaffirmed in the Declaration of the 1972 United Nations Conference on the Human Environment (Stockholm Declaration) and the Rio Declaration on Environment and Development (1992), which had broadened the principle's scope to include long-range transboundary effects caused by the activities of States and also imposed on States "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the

limits of national jurisdiction". The same principle could be found in many conventions, including the 1979 Convention on Long-range Transboundary Air Pollution.

The following points, corollaries of the *sic utere tuo* principle, were dealt with in paragraphs 15 to 33 of the current report: prevention, due diligence, knowledge or foreseeability, degree of care, burden of proof and standard of proof, jurisdiction and control. Those fundamental concepts were raised explicitly or implicitly in draft guideline 3 (a).

Turning to the principle of *sic utere tuo* in the context of global atmospheric degradation, he said that the *Pulp Mills* judgment had expanded the geographical scope of that principle, as confirmed in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, which essentially stated that the general obligation of States also applied to the global commons. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice had recognized the importance of that principle "not only for States but also for the whole of mankind". The Vienna Convention for the Protection of the Ozone Layer and the United Nations Framework Convention on Climate Change expressly enshrined that principle in their preambles, thus evincing the principle's status as an integral component of international law relating to the global atmosphere.

In the context of the protection of the atmosphere from global atmospheric degradation, substantive obligations incorporated in the relevant conventions were those of precautionary measures. There were two types of precaution: "precautionary measures" (also called the "precautionary approach") and the "precautionary principle". The former implied administrative measures to implement the rules of precaution; the latter was a legal principle applicable before a court of law, the main function of which was to shift the burden of proof from the party alleging the existence of damage to the defendant party, who was required to prove the non-existence of damage. While there were a few conventions that provided for a precautionary principle, international courts and tribunals had thus far never recognized that principle as customary international law, although it had been invoked several times by claimants. It would therefore be inappropriate to refer to that principle in the present draft guidelines, especially in the light of the Commission's 2013 understanding. Relevant conventions did however incorporate the precautionary approaches or measures, either explicitly or implicitly, as essential elements for the obligation of States to minimize the risk of atmospheric degradation. On that basis, he proposed draft guideline 3, contained in paragraph 40 of his report.

The report next dealt with the issue of environmental impact assessments, which arose out of States' obligation of due diligence. The issue of environmental impact assessments, well established in treaty practice, the case law of international courts and tribunals, and customary international law, was reviewed in paragraphs 41 to 60 of the report.

As indicated in paragraphs 44 to 50 of his third report, there were a large number of conventions governing environmental impact assessments, including the leading multilateral instrument, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). There had also been a number of judicial decisions dealing with that issue, all of which had confirmed States' obligation under customary international law to undertake environmental impact assessments. Accordingly, he proposed draft guideline 4, contained in paragraph 61 of his report.

The next important topic, dealt with in part III of the report, was the sustainable and equitable utilization of the atmosphere. The atmosphere had long been considered to be a non-exhaustible and non-exclusive resource that everyone could benefit from without depriving others. That was no longer the accepted view. The atmosphere must be seen as a limited resource with limited assimilation capacity and, like any limited resource, it must be used in a sustainable manner. The notion of sustainable development had a long history in international law, beginning with the well-known 1893 *Bering Sea Fur Seals* arbitration, but whether it remained a "concept" or was regarded as an "emergent principle" was still unsettled. In light of the term's ambiguous normative character, he suggested using the word "should" in draft guideline 5 on the sustainable utilization of the atmosphere.

While equity and sustainable development were frequently considered to be inherently interrelated, equity had particular aspects in the context of international environmental law. The notion of equity had created some confusion in international legal discourse because everyone had their own idea of what was equitable. The International Court of Justice, in its decision of 1986 in the case concerning the *Frontier Dispute* (*Burkina Faso/Republic of Mali*), had identified three categories of equity in international law: equity *infra legem* (within the law), equity *praeter legem* (outside, but close to, the law) and equity *contra legem* (contrary to law). According to that decision, equity *intra legem* was "that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes"; equity *praeter legem* was particularly important for its function of filling gaps in existing law; and equity *contra legem* was similar to settlement *ex aequo et bono*, as provided for in article 38 (2) of the Statute of the International Court of Justice, which might, upon agreement of the parties concerned, serve as a mechanism to correct existing legal rules that might otherwise lead to an unreasonable or unjust consequence, but it should be distinguished from the interpretation and application of existing law. The Commission, as it worked to codify and progressively develop international law, should concentrate on equity *infra legem* and equity *praeter legem*. Equity *contra legem* belonged to the area of law-making, *de lege ferenda*, over which the Commission had no mandate.

In the context of the law of the atmosphere, equity addressed distributive justice in allocating resources, on the one hand, and in allocating burdens, on the other hand. Therefore, its inherently twofold nature must be taken into account. It was largely a case of achieving a proper balance within the law. More specifically in relation to the protection of the atmosphere, it postulated an equitable balance between the present generation and future generations and called for an equitable global "North-South" balance, reflected in the concept of "common but differentiated responsibilities", to which he would return later.

There was abundant conventional practice relating to equity and equitable principles, as set out in paragraphs 72 to 74 of the report. Provisions on those topics could be found in numerous instruments, including: the Vienna Convention for the Protection of the Ozone Layer; the Montreal Protocol on Substances that Deplete the Ozone Layer; the United Nations Framework Convention on Climate Change; the Convention on Biological Diversity; the Convention to Combat Desertification; and the Convention on the Law of the Sea. Each of those instruments dealt in some way with protection of the atmosphere.

With regard to the previous work of the Commission, reference had been made to the draft articles on the law of the non-navigational uses of international watercourses (adopted as a convention in 1997), the draft articles on the law of transboundary aquifers or aquifer systems and the draft articles on prevention of transboundary harm from hazardous activities. Taking into account the above, he proposed draft guideline 6, as contained in paragraph 78 of the report.

He reiterated that equity was intrinsically linked to the issue of inequalities between developed and developing countries. The concept of common but differentiated responsibilities was reflected in the provisions of the United Nations Framework Convention on Climate Change and the Kyoto Protocol and was strictly applied. The 2011 Conference of the Parties, in Durban, had decided that the new instrument to be developed would apply to all parties, but would make no reference to that concept. The Paris Agreement of 2015, which was the result of the Durban process, obliged all parties to undertake the commitments set out in article 3 relating to the mitigation of greenhouse gas emissions. However, while parties were still to be guided generally by the principle of common but differentiated responsibilities, in the light of different national circumstances, in accordance with the Paris Agreement, there had unquestionably been some regression in the application of that concept in the context of climate change.

The Commission's 2013 understanding, through the inclusion of a "without prejudice clause", did not preclude referring to the principle of common but differentiated responsibilities. He suggested, however, that it would be prudent to use more moderate language in draft preambular paragraph 4, modelled on the Commission's draft articles on transboundary aquifer systems. He therefore proposed draft preambular paragraph 4, as contained in paragraph 83 of the report.

Turning to part III, chapter C, on the legal limits on intentional modification of the atmosphere, commonly called "geoengineering activities", he recalled the quite detailed presentations on that topic made by the scientists at the dialogue. Geoengineering activities included weather modification, afforestation (large-scale planting of trees), ocean fertilization, carbon dioxide removal and solar radiation management, even though many of those activities were still experimental.

The use of such environmental modification techniques in warfare was prohibited by the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Convention). That Convention did not deal with the issue of environmental modification for peaceful purposes but offered a possible solution for regulation of the deliberate manipulation of natural processes that had "widespread, long-lasting or severe effects" of a transboundary nature.

Some recommendations relating to weather control had been made by the General Assembly, the United Nations Environment Programme and the World Meteorological Organization; they called on States to be prudent in their use of such technologies on a large scale. Afforestation had been incorporated into the Kyoto Protocol and the Paris Agreement as a valuable climate change mitigation measure. Soil carbon sequestration, on the other hand, was not mentioned in the Kyoto Protocol. Carbon capture and storage in sub-seabed geological formations for permanent sequestration was allowed under certain conditions by the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) and the relevant regulations of the International Maritime Organization (IMO). Ocean fertilization, as a form of marine geoengineering, was allowed only for scientific research. In 2010, the Parties to the Convention on Biological Diversity had agreed to ensure that "no climate-related geo-engineering activities that may affect biodiversity take place, until there is an adequate scientific basis on which to justify such activities and appropriate consideration of the associated risks for the environment and biodiversity and associated social, economic and cultural impacts, with the exception of small scale scientific research studies …". The 2013 Oxford Principles on climate geoengineering governance provided good guidance in that regard from both a science and an international law perspective.

It was clear that the principles of "prudence and precaution", to use the words of the orders of the International Tribunal for the Law of the Sea, would govern all geoengineering activities, even where permitted, and that in any event international law required that environmental impact assessments should be undertaken. Accordingly, he proposed draft guideline 7, on geoengineering, as contained in paragraph 91 of the report.

With regard to the future programme of work, he suggested that at its next session the Commission should deal with the interrelationship of the law of the atmosphere with other fields of international law, such as the law of the sea, international trade and investment law and international human rights law and that, at its 2018 session, it should deal with the issues of implementation, compliance and dispute settlement in relation to the protection of the environment, with a view to completing the first reading of the topic. When considering draft articles, the Commission was required to wait one year before adopting them on second reading. He believed, however, that for the draft guidelines the Commission could proceed to second reading at its next session, as it had done with the topic of reservations to treaties. The second reading of the draft guidelines might therefore be completed by 2019, although it would of course be for the Commission to decide.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/694)

The Chairman thanked the Special Rapporteur for introducing his third report on the protection of the atmosphere and invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/694).

Mr. Hassouna said that the Commission had decided to consider the current topic because it had great practical importance for States. That was what had prompted the Sixth Committee to suggest in 2008 that the Commission should undertake a general review of

how treaties adapted to changing circumstances, with a special emphasis on subsequent agreements and subsequent practice. Indeed, providing for a clearer understanding of the definition, role and interpretative weight of subsequent practice was crucial for States to understand and meet their evolving treaty obligations, and for judges to correctly construe the meaning of a treaty in the light of those changing circumstances.

In the course of the debate on the work of the Commission in the Sixth Committee in 2015, delegations had generally welcomed the adoption of draft conclusion 11 on the constituent instruments of international organizations, although some had said that the four paragraphs should be clearer and more detailed. He trusted that the Special Rapporteur would address those concerns in the commentary. A relatively small number of States had responded to the Commission's request for examples of their national practice, which might be explained by a lack of State practice in that field. That should not, however, deter the Commission from continuing to ask States for their opinions and for examples of their practice.

Subject to certain reservations and comments that he would address later, he agreed with the general approach of the Special Rapporteur, who in his fourth report had chosen to focus on the legal effect of the pronouncements of expert bodies and the decisions of domestic courts, in the context of the interpretation of treaties.

In part II of the report, on the pronouncements of expert bodies, the Special Rapporteur referred to guidelines 3.2.1 and 3.2.3 of the Commission's Guide to Practice on Reservations to Treaties. However those guidelines had little to do with the topic because, although they dealt with the legal effects of the pronouncements of expert bodies, they related solely to the role of those bodies with regard to reservations made by States parties upon accession to a treaty, at which time they should give consideration to the treaty body's assessment. That differed from an expert body's determination of a State's application of a treaty after it had become a party and was therefore obliged to take account of such an assessment. Furthermore, the guidelines relied on by the Special Rapporteur concerned expert body pronouncements addressed to specific States in the context of making reservations to a treaty, whereas the decisions referred to in draft conclusion 12 were general in nature and meant to provide recommendations on the interpretation of treaties for all treaty parties.

With regard to draft conclusion 12 itself, an explanation of what was meant by the phrase "pronouncement of an expert body" should be added, either in the draft conclusion or the commentaries, to the definition of the term "expert body" provided in paragraph 1. Furthermore, while the role of pronouncements by expert bodies was described in general terms in paragraphs 2 and 3, it was not clear when those pronouncements played the roles described. The commentary should also indicate the weight to be given to such pronouncements taking into account the treaty in question, the type of expert body and its membership and rules of procedure, the legal content of the pronouncement and the extent to which it was accepted by States parties.

Given that the term "expert bodies" did not include organs of international organizations, a definition of the latter should be provided, together with an explanation of the reason for distinguishing them from the former, especially since they often performed the same function. Furthermore, in view of its increasing importance, the role of international organizations in the interpretation of treaties should be dealt with in a separate draft conclusion. Draft conclusion 12 should likewise make clear that what was important in the interpretation of treaties was the practice of the parties to the treaties, not the practice of other actors, for example expert bodies, whose role was solely to monitor the application of the treaties. The pronouncements of expert bodies might therefore give rise to subsequent practice as expressed through the reaction of States, but only that reaction constituted a subsequent practice in the true sense of the term. As a general rule, expert bodies should not be able to change the interpretation of a treaty without the consent of the parties. Under treaty regimes, States were the parties; they undertook the obligations set out in the treaties and had a duty to apply their provisions. While independent experts were important, they must not be able to modify a regime, unless the treaty in question provided otherwise; without that limitation, the parties to the treaty would be undermined, and the expression of sovereignty would be meaningless. Regarding paragraph 4 of the draft

conclusion, while it was clear that States should not necessarily be expected to react to all pronouncements of expert bodies, it would be appropriate to provide them with guidance as to when a reaction was necessary and under which circumstances they were expected to respond to a pronouncement.

He agreed that draft conclusion 13 might not be necessary, since its provisions were dealt with in other draft conclusions. Paragraph 1 could perhaps be retained but it was not clear why the recommendations in paragraph 2 were addressed only to domestic courts and not to international courts and more generally to all other relevant actors. Furthermore, if paragraph 2 were to be retained, its formulation should be completely revised so as to ensure that it provided guidance rather than instructions, as currently seemed to be the case.

With regard to part V of the report on revision of draft conclusion 4 (3), which would provide that other subsequent practice under article 32 consisted of official conduct in the application of the treaty, the meaning of "official conduct" should be clarified and perhaps limited.

He too had reservations about the term "significance" in new draft conclusion 1a. As to the use of other terms, he shared the view that the term "expert body" should be replaced with "expert treaty body" in the draft conclusions and the commentaries. He also suggested that at second reading the Commission should seriously consider replacing the term "conclusions" with "guidelines" in order to better reflect the object and purpose of the topic.

There had been an animated discussion as to the need for draft conclusions 12 and 13 and the appropriateness of referring them to the Drafting Committee. In his view, criticism was always welcome as long as it was constructive and aimed at helping the Special Rapporteur to improve his report. The Special Rapporteur had responded to members' concerns and explained his choice of wording for the draft conclusions. Taking into account members' views and the Special Rapporteur's explanations, he was of the view that all the draft conclusions should be referred to the Drafting Committee with a view to reaching a consensus based on mutually acceptable language, failing which the matter would have to be brought back to the plenary for further consideration. It would be helpful if the Special Rapporteur were to redraft some of his proposals in the light of the discussion in plenary in order to facilitate the work of the Drafting Committee. That approach had already been used successfully by the Commission for a number of other topics, including protection of the atmosphere and provisional application of treaties.

Lastly, he expressed support for the proposed future programme of work contained in part VI of the report.

Ms. Escobar Hernández said that, with regard to the role of expert bodies and the legal effects of their pronouncements, she largely shared the view expressed by Mr. Forteau that the role of such bodies was basically to monitor and supervise the conduct of States in applying the treaties pursuant to which they had been established. Other members of the Commission had expressed similar views. Treaty bodies were not tasked with applying the treaty but with ensuring that the States parties applied it. It followed that, in fulfilling that role, they interpreted the treaty and their interpretation could not be ignored when defining the scope of the treaty. Furthermore, their interpretation was pertinent inasmuch as it was the States themselves that had tasked them, albeit implicitly, with interpreting the treaty in question; that task was inherent to the supervisory role of those expert bodies.

Given the very nature of those bodies and the powers granted to them by States, the pronouncements of expert bodies could under no circumstances be regarded as mere suggestions or recommendations without legal effect. Two examples served to illustrate that assertion. First, the United Nations Human Rights Committee could exercise its supervisory role through various procedures: consideration of periodic reports of States parties; consideration of communications from individuals or States; and the adoption of general comments. The first case was an automatic and obligatory function attributed by a State upon ratification of the International Covenant on Civil and Political Rights. The second procedure was a function that a State chose to give the Committee by making a declaration expressly recognizing that role. In the third procedure the Committee explained its interpretation of various provisions of the Covenant, thereby facilitating its supervisory role and helping States meet their obligations under the Covenant. It was clearly the will of

States to invest the Committee with those powers. How then could the pronouncements of the Committee be considered to have no legal effect? Why would States voluntarily accept to be monitored by the Committee if they did not accept its pronouncements or considered them to be without legal effect? Those pronouncements could not be considered to be nothing more than the opinion of individuals acting solely in their capacity as experts. Their pronouncements unquestionably had legal effect and contributed to the interpretation of the Covenant because States took them into account when designing national policies and aligning their domestic legislation with the Covenant. Such pronouncements were comparable to decisions handed down by a judicial body. It was not therefore surprising that numerous publications described expert bodies as "quasi-judicial". That was even truer with regard to the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the European Commission on Human Rights, whose decisions undeniably had legal effect.

While it was true that the Commission on the Limits of the Continental Shelf could not for example be said to "authorize" a State to extend its continental shelf, only a favourable recommendation from the Commission in response to a State's request could be cited to justify an extension of its continental shelf to third parties, who could not object, so long as the extension was in accordance with the United Nations Convention on the Law of the Sea. The Commission's recommendations could not therefore be said to have no legal weight or effect. States themselves had freely established the Commission as an authority on the interpretation of the Convention whose competence was recognized by States when they acceded to or ratified the Convention.

There could be no doubt that expert bodies had a mandate to interpret the instruments under which they had been established and that their interpretation of those instruments had legal effect. That interpretative role must however be defined because it did not fall under the category of subsequent agreements or subsequent practice, which never referred to a particular form of interpretation but rather to a particular mechanism for interpretation. While that mechanism was not precisely defined in the Vienna Convention, there was no basis to conclude that any act of interpretation constituted a subsequent agreement or subsequent practice.

While it was not possible to make a general statement that the work of expert bodies presented no element that made it possible to establish the existence of a subsequent agreement or subsequent practice within the meaning of article 31 (3) (a) and (b) and article 32 of the Vienna Convention, the "pronouncements" of the expert bodies, the subject of draft conclusion 12, clearly did not constitute a subsequent agreement or subsequent practice. Closer examination of the practice of such expert bodies showed that in some cases certain aspects of their procedures might constitute a subsequent agreement or subsequent practice but would in any case be attributable to the States themselves and not to those bodies. In other words, while the work of expert bodies might be useful in determining subsequent agreements and subsequent practice, it could not in itself constitute a subsequent agreement or a subsequent practice.

She therefore had serious reservations about draft conclusion 12, in particular paragraphs 2 and 3. Furthermore, the Special Rapporteur's conclusion in paragraph 4 was not entirely justified by the arguments set out in the report. In addition, the paragraph should be compatible with the other draft conclusions provisionally adopted by the Commission that dealt with the issue of silence on the part of a State. Lastly, she was unsure of the Special Rapporteur's intention in paragraph 5, which did not seem to be in line with the general structure of the draft conclusions.

Regarding draft conclusion 13, she fully endorsed the comments made by other members. Paragraph 2 seemed out of place in the draft article under consideration. It consisted of recommendations to domestic courts on how to interpret article 31 (3) (a) and (b) and article 32 of the Vienna Convention, whereas it was for domestic and international courts themselves to draw the appropriate conclusions in the light of the draft conclusions as a whole. It was therefore somewhat incongruous to tell them what they should interpret and how. Furthermore, if the Commission were to decide to make recommendations, it was not clear why those recommendations would not apply to all. In any case, to amend the

object of the draft conclusions at the end of first reading would not be appropriate or consistent with the Commission's methods of work.

She had no objection to the substance of paragraph 1, but had real doubts about the desirability of a draft conclusion that highlighted a particular type of State practice. While she was not opposed to the Special Rapporteur expressly mentioning judicial practice, it would probably be preferable to include a reference thereto in another draft conclusion. Furthermore, in paragraph 2 of the Spanish version of the text, the word "should" had been translated as "*deben*"; the latter should be replaced with "*deberían*". It was an important detail because it could have significant legal consequences.

She agreed with new draft conclusion 1a, although she had doubts about the term "*importancia*" in the Spanish version. It seemed that the translation of the word "significance" raised problems in other language versions too, as other members had noted. The Special Rapporteur's suggested amendment to draft conclusion 4 (3) did not seem timely or necessary and in any case would require further explanation. Furthermore, there would be an opportunity to make any necessary changes on second reading.

In conclusion, she said that she was not opposed to sending the draft conclusions proposed by the Special Rapporteur to the Drafting Committee if the Commission so decided. That said, referral of the draft conclusions should give rise to a more in-depth discussion of the issues raised by various members and make it possible to identify points that should perhaps be given more emphasis within the context of other draft conclusions. In other words, a decision to refer the draft conclusions to the Drafting Committee should not be taken as implying that the Commission wished to include the draft conclusions proposed by the Special Rapporteur, in particular draft conclusions 12 and 13, in the final text to be adopted on first reading.

Mr. Šturma said that, in his view, it was for the Drafting Committee to review new draft conclusion 1 a and draft conclusion 4, although any decision on the proposed amendments would depend on the decision taken with regard to draft conclusion 12.

He shared the concerns expressed by other members concerning the pronouncements of expert bodies but nevertheless supported sending draft conclusion 12 to the Drafting Committee. The discussion thereof had highlighted differences of opinion among the members. Some thought that the draft conclusion served no purpose because the pronouncements of expert or treaty bodies could not be considered to be subsequent practice, since they constituted quasi-judicial precedents or jurisprudence. Other members had taken a very cautious approach regarding the judicial nature of those conclusions or pronouncements and had recommended verifying the legal basis and nature of the expert bodies in question and the decisions they adopted under their different treaty regimes. Those differences of opinion were an additional reason for closer study of the role of the pronouncements of expert bodies.

Those pronouncements were similar but not identical to those of international courts. Judicial decisions were legally binding on the parties to a dispute and constituted, for other States, subsidiary means for the determination of rules of law. Pronouncements of expert bodies had a quasi-judicial nature. While he generally agreed with Mr. Forteau in that regard, he recognized that there was no consensus on that point for various reasons: pronouncements of expert bodies were not binding; they were not always recognized as a subsidiary source of law; and, lastly, there were different types of expert bodies and pronouncements. Expert bodies nevertheless played an important role in the interpretation and application of treaties. They were often cited in legal literature as well as by national and international courts and could — but sometimes did not — influence the subsequent practice of States.

He wondered whether it was necessary to exclude expert bodies that were bodies of an international organization from the definition of expert bodies in draft conclusion 12. In other words, what were the key characteristics of such bodies: the way they had been established (for example pursuant to a specific treaty or the constituent instrument of an international organization and/or a secondary source of law); or the nature of their work under the provisions of the treaty in question?

He agreed with Mr. Park that the draft conclusion should make it clear that the pronouncements of expert bodies could not constitute, by themselves, subsequent practice within the meaning of articles 31 (3) and 32 of the Vienna Convention. The subsequent practice of States could however be highlighted in a pronouncement of an expert body or arise from or be reflected in that pronouncement. Since States often reacted differently to those pronouncements it would seem that the latter generally did not establish an agreement but nonetheless constituted subsequent practice, at least within the meaning of article 32.

With regard to draft conclusion 13, he said that it was true that in applying international instruments domestic courts were in principle involved in their interpretation. At the same time, as State bodies, they were contributing to subsequent practice. They were perhaps different from other national bodies in that they interpreted those instruments more often, sometimes by making specific reference to methods of interpretation. Therefore, given the structure of the draft conclusions as described by the Special Rapporteur in paragraph 113 of his report, it might be more appropriate to include paragraph 1 of the draft conclusion in that part of the report that dealt with specific forms and aspects of subsequent agreements and subsequent practice. He still had some concerns about paragraph 2, not with regard to its content but rather because it contained recommendations for domestic courts, rather than conclusions. Those recommendations should be redrafted or placed in the commentaries.

He concluded by recommending that all the draft conclusions should be referred to the Drafting Committee.

Sir Michael Wood said that he agreed with the Special Rapporteur that it would be helpful to include a draft conclusion of an introductory nature, such as draft conclusion 1 a. The Drafting Committee might wish to consider whether the paragraph should track the title of the topic rather than referring to “significance”.

Part II of the report, on pronouncements of expert bodies, was intended to support new draft conclusion 12 and also led the Special Rapporteur to suggest amending draft conclusion 4 (3). While it was helpful to have an overview of the positions of learned societies and the legal literature relating to “pronouncements of expert bodies”, in particular the 2004 report of a committee of the International Law Association (ILA), the main conclusion that he drew was that the Special Rapporteur used the expression “pronouncements of expert bodies” to describe very different pronouncements about which it was very difficult to generalize even when limited to human rights bodies, more so with regard to bodies like the Commission on the Limits of the Continental Shelf, a technical body with a very particular function. That Commission was not necessarily the type of treaty body the draft conclusions should deal with; however, its inclusion in the report in fact served to indicate that the term “expert bodies” as used in the report covered such a variety of bodies that it was hardly a useful category. The legal effect, if any, that the pronouncements of treaty bodies might have on the interpretation of the treaties under which they were established depended primarily on the provisions of those treaties. That might explain why the Special Rapporteur explained that he had derived “an indicative conclusion regarding the possible effect of pronouncements by expert bodies for the interpretation of a treaty”. The text of draft conclusion 12 as proposed seemed to be indicative in that its main provisions merely stated that subsequent agreements and subsequent practice “may arise from, or be reflected in” the pronouncements of expert bodies and that a pronouncement of an expert body “may contribute” to the interpretation of a treaty.

Like Mr. Murase, Mr. Kolodkin and other members, he did not really understand why the Special Rapporteur had excluded the organs of international organizations, whose members were likewise experts acting in their personal capacity, from his definition of “expert bodies” in draft conclusion 12. The reason appeared to be that the pronouncements of those bodies could be attributed to an international organization. In footnote 26, the Special Rapporteur referred to the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) as an example of an organ that was not an “expert body” within the meaning of draft conclusion 12; yet its pronouncements seemed to have the same weight as those dealt with in the report. The footnote also referred to information provided by the Legal Adviser of ILO giving

examples of pronouncements of its Commission of Experts that had given rise to subsequent practice.

The Special Rapporteur seemed to envisage at least three different roles for pronouncements of expert bodies in relation to the interpretation of treaties. First, those pronouncements might give rise to a subsequent agreement or subsequent practice of the parties to the treaty within the meaning of article 31 (1) (a) and (b) of the Vienna Convention on the Law of Treaties or reflect such an agreement or practice. Second, they might themselves constitute "other subsequent practice" in the application of the treaty and as such constitute a subsidiary means of interpretation under article 32 of the Vienna Convention, thereby making them relevant to the topic. Third, they might constitute a supplementary means of determining the rules of international law within the meaning of article 38 (1) (d) of the statute of the International Court of Justice, relating to judicial decisions and teachings.

The first of those roles seemed to have already been covered in the draft conclusions already adopted by the Commission. The third, as already noted by other members of the Commission, was not related to subsequent agreements and subsequent practice and thus was not within the scope of the topic at hand, which, as Ms. Escobar Hernández had said, dealt not with the interpretation of treaties in general but rather subsequent agreements and subsequent practice.

As for the second, he, like other members, had grave doubts that the pronouncements of expert bodies could themselves constitute "other subsequent practice" in the application of treaties and as such also constitute a supplementary means of interpretation within the meaning of article 32 of the Vienna Convention. The Special Rapporteur seemed to base that conclusion on the following reasoning: first, in paragraph 58 of his report, he stated that those pronouncements were "a form of practice", which seemed rather to beg the question. Mr. Forteau had quite rightly said that those pronouncements more closely resembled judicial or quasi-judicial decisions stating the law and did not constitute a form of practice in the application of the treaty. That position had been supported by the International Court of Justice in the *Ahmadou Sadio Diallo* case, in which the Court described the pronouncements of the Human Rights Committee as "interpretative case law". Second, in paragraph 60 of his report the Special Rapporteur said that the pronouncements of expert bodies were "official statements" within the meaning of paragraph 17 of the commentary to draft conclusion 4, because they were acts undertaken in the exercise of a mandate and not in a private capacity. That argument was not convincing. Pronouncements of expert bodies were of course "official" in that they were not rendered by their members in their private capacity, but, as many members of the Commission had already pointed out, that did not mean that they were "official statements" within the meaning of that term as used in paragraph 17 of the Commission's commentary to draft conclusion 4. Read in the light of that commentary, the expression "official statements" referred to the official statements of the parties to a treaty, just as the expression "official acts" in the same sentence of paragraph 17 referred to official acts of the parties to the treaty. The text of draft conclusion 4 likewise made it clear that the Commission was referring to official acts by the parties to the treaty. That was also the point of view of the International Committee of the Red Cross (ICRC) in its 2016 commentary on the First Geneva Convention, which referred to the work of the Commission, specifically draft conclusion 4 (3). The commentary stated that:

> "A subsequent practice that does not fulfil the criteria of [article 31 (3) (b) of the Vienna Convention], i.e. to establish the agreement of the Parties regarding the interpretation of a treaty, may still be relevant as a supplementary means of interpretation under Article 32. This consists of conduct by one or more of the Parties in the application of the treaty after its conclusion. The weight of such practice may depend on its clarity and specificity, as well as its repetition."

He was not trying to downplay the importance of the pronouncements of expert bodies for the interpretation of treaties, but the Special Rapporteur had not demonstrated that they amounted to subsequent practice, even though they might give rise to or reflect subsequent agreement or subsequent practice. The Drafting Committee should take that into account if draft conclusion 12 was referred to it.

He therefore did not believe it necessary to amend draft conclusion 4 (3). The adoption of draft conclusion 11 by the Commission in 2015 likewise did not warrant amending that paragraph. Draft conclusion 11 dealt with the very special case of constituent instruments of international organizations, for which the Vienna Convention made special provision in article 5.

Regarding draft conclusion 13, paragraph 1 of which dealt with the role of decisions of domestic courts and paragraph 2 of which had the nature of an instruction to those courts telling them what they "should" do "when applying a treaty", it was not clear why the Special Rapporteur thought paragraph 1 was needed. As the Special Rapporteur noted in paragraph 95 of the report, the Commission, when it had adopted draft conclusion 4, had said that subsequent practice under article 31 (3) (b) of the Vienna Convention might also include judgments of domestic courts. The latter were already accounted for in draft conclusion 5 (1); draft conclusion 13 (1) did not therefore seem necessary. He agreed with other members who felt that it was not appropriate for the Commission to adopt a draft conclusion that expressly purported to tell domestic courts what they should do when applying a treaty. It was one thing to indicate in general terms, as did the other draft conclusions, an approach for the interpretation of subsequent agreements and subsequent practice under articles 31 and 32 of the Vienna Convention with a view to assisting domestic courts. It was quite another to give explicit instructions to those courts to act in a certain way. That was not the Commission's role and it was doubtful that such instructions would be well received by the judges concerned.

The substance of the chapeau of draft conclusion 13 (2) raised two issues. Why did the paragraph apply to domestic courts "when applying a treaty" rather than "when interpreting a treaty"? Why did the sentence say that domestic courts only "should" do what was set out in (a) to (e), when the same principles were stated elsewhere more categorically? More seriously, the substance of subparagraphs (a) to (e) was already covered explicitly or implicitly in the other draft conclusions; there was no need to repeat it.

In conclusion, he said that if the Commission decided to refer draft conclusion 12 to the Drafting Committee, the latter should study it very closely to ensure that its paragraphs could be integrated into the general structure of the draft conclusions that had already been adopted. Like other members, he had real doubts about sending draft conclusion 13 to the Drafting Committee, although the part of the report dealing with draft conclusion 13 did contain very useful material that could at the appropriate time be used in the commentaries to the already adopted draft conclusions. He had no objection to referring draft conclusion 1 a to the Drafting Committee but there was no reason to request the Drafting Committee to amend draft conclusion 4 (3).

Mr. Kamto said that the fourth report of the Special Rapporteur was an example of what could happen if one tried to respond to the sometimes contradictory concerns expressed by States in response to the work of the Commission; it was clear from paragraphs 5 and 6 of the report that the Special Rapporteur was seeking to meet the expectations of certain States in proposing draft conclusions 12 and 13 and the amendment to the text of draft conclusion 4 that had already been adopted by the Commission.

The Special Rapporteur's approach to the category of "expert bodies" and to the legal effect he attributed to their "pronouncements", "recommendations" or "observations" as subsequent agreements or subsequent practice in the context of the interpretation of treaties was questionable. The major difficulty was essentially that the two draft conclusions that he proposed, draft conclusions 12 and 13, were in many ways not consistent with the arguments he used to justify them. That lack of consistency could lead to the solution suggested by some members of the Commission of not referring the two draft conclusions to the Drafting Committee. That solution seemed too severe because the report did contain various, well-substantiated arguments that justified dealing with the case law of treaty bodies and domestic courts in the draft conclusions. Two points in particular called for comment: how to reflect developments relating to what the Special Rapporteur called "expert bodies" and analysis of the practice of domestic courts.

The expression "expert bodies" was too broad and went well beyond the Human Rights Committee and similar bodies. Indeed, in the *Ahmadou Sadio Diallo* case cited by

the Special Rapporteur as a means of introducing his arguments in paragraph 28 of the report, the International Court of Justice had expressly referred to the Human Rights Committee but in a specific context that did not justify making its reasoning on that issue a general rule. Even if that case were to be used to justify a general rule, it would be prudent to keep to the accepted terminology and refer to "treaty bodies". The latter were empowered by the treaties under which they were established to interpret those treaties. An interpretation by those bodies was in many ways an authentic interpretation.

Similarly, replacing the words "by one or more parties" with "official", as suggested by the Special Rapporteur in paragraph 120 of his report, would create confusion as to terminology and lead to a complete change of approach in the determination of subsequent agreements and subsequent practice. From a terminological perspective, the word "official", which referred to the established representatives of the State, was generally used in opposition to "unofficial" or "private", as in relation to the immunity of State officials from foreign criminal jurisdiction. In the report, however, the word "official" meant something not only different but above all varied, mixing representatives of the State and bodies of independent experts. For that reason, the expression should be deleted, as should such related terms as "official means" and "official conduct", used in paragraphs 120 and 121 of the report.

Furthermore, it did not seem appropriate to raise the issue of the effect of silence on the part of States following pronouncements by treaty bodies. States could not be expected to react to everything for fear of being subject to acts that in themselves were not binding.

There was no doubt that decisions of domestic courts constituted subsequent practice of States under article 32, but solely article 32, of the Vienna Convention, in other words as a supplementary means of interpretation. As the Special Rapporteur had said in introducing his fourth report, there was no reason for the Commission to consider decisions of domestic courts to be a means of determining customary international law, in particular as an element of practice, but it could not also consider them to be subsequent practice under article 32 of the Vienna Convention.

The problem for the Commission was how to take into account both situations appropriately in the context of the draft conclusions without positing the existence of rules not provided for in articles 31 (3) (b) and 32 of the Vienna Convention. With regard to the case law of domestic courts, he agreed with Sir Michael Wood that there was no need to repeat what had already been said in a previous draft conclusion.

The Commission should therefore retain draft conclusions 12 and 13 in principle but with a radically different text, shorter, much simpler and less normative because, as a number of members had said, draft conclusion 13 (2) in particular prescribed a set of norms, whereas the purpose of the Commission's work on the topic was not to issue directives but rather to prepare draft conclusions. Paragraph 3 of previously adopted draft conclusion 4 should not be amended. Draft conclusion 12 should be replaced with a single paragraph to read:

> "Consideration may be given to interpretation by treaty bodies as a supplementary means of interpretation of treaties within the meaning of article 32 of the Vienna Convention on the Law of Treaties."

Provided that the Commission considered that the question of domestic courts had not been dealt with adequately in the already adopted draft conclusions, draft conclusion 13 should likewise be replaced with a single paragraph:

> "Decisions of domestic courts in the application of treaties may contribute to the determination of subsequent practice as a supplementary means of interpretation of treaties within the meaning of article 32 of the Vienna Convention on the Law of Treaties."

If the Commission were to reach an agreement to that effect, he would be in favour of sending draft conclusions 1a, 12 and 13 to the Drafting Committee.

The meeting rose at 11.50 a.m.