

Provisional

For participants only

4 June 2018

Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3395th meeting

Held at Headquarters, New York, on 4 May 2018, at 10 a.m.

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Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

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18-07159 (E)



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Present:

Chair: Mr. Valencia-Ospina

Members: Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guilloff
Mr. Hassouna
Mr. Hmoud
Mr. Jalloh
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/712 and A/CN.4/715)

The Chair invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Mr. Cissé said that he wished to applaud the Special Rapporteur for his excellent report, as well as for his commitment, flexibility and patience in conducting the Commission's deliberations on a complex topic. Subsequent agreements and subsequent practice in relation to the interpretation of treaties were the very expression of the dynamic nature of international law and its ability to adapt to the changing needs and varying interests of States. As a new member of the Commission who was not versed in the history of the topic, he had only a few minor observations to make concerning the draft conclusions.

Regarding the form of the report, the comments made by States during the discussion in the Sixth Committee of the General Assembly, while necessary and relevant, were often reproduced in somewhat too much detail, making it sometimes difficult to identify the main issues or even the legal issues that required clarification. Yet, the point of requesting such comments was to shed more light on and refine the draft conclusions. Reproducing them in the body of the report did not seem particularly useful in clarifying the applicable law. It would have been more useful to summarize the comments in the footnotes, discuss the legal issues on which States had concurring or divergent views in the body of the report, and set out in full the comments and observations of each State in a separate document, as had been suggested by Sir Michael Wood. The concurring views of States were the ones that should interest the Commission for the current discussion, since they provided it with more objective arguments in support of the draft conclusions. It was his understanding — which might be a naive one — that the most important elements of that exercise were the comments made by the Special Rapporteur in the light of the observations made by States during the debates of the Sixth Committee. Indeed, while States' submissions were highly useful, their value should not be overestimated, particularly since they were relatively few in number and did not come from all regions of the world. The report would have been improved had the Commission given priority to the practical aspects of the

comments, whose sole function was to clear up the controversial points of law in treaty interpretation.

Still on the question of form, it seemed logical to move draft conclusion 4 (Definition of subsequent agreement and subsequent practice) to just after draft conclusion 1 [1a] (Introduction), given that, before going any further in the development of the topic, it was necessary to provide a clear definition of what constituted a subsequent agreement and subsequent practice. Along the same lines, draft conclusion 6 (Identification of subsequent agreement and subsequent practice) should be positioned just after draft conclusion 4, since, once something had been identified, it was then easier to identify it.

Although the objective of the report was to propose sufficiently detailed and even progressive standards for the interpretation of subsequent agreements and subsequent practice based on the rules for the interpretation of treaties contained in the 1969 Vienna Convention on the Law of Treaties, there was an undeniably close relationship between the current topic and that of identification of customary international law. Indeed, a treaty or an agreement could give rise to a rule of customary international law, and a rule of customary international law could give rise to a treaty following its codification. For that reason, it was important to point out, in the commentary, the distinction between practice that led to the development of a rule of customary international law and practice that arose following the conclusion of a treaty.

Concerning the substance of the draft conclusions, with reference to draft conclusion 1, he saw no need, *a priori*, for an introductory draft provision. While he did not have any major observation to make in that regard, he would nevertheless be inclined to propose that the draft conclusion should end with the words “on the basis of the rules of interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which reflected customary international law” [*sur la base des règles d'interprétation définies par les Articles 31 et 32 de la Convention de Vienne sur le droit des traités, reflétant le droit coutumier international*]. Even if those clarifications made the definition longer, they should be included in the introductory draft provision, to announce to the reader the legal basis of the analysis that followed.

Draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation) and the commentary thereto dealt, to a large extent, with “authentic means of interpretation” and “objective evidence of the understanding of the parties as to the meaning of the treaty”. The Commission

had explained in the commentary that that wording had been taken from its 1966 commentary on the draft articles on the law of treaties. However, despite being somewhat too detailed, the commentary did not contain an explanation of the expression “authentic means of interpretation”. In fact, the reasoning employed therein was circular in nature, since that expression referred back to the expression “objective evidence of the understanding of the parties as to the meaning of the treaty”. In the absence of further explanation, those concepts were ambiguous and gave rise to uncertainty as to how and on what basis subsequent agreements could be qualified as objective evidence, given the subjective and political nature of the actions of States in concluding subsequent agreements, in developing subsequent practice and in carrying out the interpretative act itself, which was inherently subjective. It was therefore necessary to indicate clearly how subsequent agreements and subsequent practice constituted objective evidence.

Indeed, therein lay the challenge, because the adduction of evidence in relation to the subsequent practice of the parties to a treaty could prove difficult, since, in many countries, and particularly in the developing world, there was little or no systematic archiving of legal, diplomatic or other documents relating to international law. Indeed, that weakness was revealed in the report of the Special Rapporteur, as the States that had submitted comments in response to the Commission’s request were largely from Asia and Europe. To avoid confusion, the Commission would have to clarify what it meant by “objective evidence” and “authentic means of interpretation”. It would also have to indicate clearly what constituted an authentic or an inauthentic means of interpretation, and what legal consequences such a qualification entailed in the exercise of interpretation in respect of subsequent agreements and subsequent practice. It seemed clear that, in the current context, the authenticity of the means of interpretation referred to the intention of the contracting States. The meaning and scope of that intention should be explained in the commentary, since it was when the intention of the parties became ambiguous over time that it would become necessary to take into account the context, within the meaning of article 31 of the 1969 Vienna Convention, as well as the supplementary means set out in article 32 of the Convention, in order to interpret the treaty or the subsequent practice in question.

For various reasons, the Commission had decided, for the purposes of the current report, not to discuss the problems associated with the relationship between an amendment or modification of a treaty, on the one hand,

and the interpretation of a treaty or subsequent practice, on the other. He took the opposite stance, finding it difficult to understand the Commission’s decision, especially since there were a number of excellent examples of why that aspect deserved its full attention. Two such examples were the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

The first of those agreements provided an example of subsequent practice resulting, in part, from an amendment related to the United Nations Convention on the Law of the Sea. That subsequent agreement had given rise, even among non-member States, to subsequent practice. Despite it being entitled, “Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea”, it had produced the double effect of both interpreting those provisions and modifying or amending them. The Agreement could therefore be considered subsequent practice that could assist in interpreting a treaty and in amending it. It specified the method that was henceforth to be used to determine the “maximum sustainable yield” — a key concept of the provisions on fisheries set out in parts V and VII of the Convention. It went even further than the Convention, since, to a certain extent, it changed the nature of that concept, as set out in the Convention, by transforming it into a minimum standard in relation to total allowable catch. That example illustrated the very real possibility that a subsequent practice, aimed, in part, at interpreting the provisions of a treaty, could give rise to an amendment or modification of those provisions. Consequently, the Commission should address that possibility in the draft conclusions, or at least in the commentary thereto.

The second example, namely the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, had been adopted following the entry into force of the Convention and had been subject to several amendments, as had been the wish of several major maritime powers, including the United States.

He recommended that the set of draft conclusions should be referred to the Drafting Committee, and he supported the Special Rapporteur’s proposal regarding the submission to the General Assembly of the results of the Commission’s final work on the topic.

Mr. Vázquez-Bermúdez said that he wished to congratulate the Special Rapporteur for his report, which, like each of his previous reports on the topic, was of a very high calibre and was based on rigorous legal research and analysis. The set of draft conclusions and the commentaries thereto would be of great practical usefulness to all legal operators called upon to interpret and apply international treaties.

He would make only brief comments on the draft conclusions, since he agreed with most of the Special Rapporteur's analyses, suggestions and observations concerning the comments and proposals of States. Since the Commission assigned the highest importance to the contributions of States throughout the discussion of its topics, it would be useful if the Secretariat, in addition to the topical summary of Sixth Committee debates, could compile the contributions made by each State over the course of the discussion on the topic. That suggestion could perhaps be discussed by the Working Group on Methods of work, which had been reconstituted at the current session.

With regard to draft conclusion 2 [1] (General rule and means of treaty interpretation), given the express reference in paragraph 1 to articles 31 and 32 of the 1969 Vienna Convention, the text of those articles should be set out in full in the commentary to the draft conclusion, for the convenience of readers. Alternatively, the text of the articles could be reproduced as a footnote to paragraph (1) of the commentary to the draft conclusion when they were mentioned expressly therein. That proposal was further supported by the assertion made in paragraph (7) of the commentary that "[a]ll means of interpretation in article 31 are part of a single integrated rule."

Moreover, the reference to articles 31 and 32 and the statement that the rules set forth in them also applied as customary international law should be understood as being without prejudice to the importance of another provision concerning treaty interpretation of the Vienna Convention, namely article 33 (Interpretation of treaties authenticated in two or more languages), and as being without prejudice, as well, to the application of that article as a rule of customary international law. It was stated in paragraph (6) of the commentary that "there are significant indications in the case law that article 33, in its entirety, indeed reflects customary international law". Since draft conclusion 2 and the commentaries thereto were expected to be adopted on second and final reading, the Commission should maintain that position and should no longer reflect the opposing views on that matter that had been expressed by two different groups of Commission members. The full text of article 33

should also be reproduced in a footnote to the first reference to the article in the commentaries.

Regarding paragraph 4, he endorsed the proposal made by Spain that, in the Spanish version, the words "*en el sentido del artículo 32*" should be replaced with the words "*en virtud del artículo 32*", which was more accurate, given that the term "subsequent practice" was not expressly mentioned in article 32 of the Vienna Convention.

With regard to draft conclusion 4, both subsequent agreements and subsequent practice were correctly defined in the text as "authentic means of interpretation". That assertion was important, since they were expressions of the meaning given to the provisions of a treaty by States parties as a whole.

Among the important clarifications made by the Commission on the topic was fact that a subsequent agreement concerning the interpretation of a treaty or the application of its provisions did not necessarily have to take the form of a treaty. In keeping with a suggestion made by Austria and the United Kingdom, he proposed that the following sentence should be added to paragraph 1: "Such an agreement does not necessarily have to be a treaty" [*Dicho acuerdo no tiene que ser necesariamente un tratado*]. That said, he could go along with the Special Rapporteur if the latter wished to maintain his view that it was not advisable to overburden the definition, and that the reference to draft conclusion 10 — which dealt with that issue — in the commentary to draft conclusion 4 was sufficient.

Some members of the Commission, endorsing a suggestion made by the United Kingdom, had proposed that the word "all" should be inserted before the words "the parties" in paragraphs 1 and 2, to make it clear that the agreement of all the parties was required. He agreed with the Special Rapporteur that the expression "the parties" in both paragraphs made it sufficiently clear that the agreement of all the parties was required — a point that was confirmed and elaborated upon in the commentary. In addition, since the assertion applied to both multilateral and bilateral treaties, it was not appropriate to refer to the agreement of all the parties.

With regard to draft conclusion 5 (Attribution of subsequent practice), he agreed with the Special Rapporteur's recommendation that paragraph 1 should be reformulated to make it clearer that not all conduct that might be attributable to a State under the rules of State responsibility was sufficient to count as subsequent practice for the purpose of treaty interpretation. However, the wording proposed by the Special Rapporteur failed to achieve the desired objective. As initially suggested by Mr. Murphy, the

Commission should avoid referring to conduct that was attributable to a State and should follow instead the formula used in draft conclusion 5 of the draft conclusions on identification of customary international law that had been adopted by the Commission, with an indication that the conduct was that of a State party and was “in the application of a treaty”. Along those lines, he found the text suggested by Ms. Galvão Teles and incorporating Mr. Murphy’s proposal to be acceptable. Of course, the title of draft conclusion 5 should also be amended to reflect that new content. It could perhaps read: “Conduct of the State party as subsequent practice” [*Conducta del Estado parte como práctica ulterior*].

With regard to draft conclusion 13 [12] (Pronouncements of expert treaty bodies), the new text that the Special Rapporteur proposed to add as paragraph 4 was unnecessary, not because it was inaccurate, but because it fell outside the scope of the topic. The role of such pronouncements with respect to a subsequent agreement or subsequent practice of the States parties in relation to the interpretation of the treaty was already adequately reflected in paragraph 3, which read: “A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties.” Perhaps the words “refer to” [*referirse a*] should be replaced with the word “reflect” [*reflejar*], which would be more appropriate. Paragraph 4 also made it clear that the draft conclusion was without prejudice to the contribution that a pronouncement of an expert treaty body might otherwise make to the interpretation of a treaty. In any case, to avoid suggesting that any diminishment of the importance of the pronouncements of expert treaty bodies was intended, that point should be explained in more detail in the commentary.

A set of conclusions accompanied by commentaries was the appropriate form for the Commission’s final output on the topic, as it brought legal clarity to an important and complex aspect of the law of treaties. He endorsed the Special Rapporteur’s proposed recommendations to the General Assembly. The formula that the General Assembly had been applying with regard to the Commission’s final output since 2000 was a very useful one.

Mr. Rajput said that the set of draft conclusions had addressed an important area of the law of treaties and, broadly speaking, had met the objective of providing a concise and practical guide for those called upon to interpret treaties. He congratulated the Special Rapporteur for his patience and hard work in bringing the topic to the crucial stage of second reading and for his report, in which he accurately summarized the

reactions of States, while making further suggestions for improvement.

The role of subsequent agreements and subsequent practice in relation to treaty interpretation should neither be understated nor overstated. Although important, they constituted only one aspect of the general rule of treaty interpretation that was enshrined in articles 31 and 32 of the 1969 Vienna Convention and were merely an appendage to the consideration of the context of a treaty. Although that role was pivotal, the Commission should not emphasize it to the extent that it overshadowed other aspects of treaty interpretation, disrupted the delicate balance of *pacta sunt servanda* or disturbed the stability of treaty relations by introducing too much flexibility into any aspect of the general rule of interpretation. Several States had highlighted that the current project was about clarifying and supporting the relevant provisions of the 1969 Vienna Convention, not changing them in any way. Thus, an appropriate balance of stability and predictability of treaty relations versus flexibility of interpretation should be the factor guiding the Commission in its general debate and in the more granular debate that would take place in the Drafting Committee.

The outcome of the first reading of the draft conclusions had produced a wealth of material, and the ethos it embodied should be maintained. Doing so would be of great assistance, not only for the entities specifically called upon to interpret treaties but also for practitioners and scholars in the field. Thus, the material presented in the commentary was important, helpful and necessary. However, it had the disadvantage of making the outcome bulky; consequently, steps should be taken to keep the commentaries to a manageable length.

Turning to the draft conclusions, he agreed in principle with the contents of draft conclusions 1 and 2, which comprehensively described the exercise being undertaken by the Commission in the current project. He endorsed the Special Rapporteur’s approach of not introducing the role and effect of the nature of treaties into the project. Doing so would have made the project unwieldy, given the difficulty of articulating dedicated areas of emphasis if treaties were categorized based on their nature. The Commission had adopted a similar approach in the past, as reflected in paragraph (4) of its commentary to article 35 of the draft articles on the law of treaties. Paragraph 1 of draft conclusion 2 needed to be amended to bring it into line with articles 31 and 32 of the Vienna Convention. Article 31 was in the singular, whereas article 32 was in the plural. It might be appropriate to refer to the general rule of interpretation in the singular, but the reference to supplementary means had to be in plural, as it was a reference to

article 32. While the reference to the expression “general rule of interpretation” mirrored the wording of article 31, the reference to “the rule on supplementary means of interpretation” could be changed to “supplementary means of interpretation” to more closely track the wording of article 32.

With regard to draft conclusion 3, he remained unconvinced by the reservations expressed by some States regarding the description of subsequent agreement and subsequent practice as “objective evidence” and “authentic means”. Neither term was new; rather, both had been taken from the commentary to the draft articles on the law of treaties prepared by the Commission. In paragraph (14) of the commentary to draft article 27 (3), which had later become article 31 (3) of the 1969 Vienna Convention, any subsequent agreement between the parties regarding the interpretation of the treaty was described as an “authentic element of interpretation”, while in paragraph (15) of the same commentary subsequent practice was said to constitute “objective evidence of the understanding of the parties as to the meaning of the treaty”. Although in those draft articles the word “authentic” was used with reference to subsequent agreements and the word “objective” was used with reference to subsequent practice, since the Commission was dealing with both notions in a single paragraph in draft conclusion 3, the collective use of those phrases was acceptable. He therefore concurred with the Special Rapporteur’s decision not to make any changes to draft conclusion 3. Instead, that point could adequately be reflected in the commentary.

On draft conclusion 4, he agreed with the proposal by the United Kingdom and with Mr. Park that the word “all” should be inserted before the words “the parties” in both paragraphs 1 and 2. The Commission should avoid allowing for the possibility that a few parties to a treaty could alter its meaning through a limited agreement or practice. That was particularly critical in multilateral treaties, where a light inference of subsequent agreement or subsequent practice could create practical problems.

Regarding the non-binding nature of subsequent agreements, an agreement whose purpose was to serve as a subsequent agreement did not need to comply strictly with every legal requirement of the 1969 Vienna Convention for the conclusion of an agreement. But if non-binding agreements were to be included, then non-binding instruments were better characterized as subsequent practice than as subsequent agreements, to avoid interference with the notion of agreement, which had a technical meaning in other areas of international law. The work on the current project should be

consistent with the work in other areas of international law.

With regard to draft conclusion 5, the role of attribution had elicited some divergence of views in the plenary debate and represented a complex issue. What was needed was a clear provision that did not compromise the need for flexibility. That could be addressed by keeping paragraph 1 as had been proposed during the first reading and amending paragraph 2 to function as an exclusion clause. Although, based on its current wording, paragraph 1 was perhaps already intended to function as an exclusion clause, it was also limited to non-State actors. He proposed the addition of a paragraph that excluded from subsequent practice actions taken by agents contrary to instructions; that paragraph could then become paragraph 2 and could start with a non-obstante clause. The new paragraph 2 would read: “Notwithstanding paragraph 1, actions of State agents taken contrary to instructions do not constitute subsequent practice.” The current paragraph 2 would then become paragraph 3, and before the words “non-State actors”, the words “lower and local officials of a State” could be inserted. Paragraph 3 would then read: “Other conduct, including by lower and local officials of a State and non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.” That proposal would perhaps address the legitimate and reasonable concerns of the United States and Ireland.

With regard to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), the aim of the second sentence of paragraph 1 was to set out, in a neutral manner, a range of possible outcomes for subsequent agreements and subsequent practice, not to propose any hierarchy between them, as the current wording seemed to suggest. To make it clear that the list was illustrative and that no order of priority between the possible outcomes was intended, paragraph 1 should be reformulated to read: “This may result in a range of possible interpretations, including narrowing, widening, or otherwise determining any scope for the exercise of discretion which the treaty accords to the parties.”

With reference to paragraph 3, in the process of interpretation, the role of subsequent agreements and subsequent practice ended where the role of amendment and modification began. In part IV of the 1969 Vienna Convention, articles 39 to 41 dealt separately with the amendment and modification of treaties, and the current work was without prejudice to any provision in that regard. A claim that subsequent agreements and subsequent practice could amend and modify treaties

went beyond the normative contents of those concepts as embodied in the Convention. He therefore supported the Special Rapporteur's position in that regard. However, the use of the word "presumed" was problematic because it gave the impression that the Commission was creating some sort of legal fiction, namely that subsequent agreements and subsequent practice had to be presumed to be limited to treaty interpretation and did not extend to amendment or modification. On the contrary, it was a fact of law that, by their very nature, they were limited to treaty interpretation and could not result into the modification or amendment of a treaty.

With regard to draft conclusion 13, it was difficult to understand the rationale for the introduction of paragraph 4, which referred to the contribution of expert treaty bodies to the interpretation of treaties — an aspect that fell outside the scope of the draft conclusions. The only reason given by the Special Rapporteur for the reintroduction of paragraph 4 came during his oral presentation of the report, where he explained that the "without prejudice" clause in that paragraph was what remained of his more ambitious but nevertheless moderate proposal to acknowledge the significance of the pronouncements of expert treaty bodies, and that the prominent contribution of expert treaty bodies had been recognized by the International Court of Justice and, hence, they deserved a special mention in the draft conclusion. That reasoning was unconvincing. Paragraph 4 contained a reference to the role of expert treaty bodies in general in relation to articles 31 (1) and 32, which were provisions on general interpretation. None of those provisions related to subsequent agreements and subsequent practice directly, hence paragraph 4 was unnecessary. The express acknowledgement of the contribution of expert treaty bodies to subsequent agreements and subsequent practice in paragraph 3 was sufficient. The International Court of Justice had duly and appropriately acknowledged the role of expert treaty bodies in the general exercise of interpretation because it had had reason to do so. The Commission, on the other hand, would only be creating an artificial occasion to certify the role of expert treaty bodies even though that was outside the scope of the current project.

In conclusion, he supported the referral of the draft conclusions to the Drafting Committee and the completion of the project in light of the Special Rapporteur's suggestions.

Mr. Jalloh said that he wished to thank the Special Rapporteur for his excellent report. He endorsed Sir Michael Wood's suggestion that the Secretariat should provide the Commission with the full set of the

comments and submissions of Governments on the draft conclusions. While expressing his appreciation to the Secretariat's report compiling the comments and observations of States on subsequent agreements and subsequent practice, he noted with interest the suggestion by Sir Michael Wood concerning the presentation to the Commission of the full texts of the comments and submissions of States for the first reading of texts. He also thought that it might be helpful for members to see a State's overall position alongside the conclusion-by-conclusion analysis in the Secretariat's report. He echoed the comments of Commission members who had highlighted that only a small number of States from certain geographic regions regularly commented in writing on the outcome of the Commission's work, including on the current topic. While he appreciated the various reasons for that state of affairs, given the virtual silence of States from the African region concerning the project, he strongly urged the Commission not to place undue emphasis on the written comments of States. Accordingly, he appreciated the Special Rapporteur's composite review of the comments of States, which took into account not only their written submissions in response to the Commission's 2016 request, but also the statements they had made during the debates in the Sixth Committee between 2013 and 2016. He hoped that other Special Rapporteurs would consider replicating that sound approach.

Although the need to encourage comments from more States was a major structural challenge that the Commission needed to address, he hoped that Commission members might nevertheless take advantage of the opportunity of being at United Nations Headquarters in New York to begin informally engaging Member States to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification, as set out in Article 13 (1) (a) of the Charter of the United Nations. The robust engagement of Member States with the Commission's work was imperative, not only because the Commission's statute required it, but also in order to ensure the continued practical relevance, authoritativeness and legitimacy of the Commission's work.

The outcome of that work on the current topic would provide practical guidance to the interpreters of treaties in the application of the relevant provisions of the 1969 Vienna Convention. The role of subsequent agreements and subsequent practice could and should be properly understood only in that wider context. He agreed with the vast majority of the Special Rapporteur's recommendations. Despite the need to

hear and take into account the views of more States, he agreed with the Special Rapporteur that most of the comments made or received did not call for major amendments to the draft conclusions. He urged Commission members to exercise restraint, show flexibility in the Drafting Committee and focus on fine-tuning the text as it stood rather than rewriting entire provisions or parts thereof. As the Special Rapporteur had noted when introducing the report, the States that had commented on the topic seemed generally in agreement with the Commission's work on it. The significance of that observation should not be underestimated, nor should it be disturbed. Moreover, as Ms. Lehto had already indicated, many of the specific issues raised could either be or had already been adequately addressed in the commentaries.

Like the Special Rapporteur, he too was a big supporter of the 1969 Vienna Convention on the Law of Treaties, and of treaty law in general. However, he wished to address a highly sensitive issue on which Commission members as well as States diverged, namely the pronouncements of expert treaty bodies, covered in draft conclusion 13. That provision was the only one for which the Special Rapporteur proposed a significant revision to the text previously debated and adopted by the Commission. For that reason, the matter deserved careful deliberation in the Commission's usual collegial and flexible spirit. Based on what he had heard in the plenary debate, including in the mini-debates, he did not think that reconsidering the matter would be reopening old wounds or creating new ones.

Part of the difficulty with the issue, both in the Commission and among States in the Sixth Committee, appeared to be an understandable misunderstanding, given the complex nature of the topic. He urged the members to accept the Special Rapporteur's recommendations about draft conclusion 13, because he did not think the Special Rapporteur meant to advance the startling proposition that all or only some pronouncements of expert treaty bodies amounted to subsequent practice. Rather, the reintroduction of his earlier proposal was aimed at acknowledging the significance of the pronouncements of expert treaty bodies in some limited circumstances, when at least some of them "can give rise to" subsequent agreements and subsequent practice under article 31 (3) of the Vienna Convention.

In both his report and his introductory statement, the Special Rapporteur had recalled that the reason the "without prejudice" clause in draft conclusion 13, paragraph 4, had been adopted was not because members of the Commission had called into question the substantive findings of the International Court of Justice

on the significant role of treaty bodies in interpreting the text of the relevant treaties. That role was evidenced in the *Diallo* case, the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, all detailed in paragraph 138 of his report. On the contrary, the Special Rapporteur's proposal was aimed only at bringing greater clarity to the provision previously adopted by the Commission.

Regarding Sir Michael Wood's remark that the word "pronouncements" was inappropriate and Mr. Gómez-Robledo's suggestion of the word "determinations" in its stead, he recalled that Spain had emphasized that "pronouncements" was the correct term. In his own view, the word "pronouncements" best captured the variety of issuances, such as general comments and decisions on individual communications and State party reports, that expert treaty bodies typically made. If the concern was that press releases and other "statements" would be deemed subsequent practice, he entirely agreed that they were not the type of pronouncement that the Commission had in mind. If the English term had to be changed, he agreed with the United States that the word "views" was more suitable for the particular context of that topic.

In sum, like many other speakers, he endorsed the Special Rapporteur's proposal for draft conclusion 13, but emphasized the need to make absolutely clear in the commentary the Commission's position on the response that States had or did not have to make to any given pronouncement and, in particular, its position on the sensitive issue of silence.

Addressing the Special Rapporteur's proposal as to the final form of the work, he said that although he had initially been quite intrigued by Mr. Murase's comments about the need for consistency in the Commission's approach to the current topic and other projects relating to the Vienna Convention, namely reservations to and provisional application of treaties, and also welcomed Sir Michael Wood's openness towards the idea of adopting guidelines instead of conclusions on the topic, he was still inclined to endorse the Special Rapporteur's preferred form, as outlined in paragraphs 146 and 147 of the report. He agreed that the intent was to reaffirm and clarify the law on subsequent agreements and subsequent practice in relation to articles 31 and 32 of the Vienna Convention and to contribute to the codification of international law, without aiming to replace an existing convention or eventually developing a convention, and without prejudice to the development or evolution of customary

international law on the matter of subsequent agreements and subsequent practice.

He expressed appreciation to the Special Rapporteur for his deep dedication to the work on an important topic and looked forward to the successful completion of the consideration of the text on second reading.

Lastly, he welcomed the holding of the current part of the session in New York and hoped that the Commission would choose one day to meet in a country in Africa, Asia or Latin America and the Caribbean, in exercise of the right laid down in article 12 of its Statute “to hold meetings at other places”.

Mr. Tladi said that Mr. Jalloh had suggested that those members of the Commission, of whom he himself was one, who considered that draft conclusion 13, paragraph 4 was not appropriate were labouring under a misconception. All the paragraph sought to do, according to Mr. Jalloh, was to indicate that pronouncements of expert treaty bodies could give rise to subsequent practice. However, he would like to know whether that matter had not already been covered, and covered in clearer terms, in draft conclusion 13, paragraph 3.

Mr. Jalloh said that the two paragraphs did not say the same thing; there was a nuance differentiating them, but to save time in the plenary Commission for other matters, he would prefer to discuss the subject further at a meeting of the Drafting Committee.

Mr. Petrič said that Mr. Tladi had raised a very important question and the answer should be given in plenary. Draft conclusion 13 was the most disputed provision of the text, and any light that could be shed on it would be welcome.

The Chairman invited Mr. Petrič to join the Drafting Committee on the topic, not only so that he could engage in further discussion with Mr. Jalloh, but also to participate in a broader debate with other members of the Commission.

Mr. Ruda Santolaria congratulated the Special Rapporteur on his excellent report, which reflected his rigorous yet flexible approach to the topic. The sequence of events whereby the topic had first been considered in a Study Group and a Special Rapporteur had then been appointed had paid off well, since the Commission was already considering the relevant text on second reading. He endorsed the careful approach taken by the Special Rapporteur in not appearing to rewrite the Vienna Convention, but instead, bringing forth aspects that facilitated the understanding and application of the Convention in relation to subsequent agreements and

subsequent practice in the interpretation of treaties. He agreed with most of the Special Rapporteur’s proposals.

Concerning draft conclusion 2, paragraph 1, he said that, like Mr. Grossman Guiloff, he agreed with the suggestion by the United Kingdom that the fact that the rules on interpretation applied to treaties that predated the Vienna Convention should be made clearer. In paragraph 4, as Ms. Escobar Hernández had remarked, the replacement in Spanish of the words “*en el sentido*” with “*en virtud del*” would be an improvement.

For draft conclusion 4, paragraph 2, it would be useful to take up the proposal by the United Kingdom to impart greater clarity to the use of the expression “subsequent practice.” Although the Special Rapporteur gave a good explanation on the subject, he himself thought that a more detailed explanation could be useful in the current instance to dispel any doubts among legal practitioners.

Regarding draft conclusion 5, he shared the concerns of other members of the Commission about the terms “attribution” and “attributable to a party”, which came from the vocabulary of responsibility of States for internationally wrongful acts, and about the need to replace them, as suggested by Mr. Murphy or Mr. Murase.

In draft conclusion 6, paragraph 3, in view of the desire of Japan for a clearer distinction between subsequent practice under article 31(3) (b), and that under article 32, and to bring it more into line with the commentary to draft conclusion 4, paragraph 3, he would suggest the addition of the word “other”, before “subsequent practice.”

The same addition should be made in draft conclusion 7, paragraph 2. On paragraph 3, he welcomed the Special Rapporteur’s suggestion in paragraph 69 of his report that a way to emphasize the distinction between interpretation and modification would be to make the third sentence of paragraph 3 (the “without prejudice” clause) a separate additional paragraph. That would usefully reinforce the underlying idea of the draft conclusion.

On draft conclusion 8, like Mr. Reinisch, he had no objection to the inclusion of the phrase “the presumed intention of the parties” with reference to the fact that the meaning of a term used in a treaty might be capable of evolving over time.

He agreed with the Special Rapporteur that it would be useful to insert, in draft conclusion 9, paragraph 2, a reference to the criteria of consistency and breadth in relation to the weight of subsequent practice under article 31(3) (b).

The clarity of draft conclusion 10, paragraph 1, would be improved if the final sentence was replaced with the following formulation suggested by the Special Rapporteur in paragraph 90 of his report: "Such an agreement may, but need not necessarily be, legally binding for it to be taken into account".

He was fully in support of the reference in draft conclusion 11, paragraph 2, to the decisions adopted within the framework of a conference of States parties and to the legal effect of such decisions, which depended primarily on the treaty. The insertion of the word "other" at the end of the second sentence, before "subsequent practice under article 32", would correspond to the wording proposed for draft conclusion 4, paragraph 3.

He saw the relevance of including draft conclusion 12, on the constituent instruments of international organizations, which were covered under the 1969 Vienna Convention, as set out expressly in its article 5, and in particular paragraph 3, which referred to the possible contribution that the practice of an international organization might make to the interpretation of its constituent instrument. It was also appropriate, in line with the Commission's usual practice, to confine the scope of the draft conclusion to treaties between States, as opposed to treaties of international organizations, despite the similarities between the provisions of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and those of the 1969 Vienna Convention. In paragraph 107 of his report, the Special Rapporteur referred to the comment by some States that the interpretation of a constituent instrument of an international organization could not lead to a modification of such a treaty. That was all the more important if the principle of attribution was applied to international organizations, in which case they could not act beyond the scope of their constituent instruments through an interpretation; they could only do so through an amendment to said instrument.

He agreed with the inclusion of draft conclusion 13 on pronouncements of expert treaty bodies. The text followed a logical sequence and provided balance by specifying that such pronouncements were not those of international organizations, which were specifically covered in draft conclusion 12. As Spain explained, the use of the word "pronouncements" was correct, and as the Special Rapporteur pointed out in paragraph 124 of his report, it was a neutral term that was not invested with any binding or non-binding character and that was able to cover all kinds of situations. Paragraph 3 of the draft conclusion made it clear that although the pronouncements of expert treaty bodies were not strictly speaking subsequent agreements and subsequent

practice, they did have legal effects, as Ms. Escobar Hernández had forcefully argued, since they could rise to or refer to subsequent agreements and subsequent practice. Indeed, depending on what was written in the relevant treaty, the proceedings under treaty bodies could point to the existence of or generate subsequent agreements and subsequent practice.

Compared to the term "independent experts," as proposed by Spain, "experts serving in their personal capacity," as favoured by the Special Rapporteur, was the most accurate. On the other hand, he disputed the Special Rapporteur's assertion in paragraph 141 of his report that expert treaty bodies had been created by States to act as their agents in the process of ensuring the proper application of treaties. Certainly, expert treaty bodies played a noteworthy role in ensuring the proper application of treaties by States, but their work was shaped by the will of States in relation to each of the treaties; they did not operate as agents of the State, since they did not form part of or operate in the name of any State, but rather, performed supervisory and control functions in respect of States on an independent basis.

In view of the important interpretative function of treaty bodies, not only in the sphere of human rights but in other areas, and of the importance accorded to that function by the International Court of Justice in a number of decisions, he agreed with the idea of including the new paragraph 4 proposed by the Special Rapporteur, or of exploring some of the options proposed by Ms. Escobar Hernández.

In conclusion, he recommended the referral of the draft conclusions to the Drafting Committee and expressed the hope that, upon the conclusion of the Commission's second reading of the text, it would recommend that the General Assembly take note of the draft conclusions in a resolution, annex the draft conclusions to the resolution, encourage their widest possible dissemination and commend them to the attention of States and all who might be called upon to interpret treaties.

Mr. Ouazzani Chahdi congratulated the Special Rapporteur on his concise, precise and well-constructed work on a complex aspect of the law of treaties. The number of Governments that had commented on his report was small; the Special Rapporteur had been able to take most of them into account and to make recommendations based on their proposals.

In the context of draft conclusion 2 and the commentary thereto, States had expressed different views on certain points, such as the nature of the treaty. The Special Rapporteur was right to recall, as he did in paragraph 26 of his report, that the relevance of the

distinction between bilateral and multilateral treaties had already been considered by the Commission, which had decided not to insist on that distinction in the text of the draft conclusions.

On draft conclusion 4, he agreed with previous speakers that it would be preferable in paragraph 3 to replace the phrase “one or more” with “all”, to conform to article 31 (2) of the Vienna Convention. He endorsed the Special Rapporteur’s recommendation on the draft conclusion in all other respects.

Turning to the reference in draft conclusion 5 to non-State actors, he said that he agreed with the Special Rapporteur’s reminder, in paragraph 43 of his report, that the Commission’s general approach in draft conclusion 5 was that only the practice of States parties to a treaty constituted subsequent practice under articles 31 and 32, and that the practice of other actors could merely play an indirect role as a means of interpretation for the treaty.

Draft conclusion 7, paragraph 3, would be improved with clarification of the relationship between an interpretation and an amendment or modification of a treaty, including the possible role that subsequent agreements and subsequent practice might play in that context. As the Special Rapporteur emphasized in paragraph 64 of his report, it was a difficult question. On the presumption of interpretation in connection with paragraph 3, he endorsed the suggestion of the Czech Republic that the question must be decided on a case-by-case basis and in the light of the circumstances. All such matters should be clarified for readers and researchers in the commentary.

On draft conclusion 8, like other speakers such as Mr. Murphy, he wondered whether, in the interests of precision and simplicity, the word “presumed” before “intention” could be deleted, because presumption was subsumed in “intention”.

Draft conclusion 10 dealt with important questions, such as the common understanding of the parties and silence of the parties, which could constitute acceptance of subsequent practice. On the first question, he endorsed the Special Rapporteur’s approach of relying on the 1964 and 1966 commentaries to the draft articles on the law of treaties to clarify the notion of a common understanding of the States. On the second question, he agreed with the States that were advocating a prudent approach to the circumstances in which silence could contribute to determining the existence of a common understanding among the parties.

In draft conclusion 11, paragraph 3, he had no objection to the option proposed by the Special Rapporteur in paragraph 102 of his report to retain the

phrase “including by consensus” in brackets, as an example of decisions that might be adopted within the framework of an international conference to express agreement in substance between the parties regarding the interpretation of a treaty.

He agreed with the Special Rapporteur’s wish to retain the references in draft conclusion 12, on the constituent instruments of international organizations, to articles 31 and 32 of the 1969 Vienna Convention and not to refer to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Draft conclusion 13 had given rise to much substantive discussion. Clearly, the pronouncements of expert treaty bodies could make a real contribution to the interpretation of treaties, as amply demonstrated in international human rights law. Sweden, on behalf of the Nordic countries, had strongly emphasized that the legal weight of such pronouncements depended on their content, quality and legally persuasive character. In the commentary to the draft conclusion, the Special Rapporteur had used examples drawn primarily from the work of the Human Rights Committee, but perhaps examples from the work of other human rights treaty bodies, and of institutions responsible for the enforcement of the law of the sea, were also worth including.

As to the final form of the work on the topic, he agreed with the Special Rapporteur about the use of the term “conclusions”, pending the consideration by the Working Group on Methods of work of general criteria for the selection of articles, conclusions, guidelines and so on.

He endorsed all the recommendations made by Special Rapporteur and was in favour of referring the draft conclusions to the Drafting Committee.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties was composed of Mr. Cissé, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 11.50 a.m. to enable the Drafting Committee on Peremptory norms of general international law (jus cogens) to meet.