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Chair:	Mr. Charles	(Trinidad and Tobago)
later:	Ms. Morris-Sharma (Vice-Chair)	(Singapore)
later:	Mr. Charles (Chair)	(Trinidad and Tobago)

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15-19318 (E)

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

Agenda item 83: Report of the International Law Commission on the work of its sixty-seventh session (A/70/10) (*continued*)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XII of the report of the International Law Commission.

2. **Mr. Leonidchenko** (Russian Federation) said that the Commission's six years of work on the topic of the most-favoured-nation (MFN) clause had culminated successfully in a useful final report by the Study Group (A/70/10, annex) that would facilitate understanding of such clauses. The Commission should consider preparing similar reports on other topics. Although a major outcome of its work was the preparation of draft articles, some of which could form the basis for the development of international treaties, sometimes it might be more appropriate to produce a report that provided a comprehensive survey of an area of international law without attempting to impose a particular point of view on States. Indeed, unlike a conventional academic paper, the Commission's reports presented a mixture of views of recognized experts representing a variety of legal systems, complemented by the views expressed by States directly or through the Sixth Committee.

3. His delegation believed that the MFN clause was of interest not only as a key element in multilateral and bilateral economic and trade regimes, but also as an aspect of investor relations. While the final report of the Study Group analysed a wide array of practice among international organizations, States and arbitral tribunals in the interpretation and application of the most-favoured-nation principle, it devoted considerable attention to application of the clause in relation to dispute settlement. In so doing, it seemed to give more importance to the decisions of arbitral tribunals than to the practice of States. That might be because information on such decisions was more readily available, but it was nonetheless important for the Commission to give due regard to State practice in its work. The Commission itself had highlighted the importance of such practice in its work on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law".

4. The final report confirmed the existence of diverse and often conflicting approaches to the application of the MFN clause, especially with regard to dispute settlement under investment treaties. The Study Group's most important conclusion in that regard related to the key role of the 1969 Vienna Convention on the Law of Treaties. His delegation understood that the Study Group had taken a cautious approach in paragraphs 215 and 216 of its final report, but it believed that more definitive conclusions would be desirable. In its view, a most-favoured-nation clause could be deemed to apply to dispute settlement only where the treaty contained a specific provision to that effect or where the parties had not agreed to another form of dispute settlement.

5. Turning to the topic of protection of the atmosphere, he recalled that his delegation had previously expressed scepticism about the need to formulate rules on the matter, particularly as some aspects of the topic were already regulated under existing legal regimes, while others were the subject of intense negotiations. The Commission had correctly decided to limit the scope of the topic, and while it had endeavoured to remain within the agreed scope, it had not been entirely successful. The definition of "atmospheric pollution" in draft guideline 1, for example, made reference to deleterious effects extending beyond the State of origin, although draft guideline 2 indicated that the guidelines would not deal with questions relating to airspace or outer space. It was unclear, however, whether draft guideline 1 referred to the actual territory of a State or to the space under the jurisdiction of the State. The commentary to draft guideline 2 stated that the guidelines would not deal with domestic or local pollution. It was important to note, however, that pollution that occurred at the local level could sometimes have a transboundary impact.

6. His delegation had no objection at the current stage to the proposed definition of "atmosphere" in draft guideline 1 and welcomed the relatively high threshold set by the references to deleterious effects "of such a nature as to endanger human life and health and the Earth's natural environment" in the definitions of "atmospheric pollution" and "atmospheric degradation". It also agreed with the Commission's decision to include in the preamble the idea that atmospheric degradation was a pressing concern of the international community as a whole, thus expressing

the concern of the international community as a matter of a factual statement, not as a normative statement. At the same time, his delegation was not sure that it was possible to consider the issue of atmospheric degradation without also touching upon issues relating to climate change, which should remain outside the scope of the topic, as should matters relating to emissions of certain gases and to the ozone layer. Given the limitations placed on the scope of the guidelines under paragraph 2 of draft guideline 2, it was not entirely clear what aspects of atmospheric pollution the Commission intended to deal with.

7. It was difficult to argue against the idea that there was a need for international cooperation on matters relating to protection of the atmosphere. However, it needed to be clarified how the provisions of draft guideline 5 would relate to general principles of international law on cooperation, particularly as reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. That clarification could be provided in the commentary. Moreover, as the Commission had already dealt with the topic of prevention of transboundary harm from hazardous activities, it might be possible to borrow the provisions of the relevant draft articles on that topic. In that connection, he noted that the commentary to the preamble indicated that the Arctic region was one of the areas most seriously affected by the worldwide spread of deleterious pollutants, although it was not clear what data provided the basis for that assertion. In his delegation's view, the draft guidelines should not highlight a particular region, given that the document was meant to be global in scope.

8. **Ms. Fariheen** (Malaysia), welcoming the conclusion of the Commission's work on the MFN clause, said that the task of clarifying the scope of application of such clauses had required conscientious effort to assess the factors that were relevant in the interpretative process of determining whether such clauses applied to dispute settlement provisions. The final report of the Study Group on the topic had managed to draw a detailed distinction between substance and procedure by examining the basic question of whether such clauses could relate to both the procedural and the substantive provisions of a treaty. Following the decision of the International Centre for Settlement of Investment Disputes in the case of *Emilio Agustín Maffezini v. Kingdom of Spain*, there was now a growing propensity to state expressly whether an MFN clause would or would not apply in investment disputes. However, as was evident from the decision in the case of *Plama Consortium Limited v. Republic of Bulgaria*, which stood in stark contrast to the *Maffezini* decision, the jurisprudence remained inconsistent, rather than promoting a more constant and uniform approach to interpretation.

9. While the Vienna Convention on the Law of Treaties should remain the general point of departure for interpreting the MFN clause, it was ultimately up to the States concerned to determine whether the clause would encompass dispute settlement provisions. Explicit language could resolve the issue of applicability, and her delegation was therefore of the view that an expansive interpretation of the MFN clause should be avoided. The clause should be interpreted in such a way that it applied only to substantive preferential treatment provided for in treaties and not to investor-State dispute settlement mechanisms. Consistent practice by a State vis-à-vis the MFN clause, its negotiating background and its drafting intention should play a pivotal role in contextualizing the proper interpretation and application of the clause. The Study Group had made a substantive contribution with respect to interpretation, particularly by elucidating the applicable principle and the context in which the MFN clause would apply, and her delegation was convinced that the final report would be of great utility to States in the negotiation, drafting, interpretation and application of such clauses in treaties. The report should, however, be considered a non-binding guide.

10. With regard to the topic of protection of the atmosphere, her delegation wondered why elements other than gases had not been included in the definition of the atmosphere contained in draft guideline 1, since there was scientific evidence that the atmosphere also contained clouds, dust particles and aerosols. The definition proposed by the Commission should not alter or narrow the existing scientific interpretation of the meaning of "atmosphere". The definition of "atmospheric pollution" in draft guideline 1 appeared to create an obligation to prove that substances contributing to deleterious effects extended beyond the State of origin; a more subtle formulation would be preferable. Her delegation was not familiar with the term "atmospheric degradation" and believed that

technical and scientific experts should be consulted with a view to framing a clear, comprehensive and acceptable definition. In addition, her delegation would like assurance that the specific types of human activity covered under the draft guidelines did not overlap with those covered under the existing international regime on environmental protection.

11. As to the scope of the guidelines, her delegation believed that consultation with relevant agencies and technical experts would be required. International cooperation was at the core of the draft guidelines. However, it could take many forms, and she therefore wondered whether it was appropriate to highlight only information exchange and joint monitoring in paragraph 2 of draft guideline 5. Cooperation in the form of technology transfer and capacity-building, for example, might also be important. With respect to the preamble, the fourth paragraph, which reflected the Commission's 2013 understanding regarding the work on the topic, should be placed under draft guideline 2 (Scope of the guidelines). Further, detailed deliberation on the topic would be required in order to ensure a suitable outcome.

12. **Mr. Koch** (Germany), said that his delegation continued to take a keen interest in the Commission's work on the topic of protection of the atmosphere. As adherence to the understanding reached in 2013 on the scope of the topic was essential to a successful outcome, his delegation was pleased to see that the draft guidelines provisionally adopted by the Commission clearly reflected that understanding. It also welcomed the Commission's decision to acknowledge in the preamble the importance of the atmosphere and its essential role for sustaining life on Earth, human health and welfare, and ecosystems. Protection of the atmosphere was indeed a pressing concern for all States, and it might therefore be justifiable to follow the Special Rapporteur's initial recommendation and classify it as a common concern of humankind. His delegation was pleased that draft guideline 5 stressed the obligation of States to cooperate for the protection of the atmosphere.

13. **Ms. Natividad** (Philippines), acknowledging the International Law Commission's invaluable contribution to the multilateral treaty process, said that her delegation wished to congratulate the Study Group on the completion of its work on the most-favoured-nation clause. Such clauses established the principle of equality of international treatment. In the previous 25 years, the Philippines had pursued preferential and multilateral trade agreements with a view to benefiting from trade liberalization, alleviating poverty and raising standards of living. Most-favoured-nation treatment had been a key tool for achieving those objectives.

14. The 1978 draft articles on most-favoured-nation clauses, while still helpful, had been overtaken by subsequent developments. The scope of such clauses had been the key interpretative issue addressed in the work on the topic. The benefit that could be conferred or obtained depended on the interpretation of the MFN provision itself. If the parties did not agree, or if they failed to use explicit language, the provisions of such clauses in bilateral investment treaties could extend from substantive obligations to procedural protections or dispute settlement provisions. That had been the essence of the *Maffezini* case. The notion that the treatment of investment and/or investors could encompass dispute settlement had raised the stakes, potentially leading to litigation. Matters not appearing to be the specific will of the parties might be brought into play through an MFN clause if more favourable provisions could be found in other investment treaties. Her delegation was grateful to the Study Group for highlighting the useful role of the Vienna Convention in the interpretation of treaties containing an MFN clause. Its final report would certainly assist national authorities in negotiating clearer bilateral treaties so as to avoid future problems.

15. With regard to the topic of protection of the atmosphere, her delegation welcomed the effort to negotiate rules that were rooted in science and thanked the Commission for engaging the scientific community on the topic. As a shared resource, the atmosphere was the common concern of all States, and all had a general obligation to cooperate in protecting it from harmful effects of human activity, particularly pollution and degradation. That obligation extended beyond enhancing scientific knowledge, exchanging information and joint monitoring. Her delegation was in general agreement with the text of the preamble and the draft guidelines. It also agreed that the content of draft guideline 3 as proposed by the Special Rapporteur in his second report (A/CN.4/681) belonged in the preamble. With regard to draft guideline 2, her delegation would appreciate an explanation of the implications of the two bracketed wording options in paragraph 1 and clarification of the

logic behind the double negative "do not deal with" followed by "but without prejudice to" in paragraph 2. In particular, how would the meaning change if "and" were used instead of "but"? Her delegation looked forward to continued work on the topic.

16. The Philippines supported the proposal for the Commission to hold part of its future sessions in New York, which would be of benefit to both the Commission and Member States' missions in New York. It shared the Commission's disappointment regarding the curtailment of the Codification Division's desktop publishing initiative, which played a crucial role in disseminating the Commission's work, as well as the work of the United Nations on the rule of law, to a wide readership. It supported the Commission's request that the Codification Division continue to provide it with legal publications.

17. **Mr. Townley** (United States of America) said that the final report of the Study Group on the most-favoured-nation clause would serve as a useful resource for Governments and practitioners. His delegation supported the Study Group's decision not to prepare new draft articles or revise the 1978 draft articles, but instead to include a summary of conclusions in the final report. It also agreed with the conclusion that the interpretation of MFN clauses should be undertaken on the basis of the rules for treaty interpretation set out in the Vienna Convention. Each such clause was the product of a specific treaty negotiation and could therefore differ considerably in language, structure and scope from MFN clauses appearing in other treaties. Each was also dependent on other provisions in the treaty. Thus, while there was value in a general study of such clauses, they resisted a uniform interpretation.

18. His delegation remained concerned about the direction that the Commission appeared to be taking with respect to the topic of protection of the atmosphere. It opposed the inclusion of the topic in the Commission's programme of work, since various long-standing instruments already provided general guidance to States on the development, refinement and implementation of treaty regimes, including very specific guidance tailored to discrete problems relating to atmospheric protection. Any exercise aimed at extracting broad legal rules from specific environmental agreements would not be feasible and might potentially undermine carefully negotiated differences among regimes. Moreover, such an exercise would most likely complicate, not facilitate, ongoing and future negotiations and thus might inhibit State progress in the environmental area.

19. Those concerns had been somewhat allayed by the Commission's 2013 understanding, which his delegation had hoped might prevent the work from straying into areas where it could do affirmative harm. However, both the first and second reports of the Special Rapporteur had evinced a desire to re-characterize the understanding and take an expansive view of the topic. Paragraph 1 of draft guideline 5 was especially worrying, as it purported to describe States' obligations to cooperate with respect to the protection of the atmosphere. That provision did not reflect customary international law and should be reconsidered. If the Special Rapporteur's proposed long-term plan of work on the topic was followed, the work would continue to stray outside the scope of the 2013 understanding and into unproductive and even counterproductive areas. His delegation therefore called upon the Commission to suspend or discontinue its work on the topic.

20. With regard to the new topic of *jus cogens*, given the relative paucity of case law on the subject, he urged the Commission to focus on treaty practice, notably under the rules reflected in the Vienna Convention, and on other State practice that illuminated the nature and content of *jus cogens*, the criteria for its formation and the consequences flowing therefrom. Only research and analysis thoroughly grounded in the views expressed by States was likely to add substantial value to the voluminous academic commentary on the topic.

21. **Ms. Faden** (Portugal) said that, although it was sometimes difficult for States to keep up with the requests for information on their practice and legislation, the Commission should continue to seek such information for its codification work. It should also continue to propose the progressive development of international law whenever necessary to address new trends in contemporary international relations. The meaning of progressive development and its relationship to codification would, however, benefit from further analysis. In any case, when embarking upon progressive development, the Commission should be responsive to the needs of States and respect their concerns. In order to increase and broaden State participation in the progressive development and codification of international law, priority should be given under the United Nations Programme of

Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law to aiding the development of national legal services with trained human resources.

22. The new topic of *jus cogens* was of the utmost importance. International peremptory norms protected the basic values of the international community. However, the content of *jus cogens* and its relationship with other norms and principles of international law required clarification, and her delegation therefore looked forward to the Commission's work on the topic. The syllabus prepared by the Special Rapporteur in 2014 (A/69/10, annex) would provide a good basis for that work. Her delegation welcomed the Commission's request to the Secretariat to review the list of possible future topics established in 1996 and prepare a list of potential topics accompanied by brief explanatory notes. It also noted with satisfaction that the Commission had reconstituted its Working Group on the Long-term Programme of Work.

23. The final report of the Study Group on the most-favoured-nation clause provided an excellent overview and analysis of the contemporary relevance of such clauses and of the issues surrounding their interpretation, including in the context of recent trends in investment and trade treaties. Her delegation endorsed the Study Group's conclusions concerning the continued relevance of the core provisions of the 1978 draft articles and the Vienna Convention on the Law of Treaties in the interpretation of MFN clauses. With regard to their application to dispute settlement provisions in investment treaty arbitration, the issue of potential overlap between substantive and procedural rules could be resolved through careful wording of treaty provisions. The report was based on a comprehensive and up-to-date analysis of the topic and would be of unquestionable practical value to stakeholders.

24. Her delegation supported a balanced and positive approach to the topic of protection of the atmosphere and believed that its inclusion in the Commission's programme of work had the potential to contribute to the enhancement of international environmental law. It also took the view that the concept of "common concern of humankind" would provide an adequate framework for addressing the legal questions relating to the atmosphere. The concept had been established in State practice and relevant literature as well as in the United Nations Framework Convention on Climate Change. More recently, the 2030 Agenda for Sustainable Development had characterized natural resource depletion and environmental degradation as challenges faced by humanity. The principle of "common concern of humankind" entailed both acceptance that harm to the atmosphere from human activities adversely affected all humankind and recognition that the international community must take joint action to protect the atmosphere.

25. **Mr. Adank** (New Zealand) said that the evolving nature of jurisprudence on the MFN clause had made it increasingly difficult to define authoritatively how the clause should be applied in international law. His delegation had believed it important to consider whether there was a need for further practical guidelines beyond those provided in the 1978 draft articles. It agreed, however, that there was no appetite to revisit the draft articles with the intent of providing an exhaustive baseline for the interpretation and application of MFN clauses. The report provided an extensive review of the case law, and his delegation encouraged its wide dissemination in order to provide context and guidance for States and practitioners in the field of investment arbitration and in other related contexts. It was to be hoped that the report would also encourage consistency in the decisions of various bodies on the interpretation of MFN obligations in bilateral investment treaties.

26. His delegation welcomed the inclusion of the topic of *jus cogens* in the Commission's programme of work and recognized that information on State practice might enable the Commission to determine whether it had sufficient information to draw up an illustrative list of norms that had achieved the status of *jus cogens*. It also acknowledged the Commission's careful analysis of the material provided to it by States.

27. New Zealand strongly supported the Commission's efforts to enhance knowledge of international law and welcomed the improvements to its website, which would facilitate the dissemination of information. The Commission's efforts to build good working relationships with Sixth Committee members based in New York were also to be commended. His delegation welcomed the increased number of informal briefings offered by Commission members for Sixth Committee members and was hopeful that the Commission would hold a half-session in New York in either 2017 or 2018.

28. **Ms. Özkan** (Turkey) said that the Commission continued to play an important role in the development and codification of international law. Her delegation commended the Commission's careful consideration of its programme of work and its efforts to improve its working methods. The Commission's interaction with Sixth Committee members greatly contributed to the dialogue between Member States and the Commission on its work. Its new website would enable it to disseminate information on that work to a wider public.

29. Her delegation noted the Commission's decision to include the topic of *jus cogens* in its programme of work and was grateful to the Special Rapporteur for the clear and concise syllabus on the topic presented in 2014 (A/69/10, annex). The syllabus noted that the Commission had previously decided not to take up the topic, having concluded that it would not serve a useful purpose at that stage, since practice was insufficient. Her delegation believed that that was still the case and did not think that States had signalled a need for the progressive development and codification of *jus cogens*. Before the Commission began working on the issue, she would welcome further explanation as to how the examination of the topic would have an impact on its development. She urged a prudent approach.

30. **Mr. Špaček** (Slovakia) said that the final report of the Study Group on the most-favoured-nation clause was a valuable complement to the 1978 draft articles, which had also provided a useful tool for the interpretation and application of MFN clauses and an important point of reference for arbitral tribunals. His delegation had consistently supported the Commission's decision not to undertake any amendment of the draft articles, but rather to analyse various questions of interpretation, in particular in relation to bilateral investment treaties, on which the draft articles provided little guidance. The Study Group had successfully identified the main types of interpretation problems and had analysed interpretative trends emerging from recent arbitral practice. The guidance on interpretative techniques in part IV of the final report was particularly helpful, although, as rightly highlighted in the report, there could be no single interpretation of a most-favoured-nation provision applicable across all investment agreements; rather, such clauses had to be interpreted on a case-by-case basis, in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties.

31. His delegation considered protection of the atmosphere important in order to ensure that the Earth remained fit to live in and to prevent further atmospheric degradation. It welcomed the dialogue held with scientists on the topic, but wished to point out that such dialogues might sometimes give rise to misleading conclusions, especially in the case of topics in which many important elements were defined by physics or other natural sciences, and not by the law. The Commission's approach to the topic, which viewed the atmosphere as the object of protection, seemed ambiguous and lacking in the necessary foundation in current international law. Protection of the atmosphere should be considered to be an aim or purpose of legal regulation rather than the object of the regulation itself. In his view, the current approach to the topic largely explained the divergent views expressed in the course of the discussions on the matter. It seemed unlikely that the work on the topic could develop beyond statements of the obvious without legal implications. No convincing legal arguments had thus far been put forward for principles such as that of protection of the atmosphere as a common concern of humankind and as a general obligation of States. It was to be hoped that in future sessions the Commission would work towards more concrete principles based on sound legal formulations.

32. His delegation fully supported the Commission's decision to include the topic of *jus cogens* in its programme of work, although the mission would be a difficult one. The contours and legal effects of *jus cogens* norms remained poorly defined, thereby raising questions about their implications. Nevertheless, the Commission should exercise the utmost caution in deciding on the scope and direction of the work on the topic.

33. **Mr. Remaoun** (Algeria), commending the work of the Study Group on the most-favoured-nation clause, said that his delegation fully endorsed the conclusions put forward in the final report, which underlined, inter alia, the importance of the Vienna Convention as the point of departure for the interpretation of investment treaties. The fundamental nature of MFN clauses had remained unchanged since the conclusion of the 1978 draft articles, and they should therefore continue to be the basis for the interpretation and application of such clauses, even if they did not provide answers to all interpretative

issues. As recommended by the Commission, the final report should be widely disseminated.

34. His delegation welcomed the Special Rapporteur's approach to the highly technical topic of protection of the atmosphere and was pleased that his second report (A/CN.4/681) had built upon the comments made in 2014 by the members of the Sixth Committee and the Commission. It noted that the Commission had deemed it necessary to provide a working definition in draft guideline 1 of the term "atmosphere". Since the term was not defined in the relevant international instruments, such as the United Nations Framework Convention on Climate Change, his delegation understood that the Commission had opted for a practical solution, which was without prejudice to the relevant political negotiations, in which parties might agree on a definition. Draft guideline 2 had addressed his delegation's concerns with respect to interference with other international processes and forums. He looked forward to the completion of discussions on the bracketed text in the first paragraph. Draft guideline 5, on the other hand, did not address all aspects of international cooperation. It should reflect the common understanding of the concept of "cooperation", which necessarily encompassed assistance, including technology transfer, and recognized the differences in levels of development between developed and developing countries. Lastly, his delegation noted with interest that the fourth preambular paragraph reflected the Commission's 2013 understanding on the topic and looked forward to further discussion on the terminology used therein and on the most suitable location for that paragraph within the draft guidelines.

35. **Ms. Brown** (Jamaica) said that the perception that the Commission had suffered a loss of influence and that the role of the Sixth Committee had diminished was a matter of concern to her delegation. The Commission consisted of eminent legal practitioners and academicians representing all legal systems, cultures and geographical regions. It was therefore ably positioned to develop and identify emerging and crystallized rules of international law. Holding part of the Commission's future sessions in New York would allow for more fruitful and in-depth exchanges between the Commission and the Committee and would heighten the prominence of the Commission's work, thereby promoting the legitimacy of international law.

36. At the international level, the rule of law could be preserved only through a coherent body of rules that promoted equity, predictability and security in relations between States and other actors. The fragmentation of international law undermined its very existence, just as incoherence and inconsistency in the decisions of tribunals on the interpretation of fundamental concepts of international law weakened the rule of law. Insecurity and instability also created difficulties for developing countries attempting to send positive signals to investors through the negotiation or renegotiation of bilateral investment treaties. Her delegation was aware that the Commission had been hesitant to embark upon a review of the topic of most-favoured-nation clauses. However, it should not shy away from dealing with matters relating to treaties that governed the commercial relations of States and transnational corporations, some of which accounted for a greater share of global income than did many small developing countries.

37. The Study Group's approach of underscoring the fundamental principles of treaty interpretation as embodied in the Vienna Convention had yielded an important contribution. The Group's report usefully highlighted the variety of ways in which MFN clauses were incorporated into bilateral investment treaties. Nevertheless, it could have done more. For example, the linkage of the clause to a standard of fair and equitable treatment had been described by some jurists as incongruous, yet the Study Group had not offered further insight into the application of the clause in that regard and thus had failed to provide the sort of guidance that would have been useful to legal officials in advising their Governments in the negotiation and application of bilateral investment treaties.

38. While the application of the MFN clause to substantive and procedural provisions was relatively fully addressed in the final report, the Study Group might have gone beyond a discursive analysis. The World Trade Organization (WTO) Appellate Body provided a mechanism for achieving coherence in the interpretation of the clause in the trade sphere. Given that article II of the General Agreement on Trade in Services — which dealt with most-favoured-nation treatment — had implications for the provisions of bilateral investment treaties related to investment in services sectors, the jurisprudence of the Appellate Body might be useful in clarifying that area of the law, although, as the Study Group had noted, the

interpretation of MFN provisions under the WTO system had limited direct relevance with respect to such clauses in other agreements. Her delegation supported the Study Group's conclusion that the key question of *ejusdem generis* had to be determined on a case-by-case basis.

39. The Study Group's report served to highlight the growing uncertainty on the matter and provided a useful analysis of jurisprudence, directing the attention of legal advisers to key decisions meriting further reflection. Her delegation hoped, however, that the Commission would do more to address some of the critical legal questions relating to interpretation in international investment law, which had the potential to have a significant impact on the sustainable development of developing countries. Her delegation also wished to express its interest in the Commission's work on the protection of the atmosphere, which it saw as a common concern of all humankind.

40. **Mr. Martinsen** (Argentina), welcoming the final report on the MFN clause, said that investors had generally invoked the clause under investment treaties with the aim of avoiding compliance with the requirement to exhaust all local remedies in the State in which the investment had been made. His delegation agreed that the clause should be interpreted in the light of the rules on treaty interpretation contained in the Vienna Convention and that a case-by-case analysis of its use was required. That analysis must consider, however, whether the State did or did not express its consent in the treaty in question, and must also take into account the principle of effectiveness (*effet utile*). Moreover, the wording and placement of an MFN clause in a treaty was decisive with regard to its interpretation. His delegation concurred with the view that the interpretation of such a clause should not necessarily fall to a judicial body.

41. The Commission's decision to take up the topic of *jus cogens* was welcome. *Jus cogens* was of unquestionable importance and impact in international law. Indeed, a *jus cogens* norm could even have the effect of rendering a treaty null and void. For that reason, the topic must be approached with caution and with due regard for the impact that any conclusions reached by the Commission might have on international relations. With regard to the Commission's request for information on State practice in relation to *jus cogens*, such practice might be quite limited because it was unlikely, for example, that the issue of nullity or termination a treaty for reasons related to *jus cogens* would ever arise in a domestic context.

42. His delegation had followed with great interest the Commission's work on the topic of protection of the atmosphere and would like to see continued attention given to the question of how the principles being identified in that context related to existing treaty law, particularly under bilateral or regional treaties establishing rights and duties in the area of environmental law that directly or indirectly related to protection of the atmosphere.

43. **Mr. Medina** (Bolivarian Republic of Venezuela) said that the right of States to regulate in the public interest was paramount and must not be undermined by the provisions of any international investment agreement, nor should investor-State dispute settlement mechanisms be allowed to elevate transnational capital to the status of a sovereign State or enable investors to challenge the right of governments to regulate and determine their own domestic affairs. His delegation hoped that the Commission would address the abuses that had arisen over time through the use of such mechanisms. Among other shortcomings, such dispute settlement processes were characterized by opacity, lack of clear rules, lack of the right to appeal and discrimination against domestic investors, who could not use the system.

44. In accordance with Article 103 of the Charter of the United Nations, any bilateral or multilateral free trade or investment agreement containing provisions that conflicted with the Charter must be revised or terminated, or incompatible provisions must be severed. At the same time, inadvertent incompatibilities could be resolved in good faith by interpreting subsequent treaties in a manner consistent with prior treaties, applying articles 31 and 32 of the Vienna Convention on the Law of Treaties. Subsequent treaties must, however, conform to the Charter and were invalid if they impeded the fulfilment of its purposes and principles, including its human rights provisions. Under the *pacta sunt servanda* principle, if States entering into an international investment agreement were already parties to United Nations human rights treaties, they were obligated to interpret the investment agreement in a manner that did not contravene those treaties. Moreover, under customary international law and article 53 of the Vienna Convention, treaties or treaty provisions that violated

peremptory norms of international law (*jus cogens*) were null and void.

45. There was a clear message emerging from developing and developed countries alike that investor-State dispute settlement was an unacceptable mechanism. An alternative system must be found, such as the investment court system proposed under the Transatlantic Trade and Investment Partnership, which might serve as a starting point for permanent regional investment tribunals and an international investment appeals court. The original concept behind investor-State dispute settlement had long since disappeared. It had now become a hugely profitable tool for a small number of investment law firms and third-party financial institutions.

46. The final report of the Study Group on the most-favoured-nation clause provided a good picture of the application and interpretation of such clauses, together with the associated problems. But it did not go far enough in addressing some fundamental issues, nor did it offer solutions to conflicting interpretations by arbitral tribunals of MFN provisions. Foreign investors in recent years had used and abused the MFN clause for purposes that it was arguably not designed to address, particularly with regard to its application to procedural matters. Given the inconsistences in the jurisprudence relating to such clauses, there was a clear need for an appellate mechanism for international investment treaties.

47. In its final report the Study Group had indicated that, because MFN clauses had been included in many investment treaties, there was no reason to consider the economic rationale for such provisions; thus it had effectively declined to address some core issues. While the Study Group's main function might have been to provide legal analysis, in keeping with the general mission of the Commission, it should have considered at least assessing whether the economic rationale underlying various treaty provisions continued to be relevant, particularly from the standpoint of how economic rationales and related State practices influenced the creation of international law. The progressive development of international law might not always call for the preparation of new instruments that could serve as a blueprint for future treaties; it could also call for the abandonment or dismantling of treaty provisions and practices that had lost their currency and led to fragmentation of international law. The application of MFN clauses in the field of international investment law had undoubtedly created significant fragmentation, and it might therefore be time to re-examine the fundamental economic rationale behind them.

48. In that context, it was perhaps unfortunate that the report, having asserted that there was little doubt that in principle MFN provisions were capable of applying to the dispute settlement provisions of bilateral investment treaties, also acknowledged that that statement had initially been premised on a misreading of the decision of the tribunal in *The Ambatielios Claim (Greece v. United Kingdom of Great Britain and Northern Ireland)*. The Study Group should perhaps have taken a more objective approach to the usefulness of such clauses and proposed solutions accordingly. The report also asserted that investment tribunals had yet to develop any jurisprudence on the notion of likeness, a statement that did not appear to be wholly accurate. While the bulk of cases addressing the notion of likeness had emerged in the context of the application and interpretation of national treatment provisions, that same analytical framework might be used to interpret and apply MFN provisions, particularly in matters of substance versus procedure. Furthermore, treaty negotiators and drafters as well as arbitral tribunals would surely benefit from a better understanding of the relationship between the principle of *ejusdem generis* and the notion of "likeness" in some investment treaties.

49. The report focused mainly on the applicability of the MFN clause to dispute settlement provisions, a question on which it took no position other than to say that it was a matter of interpretation. The issue was much broader, however. States generally had no idea how the concept of most-favoured-nation was applied, even with respect to substantive matters. In fact, the concept was unworkable in investment treaties. An MFN provision allowed parties to pick and choose the best investor clauses from other treaties, without considering the treaty as a whole. How was the clause to be evaluated and applied in that context, and how could it be determined whether one investor was better off than the other?

50. His delegation requested the Commission to undertake further study of the implications of the use and abuse of the MFN clause in investment agreements and bilateral investment treaties. It also invited the Commission to identify new topics related to

international investment dispute settlement agreements, bilateral investment treaties and investment arbitration.

51. **Mr. Murase** (Special Rapporteur on protection of the atmosphere), reading out a statement on behalf of the Chairman of the Study Group on the most-favoured-nation clause, thanked the members of the Committee for their kind remarks about the work of the Study Group and the final report on the topic. The Chairman had noted that some questions had been raised as to whether a final report was an appropriate outcome of the Commission's work with regard to codification and progressive development of international law. Such questions would be important for the Commission to consider as it developed its future programme of work. Speaking for himself, he paid tribute to the Chairman's high standard of professionalism and sense of responsibility, which had led to the successful completion of the work on the important topic of the MFN clause, noting that even while contending with serious health problems in 2013 and 2014, the Chairman had continued to provide notes and comments to enable the Study Group to continue its work in his absence.

52. He wished to express his heartfelt appreciation to the representatives who had spoken on the topic of protection of the atmosphere, including those who had expressed certain concerns. The debate had been extraordinarily rich and substantive, and the comments had evidenced the care with which Committee members had read the various reports on the topic. He would not attempt to respond to each comment, but he could assure the Committee that all the points raised in the discussion, including the suggested drafting changes, would be reflected in his third report, which he intended to submit in May 2016. The third report would include a revised draft guideline on the obligation of States to protect the atmosphere and would also address the legal implications of utilization of the atmosphere in the context of sustainable development.

53. As the topic was highly scientific in nature, he had followed the example of the Special Rapporteur on the topic of shared natural resources (Law of transboundary aquifers) and sought advice from atmospheric scientists at various international organizations, including the United Nations Environment Programme. He had also organized a dialogue with scientists during the Commission's 2015 session, an experience that he planned to repeat in 2016, as Commission members had found the dialogue useful.

54. *Ms. Morris-Sharma (Singapore), Vice-Chair, took the Chair.*

55. **Mr. Singh** (Chairman of the International Law Commission), introducing chapters VI to VIII of the Commission's report on the work of its sixty-seventh session (A/70/10), said that the third report of the Special Rapporteur on the topic "Identification of customary international law" (A/CN.4/682) covered several issues raised in 2014, along with some new issues. It proposed additional paragraphs to three draft conclusions proposed in the second report (A/CN.4/672), together with five new draft conclusions, which had been referred to the Drafting Committee. The Drafting Committee had provisionally adopted eight draft conclusions, as well as additional paragraphs for two of the draft conclusions provisionally adopted in 2014. The 16 draft conclusions provisionally adopted thus far by the Drafting Committee were reproduced in its report (A/CN.4/L.869). The Commission had taken note of the 16 draft conclusions on which it would welcome preliminary comments from delegations. He wished to emphasize, however, that the conclusions had not yet been adopted by the Commission. It expected to consider them, along with accompanying commentaries, in 2016.

56. The Special Rapporteur's third report had sought to address, in particular, the relationship between general practice and *opinio juris*, the question of inaction and the relevance of the practice of international organizations and non-State actors. The report also considered several new issues, beginning with certain forms of practice and evidence of *opinio juris*, namely treaties and resolutions of international organizations and conferences. It further dealt with the role of judicial decisions and writings. Lastly, the third report addressed questions relating to the category of "particular custom" and to the persistent objector rule.

57. There had been general agreement among Commission members that the outcome of the work on the topic should be a set of simple, practical conclusions, with commentary, aimed at assisting practitioners in identifying rules of customary international law. Members had reiterated their support for the two-element approach to the identification of customary rules, which took account of both general

practice and *opinio juris*. As to the relationship between the two constituent elements, some members had supported the conclusion that, although the two elements always needed to be present, the two-element approach might be applied differently in different fields or with respect to different types of rules. Support had been expressed for the conclusion that each element should be separately ascertained, which generally required an assessment of specific evidence for each element. It had been stressed that the same material could not be evidence of both elements.

58. While the analysis on the relevance of inaction for the identification of rules of customary international law had been generally welcomed, a number of members had noted the practical difficulty of qualifying inaction for that purpose. Members had indicated that the situation should warrant reaction by the States concerned, that States must have actual knowledge of the practice in question and that inaction had to be maintained for a sufficient period of time.

59. Views had differed regarding the relevance of the practice of international organizations. A number of members had pointed out that such practice could contribute to the formation or expression of rules of customary international law. Others had stressed that rules could be formed only if the practice of an international organization reflected the practice or conviction of its member States or would catalyse State practice, but that the practice of international organizations as such was not relevant for the assessment of general practice. Several Commission members had supported the Special Rapporteur's view, expressed in a draft conclusion, that the conduct of other non-State actors did not constitute practice for the purposes of formation or identification of rules. Some members had considered the proposal too strict, particularly in view of the significance of the practice of certain non-State actors and the importance of activities involving both States and non-State actors.

60. The Special Rapporteur's conclusion on the role of treaties as evidence of customary international law had been generally supported, although members had stressed that not all treaty provisions were equally relevant as evidence of rules of customary international law and that only treaty provisions of a fundamentally norm-creating character could generate such rules. A range of views had been expressed on the evidentiary value of resolutions adopted by international organizations or international conferences. According to one viewpoint, such resolutions, in particular those of the General Assembly, could sometimes be regarded as sources of customary international law; their evidentiary value, however, had to be assessed with great caution. Members had generally agreed that resolutions of international organizations and conferences could not, in and of themselves, constitute sufficient evidence of the existence of a customary rule; rather, the evidentiary value of such resolutions depended on other corroborating evidence of general practice and *opinio juris*. It had been pointed out that, in order to rely on a resolution, a separate assessment would be required in order to determine whether a rule contained in a resolution was supported by a general practice that was accepted as law.

61. Members had welcomed the conclusion that judicial decisions and writings were relevant for the identification of rules of customary international law. The special importance of judicial decisions of international courts and tribunals had been emphasized, but views had differed on the relevance of decisions of national courts. According to some members, those decisions had to be included within the category of "judicial decisions" for the purposes of identification of rules of customary international law. Other members had considered that such decisions should be addressed separately and that their role should be assessed with caution.

62. It had been suggested that the term "writings" proposed by the Special Rapporteur was overly broad and should be qualified. Several members of the Commission had stated that the selection of relevant writings had to be universal and should not reflect preference for writers from specific regions. There had been debate as to whether particular custom fell within the scope of the topic. It had been stressed that special attention should be paid to the importance of acquiescence for the identification of particular custom. According to some members, it followed that a stricter standard existed for particular custom than for general or universal custom. Some other members, however, had been of the view that all rules of customary international law were subject to the same conditions.

63. With regard to future work on the topic, the Commission had welcomed the Special Rapporteur's suggestion to examine practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law might be

determined. In his concluding remarks, the Special Rapporteur had emphasized that the aim of the work on the topic was to assist practitioners in determining whether or not a rule of customary international law existed and, if so, ascertaining its content. Regarding the application of the two-element approach in different fields, he had stressed the need to consider the context in which the evidence arose, including a careful evaluation of the factual foundations of each case and their significance. The Special Rapporteur had noted the general agreement within the Commission that each element had to be separately ascertained in order to identify rules of customary international law, but had clarified that sometimes the same evidence might be used in order to ascertain the two elements. The important thing was that both elements should be present.

64. The Special Rapporteur had considered that the conclusion reached in 2014 with regard to the practice of international organizations was not controversial, since it appeared that the practice of international organizations could give rise to customary rules that were binding, at least in their relations among themselves. He had stressed, however, that the role of international organizations, despite their importance, was not comparable to that of States. Non-State actors might also have a role in the formation and identification of rules of customary international law, but only by prompting or recording State practice and the practice of international organizations, not through their own conduct as such. With respect to the role of treaties, the Special Rapporteur had considered that bilateral treaties could not be excluded from the draft conclusions, although caution had to be used in assessing their impact. He had noted that the proposed draft conclusion on judicial decisions and writings required further development and that the two sources should be dealt with separately, and he had concurred with the view that judicial decisions came into play as part of a single process of determining whether or not a certain customary rule existed. He had also clarified that "writings" meant the writings of jurists and had highlighted the benefits of considering the teachings of jurists representing different legal systems.

65. With regard to particular custom, the Special Rapporteur had confirmed that all the other draft conclusions on the identification of customary rules were applicable to particular custom, including the draft conclusion on treaties, except in so far as the draft conclusion on particular custom provided otherwise. The Special Rapporteur had noted that the draft conclusion on the persistent objector rule had received widespread support and acknowledged that it should be illustrated by reference to practical examples in the commentary. He pointed out that the persistent objector rule could be raised before judges asked to identify customary international law and that it was therefore important to provide practitioners with guidelines on the matter and to clarify the requirements for a State to become a persistent objector.

66. The Commission had considered it realistic to aim to complete a first reading of the draft conclusions and commentaries on the topic in 2016. It would therefore appreciate receiving, preferably before 31 January 2016, any additional information that States wished to provide on their practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation, as set out in official statements before legislatures, courts and international organizations and decisions of national, regional and subregional courts. In addition, the Commission would welcome information about digests and surveys on State practice in the field of international law.

67. With regard to the topic of crimes against humanity, the Commission had examined the first report of the Special Rapporteur (A/CN.4/680), which had proposed two draft articles. The Commission had referred the draft articles to the Drafting Committee, which had decided to reformulate them into three draft articles and to adopt an additional draft article on scope. The four draft articles had then been adopted provisionally by the Commission. Draft article 1 established the scope of the draft articles, indicating that they applied to both the prevention and the punishment of crimes against humanity. Prevention aimed to preclude the commission of such offences, while punishment was focused on criminal proceedings against persons after such crimes had occurred or while they were being committed. The draft articles focused solely on crimes against humanity; they did not address other grave international crimes, such as genocide, war crimes or the crime of aggression. Moreover, care would be taken to ensure that they did not conflict with relevant existing treaties or with the obligations of States arising under the constituent instruments of international or hybrid criminal courts or tribunals, including the International Criminal Court.

68. Draft article 2 established a general obligation of States to prevent and punish crimes against humanity. The content of that obligation would be clarified through various, more specific obligations set forth in subsequent draft articles. Those specific obligations would address steps that States were to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations, and, as appropriate, with other organizations. The draft article recognized crimes against humanity as "crimes under international law", a characterization that indicated that they existed as crimes whether or not the conduct had been criminalized under national law. Draft article 2 also identified crimes against humanity as crimes under international law "whether or not committed in time of armed conflict". The reference to "armed conflict" should be read as including both international and non-international conflicts. While early definitions of crimes against humanity had required that the underlying acts be accomplished in connection with armed conflict, that connection had disappeared from the statutes of contemporary international criminal courts and tribunals, including the Rome Statute of the International Criminal Court.

69. Draft article 3 defined "crimes against humanity" for the purposes of the draft articles. The definition set out in the first three paragraphs reproduced verbatim the text of article 7 of the Rome Statute, except for three non-substantive changes necessitated by the different context in which the definition was being used. The Commission had considered the Rome Statute definition an appropriate basis for defining such crimes in draft article 3, as it had been accepted by the more than 120 States parties to the Statute and was now being used by many States when adopting or amending their national laws.

70. The definition set forth in the draft article contained three overarching requirements: the act must be committed as part of a widespread or systematic attack; the act must be committed as part of an attack directed against any civilian population; and the perpetrator must commit the act with knowledge of the attack. Those requirements had been elucidated through the case law of the International Criminal Court and other international or hybrid courts and tribunals. The definition also listed the underlying prohibited acts constituting crimes against humanity and defined several of the terms used. No doubt the evolving jurisprudence of the international courts would continue to help inform national authorities, including courts, as to the meaning of the term, thereby promoting harmonized approaches at the national level. The Commission had noted that relevant case law continued to develop over time; accordingly, the discussion in the report was meant simply to indicate some terminological parameters as of 2015.

71. Paragraph 4 of draft article 3, which the Commission had deemed it appropriate to adopt, was a "without prejudice" clause meant to ensure that the definition set forth in draft article 3 did not call into question any broader definitions that might exist in other international instruments or in national legislation. Thus, States that wished to adopt a broader definition in their national law would not be precluded from doing so. At the same time, an important objective of the draft articles was the harmonization of national laws, so that they might serve as the basis for robust inter-State cooperation. Any elements adopted in a national law, which would not fall within the scope of the draft articles, would not benefit from the provisions set forth within them, including any on extradition or mutual legal assistance.

72. Draft article 4 set forth an obligation of prevention with respect to crimes against humanity. Treaty practice and jurisprudence implied that States had undertaken an obligation to prevent crimes against humanity, as did the well-settled acceptance by States that crimes against humanity were crimes under international law that should be punished, whether or not they were committed in times of armed conflict or were criminalized under national law. As set forth in paragraph 1, the obligation of prevention encompassed, either expressly or implicitly, four elements. First, States had an obligation not to commit such acts through their own organs or through persons over whom they had such firm control that their conduct would be attributable to the State concerned under international law. Second, States had an obligation to employ the means at their disposal to prevent persons or groups not directly under their authority from committing such acts. Third, States had an obligation to pursue, actively and in advance, measures designed to help prevent the offence from occurring — for example, through effective legislative, administrative, judicial or other preventive measures in any territory under their jurisdiction or control, as indicated in subparagraph (a). Fourth, States had an obligation to

pursue certain forms of cooperation, not just with each other, but also with organizations such as the United Nations or the International Federation of Red Cross and Red Crescent Societies.

73. Paragraph 2 indicated that no exceptional circumstances could be invoked as justification for the offence. It had been formulated so as to cover the conduct of both States and non-State actors. At the same time, the paragraph addressed the issue only in the context of the obligation of prevention and not, for example, in relation to possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility, which would be addressed at a later stage.

74. The Commission would appreciate receiving, preferably before 31 January 2016, any additional information States wished to submit in response to its earlier request for information on whether their national law expressly criminalized "crimes against humanity" as such, conditions under which they were capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity and decisions of their national courts that had adjudicated on questions concerning crimes against humanity.

75. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", the Commission had had before it the third report of the Special Rapporteur, which had contained one draft conclusion. After referring the draft conclusion to the Drafting Committee and receiving its report, the Commission had provisionally adopted it as draft conclusion 11. The new draft conclusion dealt with a particular type of treaty — namely, constituent instruments of international organizations — and the way in which subsequent agreements or subsequent practice would or might be taken into account in their interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties.

76. Draft conclusion 11 referred only to the interpretation of constituent instruments of international organizations; it did not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it did not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations which were not themselves constituent instruments. Nor did it apply to the interpretation of decisions by organs of international organizations, including decisions by international courts, or to the effect of a "clear and constant jurisprudence" (*jurisprudence constante*) of courts or tribunals. Lastly, the new draft conclusion did not specifically address questions relating to pronouncements by a treaty monitoring body consisting of independent experts or the interpretation of decisions by organs of international organizations. In addition to subsequent agreements or subsequent practice that established the agreement of all the parties in accordance with article 31, paragraphs 3 (a) and (b), of the Vienna Convention, other subsequent practice by one or more parties in the application of the constituent instrument of an international organization might also be relevant for the interpretation of that treaty.

77. Paragraph 1 recognized the applicability of articles 31 and 32 of the Vienna Convention to treaties that were constituent instruments of international organizations. Paragraph 2 highlighted a particular way in which subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 might arise or be expressed, namely, from the reactions of States parties to the practice of an international organization in the application of its constituent instrument or in the practice of an international organization in the application of its constituent instrument. The expression "arise from" was intended to encompass the generation and development of subsequent agreements and practice, while "expressed in" was used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization might reflect subsequent agreements or subsequent practice by the States parties to its constituent instrument.

78. Paragraph 3 referred to another form of practice that might be relevant for the interpretation of a constituent instrument: the practice of the organization as such, meaning its "own practice", as distinguished from the practice of Member States. The possible relevance of an international organization's own practice could be derived from article31, paragraph1, and article32 of the Vienna Convention, which covered the practice of an organization itself, including the practice of one or more of its organs, as being relevant for the determination of the object and purpose of the

treaty, including the function of the international organization concerned.

79. Paragraph 4, which reflected article 5 of the Vienna Convention, applied to the situations covered under paragraphs 1 to 3 and ensured that the rules referred to therein were applicable, interpreted and applied without prejudice to any relevant rules of the organization. It implied, inter alia, that more specific relevant rules of interpretation contained in a constituent instrument of an international organization might take precedence over the general rules of interpretation under the Vienna Convention.

80. As noted in chapter III of the report, the Commission would welcome any examples of decisions of national courts in which a subsequent agreement or subsequent practice had contributed to the interpretation of a treaty and of pronouncements or other actions by a treaty body that had been considered as giving rise to subsequent agreements or subsequent practice relevant for treaty interpretation.

81. *Mr. Charles (Trinidad and Tobago), Chair, resumed the Chair.*

82. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Montenegro, Serbia and the former Yugoslav Republic of Macedonia; the stabilization and association process country Bosnia and Herzegovina; and, in addition, Armenia and Georgia, said that the work of the Special Rapporteur on the topic of identification of customary international law would undoubtedly be useful to practitioners. The European Union concurred with the Special Rapporteur's view that the growing role and relevance of international organizations in international relations made it only natural to expect that, depending on their particular functions and the powers conferred by their founding treaties, they would be taken into account in the identification of customary international law.

83. International organizations fell into various categories and had diverse functions and powers, which should be taken into consideration when weighing their contribution to the formation of customary international law. The European Union welcomed the Special Rapporteur's view that the contribution of an international organization to the formation of rules of customary international law depended on the competences and powers that States had given it to attain the objectives set out in its constituent treaty. Indeed, in so far as the exercise of competences and powers produced an international organization practice that supplanted in whole or in part that of its member States, that practice might be equated with the practice of States for the purposes of the draft conclusions. That made both practical and legal sense; otherwise, as the Special Rapporteur had pointed out, not only would the organization's practice not be taken into account, but its member States would be deprived of the opportunity to contribute to State practice, or have less ability to do so.

84. In the case of the European Union, for example, matters relating to treaties and judicial decisions were part of the competences conferred by its founding treaties and its normal practice. That should be reflected in an appropriate way in the draft conclusions and the commentary. The competences with which the Union's member States had endowed it and the related international responsibility were reflected in its treaty practice, as had recently been acknowledged in the advisory opinion of the International Tribunal of the Law of the Sea in Case No. 21. Hence, the treaty practices of international organizations such as the European Union should be taken into account when considering the extent to which treaty law could contribute to the formation and identification of customary international law. The same applied to the judiciary, which in the case of the European Union dealt fairly frequently with issues relating to public international law. A relevant example was the judgement of the Court of Justice of the European Union of 11 March 2015 in *Europaïsche Schule München v. Silvana Oberto and Barbara O'Leary* (joined cases C 464/13 and C 465/13). In another recent case, *Air Transportation Association of America and Others v. Secretary of State for Energy and Climate Change* (case C 366/10), the Court had examined the state of customary international law relevant to aviation and the law of the sea and drawn appropriate conclusions under European Union law.

85. Such examples of treaty and judicial practice confirmed that the formation and identification of customary international law were effected through different sources. The use of a concept of "international organization" — taken on its own in isolation and without regard to the specific competences conferred by its founding treaties — did not appropriately reflect the treaty-making, legislative and judicial powers of organizations such as the

European Union. It would be desirable to introduce appropriate language for that purpose in the draft conclusions or, if that was not possible, in the commentary in order to provide practical guidance for practitioners on the identification of customary international law.

86. The draft conclusions' treatment of international organizations was not entirely consistent. In particular, they should clarify that the references to forms of State practice might also extend to the practice of an international organization. New language to that effect might be added, for instance, at the end of draft conclusion 5 (Conduct of the State as State practice), as provisionally adopted by the Drafting Committee (A/CN.4/L.869), to the effect that the same provision would apply, mutatis mutandis, to the conduct of an international organization in so far as the organization exercised its executive, legislative, judicial or other functions on the basis of competences conferred on it by its member States in a founding treaty. Similarly, with regard to court decisions, it would be appropriate to add a reference to "other judicial decisions" after "decisions of national courts" in draft conclusions 6, 10 and 13, so as not to exclude a judicial body such as the Court of Justice of the European Union.

87. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, and speaking also on behalf of the candidate countries Albania, Montenegro, Serbia, the former Yugoslav Republic of Macedonia and Turkey, and the stabilization and association process country Bosnia and Herzegovina, he said that the European Union could, in principle, concur with the text of draft conclusion 11; however, it wished to stress that the applicability of articles 31 and 32 of the Vienna Convention on the Law of Treaties to constituent instruments of international organizations was without prejudice to any relevant rules of the organization. The Union welcomed the Special Rapporteur's acknowledgement, in his third report (A/CN.4/683), of certain specific features of the European Union in relation to the interpretation of its founding treaties and would be appreciative if those specificities could also be reflected appropriately in the commentary to draft conclusion 11.

88. The Special Rapporteur had also made reference, both in his third report and in the commentary to draft conclusion 11, to the difficulty of determining whether a decision had been taken by States acting as members of an organ of an international organization or acting in their individual capacity while meeting within a plenary organ of the organization. The recent judgement of the Court of Justice of the European Union in *European Commission v. European Council* (case C 28/12) had dealt with some aspects of that issue. The Court had stressed the importance of following separate procedures in cases in which it might be necessary to have decisions adopted by both the Union and by its member States in their independent capacity.

89. The Court's judgement in the *Europaïsche Schule München* case might also be of interest to the Commission, as in it the Court had interpreted the constituent instrument of another international organization, namely, the Convention defining the Statute of the European Schools. The Court had referred explicitly to and relied upon article 31, paragraph 3 (b), of the Vienna Convention. The practice taken into account by the Court in that instance had been the case law of the Complaints Board of the European Schools, which, according to the Court, should be considered to be a subsequent practice in the application of the Convention defining the Statute within the meaning of article 31 of the Vienna Convention. The Court had further noted that the absence of any challenge to that practice by the parties to the Convention defining the Statute must be regarded as reflecting their tacit agreement to such a practice. It should be stressed, however, that that judgement had no bearing on the Court's case law relating to interpretation of the founding treaties of the European Union, since the European Schools constituted an organization distinct from the Union.

The meeting rose at 1.05 p.m.