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Summary record of the 3343rd meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-eighth session

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the words “*erga omnes*” be deleted and that the end of that sentence be shortened and recast to read: “in the sense of article 48 of the articles on the responsibility of States for internationally wrongful acts, a matter on which there are different views”. A new footnote could be inserted at the end of the sentence, to which the reference to the work cited in the last sentence of the footnote to the paragraph could be moved.

128. Mr. MURPHY said that the authors cited in that part of the above-mentioned footnote might not necessarily hold diverging views on the issue of State responsibility, and that this point should be checked before the footnote was inserted.

129. Mr. MURASE (Special Rapporteur) said that he supported Sir Michael’s proposed amendment. As to the footnote in question, the draft text already contained enough references to sources and there was no need for the reference cited in the last sentence, which he would prefer to delete.

Paragraph (4), as amended, was adopted.

Paragraph (5)

130. Mr. TLADI proposed that the second and seventh sentences be aligned with the wording of the draft guideline by replacing the word “ensure” in both sentences with “take appropriate measures to ensure”. He noted that the word “actual” was used before “adverse effects” in the fifth sentence, while the word “significant” appeared in the rest of the paragraph, and in paragraph (3), which had just been adopted, the adjective “deleterious” was employed. It would be wise to harmonize the text in order to remove those inconsistencies.

131. Mr. NOLTE proposed that, in the third sentence, the words “in which case” be replaced with “since”.

132. The CHAIRPERSON suggested that the Commission adopt the paragraph with the changes proposed by Mr. Nolte and Mr. Tladi, on the understanding that the Special Rapporteur would subsequently harmonize the text in light of Mr. Tladi’s remarks.

Paragraph (6)

133. Mr. NOLTE proposed that the words “that could” in the first sentence be replaced with “to”.

134. Sir Michael WOOD, noting that the aim of the paragraph was to comment on and explain the phrase “prevent, reduce or control”, said that the reference to the Paris Agreement under the United Nations Framework Convention on Climate Change, though interesting in itself, did not belong in the paragraph, and that the last sentence should be deleted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

135. Mr. TLADI said that the case mentioned in the antepenultimate footnote to the paragraph should be cited more faithfully by replacing the word “becom[ing]” with “has now become”. He would leave it to the Special Rapporteur to adapt the text on the basis of that remark.

136. Mr. PARK asked what was meant by the pronoun “it” in the fourth sentence, and said that he was not sure whether the cases cited in the third to fifth footnotes to the paragraph really illustrated its content.

137. Mr. NOLTE proposed the deletion of the word “the” before “international courts and tribunals” in the fourth sentence. He failed to see the connection between the content of the paragraph and the Paris Agreement under the United Nations Framework Convention on Climate Change, to which reference was made from the fifth sentence onward.

138. Sir Michael WOOD said that, if the last three sentences of the paragraph, concerning the Paris Agreement under the United Nations Framework Convention on Climate Change, were retained, it would be necessary to review and amend them by placing the passages of the Agreement that were quoted verbatim between quotation marks and altering the wording accordingly.

139. Mr. MURASE (Special Rapporteur) said that the pronoun “it” referred to the expression “the basis of this obligation” in the previous sentence and that, in order to dispel any ambiguity, those words could be repeated in the fourth sentence. All the cases cited in the footnotes mentioned by Mr. Park dealt with the basis of the obligation to prevent significant adverse effects.

140. Mr. MURPHY said that the alternative wording proposed by the Special Rapporteur did not solve the problem, since the second part of the fourth sentence, beginning with the words “the obligation nonetheless may not be deemed fully established”, concerned the application of the obligation, not its basis. Moreover, like Mr. Nolte, he did not see the connection between the Paris Agreement under the United Nations Framework Convention on Climate Change and the subject matter of the paragraph, and would prefer to delete the last three sentences.

141. The CHAIRPERSON suggested that the adoption of the paragraph be suspended to enable the Special Rapporteur to draft a new text reflecting the comments and proposals that had been made. The Commission would adopt the new version and the remaining paragraphs of the draft text at a subsequent meeting.

The meeting rose at 6.05 p.m.

3343rd MEETING

Wednesday, 10 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilich, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kitchaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

CHAPTER VIII. *Protection of the atmosphere (concluded)* (A/CN.4/L.886 and Add.1)

1. The CHAIRPERSON invited the Commission to pursue its consideration of chapter VIII of the draft report and to resume its discussion of the portion contained in document A/CN.4/L.886/Add.1.

C. **Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (*continued*)**

2. TEXT OF THE DRAFT GUIDELINES, TOGETHER WITH A PREAMBULAR PARAGRAPH, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION (*concluded*)

Commentary to draft guideline 3 (Obligation to protect the atmosphere) (continued)

Paragraph (7) (*concluded*)

2. The CHAIRPERSON recalled that the adoption of paragraph (7) had been deferred pending some redrafting. He invited the Special Rapporteur to introduce his proposed amendments.

3. Mr. MURASE (Special Rapporteur) proposed that, beginning with the third sentence of the paragraph, the text read:

“However, the existence of this obligation is still somewhat unsettled for global atmospheric degradation. International courts and tribunals have stated, for instance, that ‘[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment ... of areas beyond national control is now part of the corpus of international law’,^[footnote] that the Court attaches great significance to respect for the environment ‘not only for States but also for the whole of mankind’,^[footnote] and that the ‘duty to prevent, or at least mitigate, [significant harm to the environment] ... has now become a principle of general international law’.^[footnote] At the same time, these pronouncements may not be deemed as fully supporting, though coming close to, the recognition that the obligation to prevent, reduce or control atmospheric degradation exists under customary international law. Nonetheless, such obligations are found in relevant conventions. In this context, it should be noted that the Paris Agreement under the United Nations Framework Convention on Climate Change, acknowledging in the preamble that ‘climate change is a common concern of humankind’, states that Parties ‘should ... respect, promote and consider their respective obligations on human rights, ...’.^[footnote] The preamble also noted ‘the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity ...’.^[footnote]”

4. The final two footnotes to the paragraph had been replaced with specific references to the eleventh and thirteenth preambular paragraphs, respectively, of the Paris Agreement under the United Nations Framework Convention on Climate Change.

5. Mr. PETRIČ proposed that a footnote be added with specific references to the “relevant conventions” mentioned

at the end of the fourth sentence of the revised text. Furthermore, the text went too far in deducing an obligation from the use of the verb “should” in the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change; language along the lines of “None-theless, such a view is indicated” would be preferable.

6. Mr. KITTICHAISAREE proposed deleting the third sentence of the revised text, which was confusing. He supported the insertion of a footnote containing references to relevant conventions. He furthermore proposed inserting the word “mainly” between the words “found” and “in relevant conventions” in the fourth sentence.

7. Mr. MURPHY said that he did not support the deletion of the third sentence of the revised text, as doing so would undermine the logic of the fourth sentence. However, the third sentence might be improved through the deletion of the words “though coming close to”. There seemed to be disagreement within the Commission about the application of the *sic utere tuo ut alienum non laedas* principle in that context; it was sufficient to state that “these pronouncements may not be deemed as fully supporting”. As to the penultimate sentence, the reference to human rights seemed out of place in the current context. He therefore proposed that, in the final two sentences, the following words be deleted: “that Parties ‘should ... respect, promote and consider their respective obligations on human rights, ...’.^[footnote] The preamble also noted”.

8. Mr. NOLTE supported the proposals to include a footnote referring to relevant conventions and to remove the reference to the phrase from the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change relating to human rights. He had no strong views about the phrase “though coming close to”.

9. Mr. PARK said that he fully supported Mr. Murphy’s views regarding the third sentence of the revised text, including the proposed deletion of the phrase “though coming close to”. In addition, he proposed inserting, in that sentence, the word “global” before the words “atmospheric degradation”.

10. Mr. NOLTE said that, if the phrase “though coming close to” were to be deleted, then an additional phrase, to read “some members consider that”, should be inserted after the words “At the same time” in order to show that there was a difference of opinion within the Commission.

11. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. Nolte’s amendment to the third sentence of the revised text. He did not see the need to insert the word “global” before the words “atmospheric degradation”, as the latter was already defined as global in the draft guidelines.

12. Mr. SABOIA said that he too supported the amendment proposed by Mr. Nolte regarding the third sentence.

13. Sir Michael WOOD said that it would be preferable to identify the courts and tribunals to which the quotations in the second sentence of the proposed text related. He therefore proposed replacing the phrase “International

courts and tribunals have stated” with the phrase “The International Court of Justice has stated” and the phrase “that the Court attaches great significance” with the phrase “and has attached great significance”. The second sentence would thus end just before the phrase “and that the ‘duty to prevent, or at least mitigate...’” and the next sentence would begin with “The arbitral tribunal in the *Arbitration regarding the Iron Rhine Railway* has referred to the duty to prevent, or at least mitigate”.

14. Mr. MURPHY proposed that, instead of the words “some members consider that”, the words “the views of members diverged as to whether” be inserted, following the words “At the same time” in the third sentence of the revised text; accordingly, the subsequent phrase “these pronouncements may not be” should be replaced with the phrase “these pronouncements may be”.

15. Mr. KITTICHAISAREE said that he supported the amendments proposed by Sir Michael. However, he was concerned about the suggestion that the sentence beginning with the words “At the same time” be maintained. Making clear that there was a divergence of opinion within the Commission would not contribute positively to the development of international customary law in that context. He remained in favour of deleting the sentence and replacing the word “Nonetheless” at the beginning of the following sentence with the words “In any case”.

16. Mr. TLADI said that he supported Mr. Murphy’s amendments to the beginning of the third sentence of the revised text. He also agreed with Sir Michael’s proposed amendments but suggested replacing his proposed phrase “has referred to the duty” with the phrase “has declared that the duty”.

17. Mr. MURASE (Special Rapporteur) said that he supported the amendments proposed by Sir Michael, with the further amendment proposed by Mr. Tladi; the insertion of the phrase proposed by Mr. Murphy regarding the members’ divergence of views; the insertion of the word “global” before the words “atmospheric degradation”; the insertion of a footnote containing a reference to relevant conventions; and Mr. Murphy’s proposed amendments to the last two sentences of the paragraph. He further proposed replacing, in the fourth sentence of the revised text, the phrase “such obligations are” with the phrase “such obligation is”.

Paragraph (7), as amended, was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

18. Mr. MURPHY said that, in the last sentence of paragraph (1), the words “It may be noted” should be replaced with the words “In a separate opinion, Judge Owada noted”.

19. Mr. TLADI said that, given that paragraph (1) identified those cases in which environmental impact assessments had been recognized by the International Court of Justice, it might be advisable to move the references to other Court rulings from paragraph (4) to paragraph (1). He therefore proposed deleting, in the fifth sentence of

paragraph (4), the reference to the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, since it was already referred to in paragraph (1), and moving that revised fifth sentence, together with the last sentence of paragraph (4), to the end of paragraph (1).

20. Sir Michael WOOD said that he supported the proposed amendments to paragraphs (1) and (4). In addition, he proposed replacing, in the last sentence of the original paragraph (4), the verb “singled out” with the verb “listed”, and the words “Advisory Opinion on Activities in the Seabed Areas” with “advisory opinion on *Responsibilities and Obligations of States sponsoring persons and entities with respect to Activities in the Area*”.

21. Mr. MURPHY said that he would like clarification as to whether it was the fifth or, rather, the sixth, sentence of paragraph (4) that should be moved to paragraph (1).

22. Mr. TLADI said that it seemed preferable to maintain the sixth sentence of paragraph (4) in that paragraph, rather than moving it to paragraph (1), as it pertained to the threshold for triggering an environmental impact assessment, and therefore went beyond mere recognition of the principle.

23. Mr. MURPHY said that in that case, the words “in several judgments”, in the fifth sentence of paragraph (4), should be replaced with the words “two other judgments”, and a footnote with a reference to the *Gabčíkovo–Nagy-maros Project* case should be added.

Paragraph (1), as amended, was adopted.

Paragraph (2)

24. Mr. TLADI proposed replacing, in the last sentence of paragraph (2), the phrase “What is crucial for the State would be to put in place” with the phrase “What is required is that the State puts in place”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

25. Sir Michael WOOD proposed deleting, in the first sentence of paragraph (3), the words “with respect to” and inserting the word “of”. The last sentence of the paragraph was unclear. He therefore proposed replacing it with a sentence reading: “Since environmental threats have no respect for borders, States may wish jointly to take decisions concerning environmental impact assessments and this is not precluded.”

26. Mr. TLADI said that, while he was not opposed to Sir Michael’s proposed amendment to the last sentence, he would prefer wording along the lines of “Since environmental threats have no respect for borders, it is not precluded that States jointly take decisions concerning environmental impact assessments.”

27. Mr. NOLTE said that, if the phrase “as part of global environmental governance” were to be maintained in the last sentence of the paragraph, he would propose replacing it with the phrase “as part of their global environmental

responsibility". Furthermore, he would prefer to use a more positive formulation than "it is not precluded that States", for example "States are encouraged".

28. Mr. PARK said that he preferred the language proposed by Sir Michael regarding the last sentence of the paragraph.

29. Sir Michael WOOD said that he, too, was not in favour of the formulation "States are encouraged" because jointly conducting environmental impact assessments could sometimes prove more complicated than doing so individually.

30. Mr. TLADI said that he agreed that States should be encouraged to conduct environmental impact assessments jointly, but did not believe that such encouragement was necessary in the commentary, which merely served to explain the draft guidelines.

31. Mr. MURASE (Special Rapporteur) said that, in the first sentence, the words "the obligation with respect to States" should be amended to read "the obligation of States" and that the last sentence should be amended to read "Since environmental threats have no respect for borders, it is not precluded that States, as part of global environmental responsibility, conduct environmental impact assessments jointly."

Paragraph (3), as amended, was adopted.

Paragraph (4)

32. Mr. TLADI said that, in the third sentence, the phrase "article 17 of the Rio Declaration on Environment and Development" should be changed to "principle 17 of the Rio Declaration on Environment and Development".

It was so decided.

33. Mr. MURPHY suggested that paragraph (4) might be combined with paragraph (5) because both referred to the threshold for triggering an environmental impact assessment.

Paragraph (4), as amended, was adopted.

Paragraph (5)

34. Mr. NOLTE, referring to the end of the second sentence, said that what constituted "significant" could not be a purely factual determination and that it must have some measure of legal interpretation or assessment. He therefore proposed inserting the words "to a large extent" between "remains" and "a factual determination".

35. Sir Michael WOOD proposed that, in line with the wording used in the footnote to the paragraph, the word "remains" be replaced with "requires" before "a factual determination". In his view, the fact that the topic covered both atmospheric pollution and atmospheric degradation had no bearing on the need for a factual determination. He therefore suggested that the second sentence be further simplified to read: "The impact of the potential harm must be 'significant'; what constitutes 'significant' requires a factual determination." Regarding the first sentence, he

suggested that the words "or transitory" be deleted, since, in its current wording, the sentence suggested that the guideline did not cover an activity that had a major, but transitory, impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

36. Mr. MURASE (Special Rapporteur) said that he agreed with the proposals to replace "remains" with "requires" and to delete "or transitory". However, it was important to retain, in the second sentence, the reference to the fact that the topic covered both atmospheric pollution and atmospheric degradation, since environmental impact assessments were required for projects likely to have an impact in terms of atmospheric degradation.

37. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in order to reconcile the views of Sir Michael and the Special Rapporteur, the second sentence be amended to read: "The impact of the potential harm must be 'significant' for both atmospheric pollution and atmospheric degradation. What constitutes 'significant' requires a factual determination."

Paragraph (5), as amended by Sir Michael Wood and further amended by Mr. Vázquez-Bermúdez, was adopted.

Paragraph (6)

38. Mr. MURPHY proposed that, in the second sentence, the words "projects intended to have" be replaced with "projects which are likely to have" and that the word "adverse" should be inserted before "effects". He further proposed deleting the parenthetical reference to geoengineering activities in that sentence because, although the term had not been defined, such activities were generally considered with a view to improving the atmosphere, and to the extent that there were adverse effects, they would potentially be on the lithosphere and marine environment. In the third sentence, the words "are likely to" should be replaced with "may", and the words "widespread, long-term and severe" could be deleted, as it was not clear whether that standard applied in the current context.

39. Mr. PARK said that he had similar concerns to those expressed by Mr. Murphy. He proposed replacing the words "it is considered that there is a similar requirement" in the second sentence with "it is considered that, as *lex ferenda*, there might be a similar requirement". In the same sentence, a full stop should be inserted after "global atmosphere" and the remainder of the paragraph should be deleted. The reference to the Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context (Kiev Protocol) was not appropriate, since the scope of the Protocol was limited to transboundary atmospheric pollution; it did not address global atmospheric degradation.

40. Mr. NOLTE said that he supported the proposals made by Mr. Murphy. However, he was in favour of replacing the words "geoengineering activities" in parentheses with a reference to draft guideline 7, which addressed the intentional large-scale modification of the atmosphere. He wondered whether Mr. Park's far-reaching proposal to include a reference to *lex ferenda* was really compatible

with draft guideline 4. Furthermore, he saw no need to delete the remainder of the paragraph, as proposed by Mr. Park. In his view, the reference to the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context seemed appropriate, since, among other things, it was an example of collaboration among certain States in a global context.

41. Mr. VÁZQUEZ-BERMÚDEZ said that he fully agreed with Mr. Nolte's comments and that he supported Mr. Murphy's proposals, which adequately reflected the focus of the draft guideline.

42. Mr. TLADI said that he did not support Mr. Park's proposal to include a reference to *lex ferenda*. He believed that the proposal by Mr. Murphy would sufficiently nuance the text. If the words "widespread, long-term and severe" were retained, a reference should perhaps be added to indicate the source of that expression.

43. Mr. MURASE (Special Rapporteur) said that he agreed with Mr. Murphy's proposals, although he would keep the word "severe" before "damage" in the third sentence, and with Mr. Nolte's proposal to replace "geoengineering activities" with a reference to draft guideline 7. He was, however, not in favour of inserting a reference to *lex ferenda*, which was not appropriate in the current context. The reference to the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context should be kept, as that instrument addressed global issues such as biodiversity and climate as well as transboundary issues.

44. Mr. MURPHY said that he agreed with Mr. Park's point about the scope of the Protocol and the relevance of a reference to that instrument in the current context. However, he would not insist on the removal of that reference. As to the proposal to replace the words "geoengineering activities" with a reference to draft guideline 7, he suggested that the latter perhaps be added in a footnote rather than in parentheses.

45. Mr. ŠTURMA said that he supported the statements of Mr. Park and Mr. Murphy concerning the Protocol.

46. Mr. VÁZQUEZ-BERMÚDEZ said that, since the first sentence referred to both "atmospheric pollution" and "atmospheric degradation", he was of the view that the paragraph could be adopted as agreed by the Special Rapporteur.

Paragraph (6), as amended, was adopted.

Paragraph (7)

47. Mr. TLADI proposed that, in the second sentence, the words "talks about the fact that environmental issues" be replaced with "provides that environmental issues".

Paragraph 7, as amended, was adopted.

The commentary to draft guideline 4, as amended, was adopted.

Commentary to draft guideline 5 (Sustainable utilization of the atmosphere)

Paragraph (1)

48. Mr. PARK proposed that, in order to reflect the discussions in the plenary, a sentence be added at the end of the paragraph to read: "Some members expressed doubts that the atmosphere could be treated analogously as aquifers or watercourses." The wording was taken from the statement of the Chairperson of the Drafting Committee.

49. Sir Michael WOOD proposed that, in the first sentence, the words "limited resource" should be replaced with "natural resource" in order to reflect the language of the draft guideline itself. He suggested deleting the fifth sentence, since it was very theoretical and difficult to follow. The beginning of the sixth sentence should then be recast to read: "First and foremost, this draft guideline proceeds on the premise that ...".

50. Mr. MURPHY said that he supported the proposals made by Mr. Park and Sir Michael. In the sixth sentence, he proposed replacing the words "the atmosphere is a limited resource" with "the atmosphere is a resource with limited assimilation capacity".

51. Mr. NOLTE said that, in the third sentence, the words "In actuality, though" should be replaced with "In truth, however". At the end of the same sentence, he proposed adding the words "exploitable and" before "exploited", in line with the second sentence. With regard to Sir Michael's proposal to delete the fifth sentence, he considered that the sentence had value, inasmuch as the function of the commentary was to explain the general considerations that had led to certain conclusions. He would, however, propose deleting the words "First and foremost", which were not necessary. The point being made in that sentence was that the conclusion was based at least in part on an analogy, which was perfectly plausible.

52. Mr. MURASE (Special Rapporteur) said that he accepted Sir Michael's proposal to replace "limited" with "natural" in the first sentence. He also agreed to Mr. Nolte's proposals to replace the words "In actuality, though" and to add the words "exploitable and" in the second sentence. The fifth sentence was important and should therefore be retained. He could, however, accept the deletion of the opening words "First and foremost". He agreed to Mr. Nolte's proposed amendment to the sixth sentence.

53. Sir Michael WOOD said that, in his view, the fifth sentence was unintelligible; he had no idea what it was intended to suggest.

54. Mr. SABOIA said that he understood the fifth sentence as combining the concept of a shared resource with that of global commons, both of which were useful for the purposes of the topic.

55. Mr. VÁZQUEZ-BERMÚDEZ said that the fifth sentence adequately reflected the source and inspiration for the draft guideline by referring to both shared resources and the recognition of commonality of interests in relation to the atmosphere.

Paragraph (1), as amended, was adopted.

Paragraph (2)

56. Sir Michael WOOD said that the first sentence could be deleted, since it simply repeated what was said in the first sentence of paragraph 1 of draft guideline 5. The opening phrase of the second sentence should then be recast to read: “The second part of paragraph 1”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

57. Mr. MURPHY said that in the final sentence, the reference to geoenvironment in parentheses should be replaced with a footnote reference to draft guideline 7, as had been done in paragraph (6) of the commentary to draft guideline 4.

58. Mr. NOLTE proposed that the words “most notably in the form of aerial navigation” be deleted from the end of the second sentence in order to avoid potential misunderstandings.

59. Mr. PARK proposed that the third sentence, whose meaning was unclear, be recast to read: “Obviously, most human activities that have been carried out directly or indirectly affect atmospheric conditions.”

60. Mr. MURPHY said that, in his view, Mr. Park’s proposed change would be going too far, as it suggested that most human activities directly or indirectly affected the atmosphere, which was not the case.

61. Mr. MURASE (Special Rapporteur) said that the wording “directly or indirectly affect” might carry additional connotations, so he would rather retain the original formulation. He did not believe that it was necessary always to specify “human” activities. He accepted the proposals by Mr. Murphy and Mr. Nolte.

62. Mr. VÁZQUEZ-BERMÚDEZ said that, in his opinion, the paragraph in its current formulation succeeded in its objective of explaining the scope of the term “utilization”. He agreed with the Special Rapporteur that amendments should not be introduced that would change its meaning. He supported the proposal to replace the reference to geoenvironment in the text with a footnote.

63. Mr. KAMTO said that, in his view the current formulation was unacceptable, at least in the French version. The phrase “Obviously, most of the activities that have been carried out so far” was much too categorical, and the Commission should exercise caution in making such statements that were not backed up by the necessary studies or data. He would be inclined to agree with Mr. Park’s proposal. In that regard, he suggested that the word “Obviously” be replaced with, for example, “Probably”.

64. Mr. SABOIA said that some of the concerns raised by Mr. Kamto might have to do with translation problems, as the French text seemed to convey stronger language than the other versions. Like Mr. Vázquez-Bermúdez and others, he would consider the paragraph acceptable with the minor amendments proposed; he was not in favour of Mr. Park’s proposed change.

65. Mr. MURPHY said that, the differences in opinion could perhaps be bridged by replacing, in the third sentence, the word “Obviously” with “Likely” and saying “most of these activities” rather than “most of the activities”, so as to clearly signal that they were human activities.

66. Mr. MURASE (Special Rapporteur) said that Mr. Murphy’s proposal was acceptable.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

67. Sir Michael WOOD said that, in the interests of clarity, the first sentence should be split into two; the first should end after “need to reconcile environmental protection and economic development” and the second sentence should read: “The Commission also noted other relevant precedents.”

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 5, as amended, was adopted.

Commentary to draft guideline 6 (Equitable and reasonable utilization of the atmosphere)

Paragraph (1)

68. Sir Michael WOOD proposed the deletion of the last sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

69. Mr. KAMTO proposed that the footnote to the paragraph be restructured to reflect the relevance of the sources cited. In his view, the footnote should first refer to the chapter by Juliane Kokott; a sentence should then be added indicating that the use of the notion of equity in jurisprudence on delimitation was also illuminating and citing the 1986 judgment of the International Court of Justice in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* and the chapter by Prosper Weil.

Paragraph (2) was adopted, subject to that amendment to its footnote.

Paragraph (3)

70. Mr. MURASE (Special Rapporteur) said that a cross reference to the second footnote to paragraph (1) of the commentary to the preamble should be added to the footnote to the paragraph under consideration.

71. Mr. MURPHY proposed that, to improve the readability of the last sentence, the words “of life” should be removed.

Paragraph (3), as amended, was adopted.

The commentary to draft guideline 6, as amended, was adopted.

Commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere)

Paragraph (1)

72. Mr. TLADI said that, in the first sentence, the text that followed the semicolon seemed superfluous and could be deleted.

73. Mr. PARK suggested that, for the sake of transparency and in line with the custom of the Commission, a new sentence be added at the end of the paragraph to read: “A number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving, and is based on scant practice.” That sentence was drawn from the relevant statement of the Chairperson of the Drafting Committee at the current session.

74. Mr. MURASE (Special Rapporteur), referring to Mr. Tladi’s proposal, said that the “intention” element was very important in the context of the draft guideline and that he would therefore prefer to retain the current formulation. As to Mr. Park’s suggestion, he was in the hands of the Commission.

75. Mr. NOLTE suggested that the sentence proposed by Mr. Park be placed at the end of the commentaries.

It was so decided.

Paragraph (1) was adopted.

Paragraph (2)

76. Sir Michael WOOD proposed that the opening phrase of the paragraph be recast to read: “The term ‘activities aimed at intentional large-scale modification of the atmosphere’, is taken in part from ...”.

77. Mr. MURPHY proposed that the words “any technique” be replaced with “techniques”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

78. Mr. MURASE (Special Rapporteur) proposed that the last four sentences of the paragraph be deleted.

79. Mr. MURPHY proposed that, in the first sentence, the word “geoengineering” be placed in quotation marks. He supported the Special Rapporteur’s proposal to delete the last four sentences.

Paragraph (3), as amended, was adopted.

Paragraph (4)

80. Mr. MURASE (Special Rapporteur) proposed that, for the sake of consistency with the previous paragraph, the last sentence be deleted.

81. Mr. MURPHY said that, while he agreed with that proposal, he had doubts about the appropriateness of the paragraph as a whole. In referring to “‘albedo enhancement’”, for example, the Commission appeared to be straying from its area of expertise.

82. Mr. ŠTURMA said that he shared Mr. Murphy’s doubts. Members of the Commission were legal experts, not scientists; he felt uneasy about adopting a paragraph whose meaning was not clear to him.

83. Mr. NOLTE said that he shared the unease expressed by Mr. Murphy and Mr. Šturma. He would prefer to delete the paragraph.

84. Mr. MURASE (Special Rapporteur) said that the information in the paragraph had been substantiated by scientists and would be of interest to delegates in the Sixth Committee.

85. Sir Michael WOOD said that, while he agreed that the Commission should not delve too deeply into the domain of science, the paragraph was interesting and should be retained, with the exception of the last sentence, which did not fit in with the commentary.

86. Mr. PETRIČ, supported by Mr. SABOIA, said that, if the paragraph was retained, it should at least be made clear that the information that it contained was based on input from scientists rather than from the Commission itself.

87. Mr. VÁZQUEZ-BERMÚDEZ said that the Commission should avoid giving the impression that it was endorsing solar radiation management as an activity that had only positive effects. He proposed retaining the first sentence and placing the second sentence in a footnote, preceded by an introductory phrase, such as “According to scientific experts”. The third sentence should be deleted.

88. The CHAIRPERSON said he took it that the Commission wished to accept the proposal made by Mr. Vázquez-Bermúdez.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

89. Mr. MURPHY said that he would prefer to simplify the paragraph by deleting the third, fourth and fifth sentences, in which an attempt was made to characterize certain obligations under the Convention on the prohibition of military or any other hostile use of environmental modification techniques and under the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The second sentence could be redrafted to include references to those two instruments, without going into further detail.

90. Mr. PARK said that he agreed with the thrust of Mr. Murphy’s proposal, but that the third, fourth and fifth sentences could perhaps be amended slightly and moved to a footnote.

91. Mr. MURASE (Special Rapporteur) said that he could accept Mr. Murphy’s proposal, as modified by Mr. Park.

92. Mr. MURPHY said that, if that was the approach taken, he wished to propose a number of changes to the three sentences and the Commission would need to agree on a revised text.

Paragraph (5) was adopted on that understanding.

Paragraph (6)

93. Mr. MURPHY proposed that, for the sake of clarity, the first sentence be redrafted to read: "Likewise, other activities will continue to be governed by various regimes."

Paragraph (6), as amended, was adopted.

Paragraph (7)

94. Mr. MURPHY proposed that the opening phrase of the first sentence be modified to read: "Activities aimed at large-scale modification of the atmosphere have a significant potential for ...". In the third sentence, he proposed inserting the words "with respect to weather modification" after "World Meteorological Organization".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

95. Mr. NOLTE said that it had been noted, during the Commission's discussion of the topic, that draft guideline 7 should not give rise to the misunderstanding that the Commission was encouraging intentional modification techniques. He therefore proposed that the second sentence be redrafted to read: "It simply sets out the principle that such activities, if undertaken at all, should be conducted with prudence and caution."

96. Mr. KAMTO, referring to the expression "prudence and caution" in the third sentence, said that it would be useful for readers if the Commission quoted the language of the International Tribunal for the Law of the Sea directly. He therefore proposed inserting a new fourth sentence that would read: "As was stated by the International Tribunal for the Law of the Sea in *The MOX Plant Case*, 'prudence and caution require that [States] cooperate in exchanging information concerning risks or effects ... and in devising ways to deal with them, as appropriate'."

97. Sir Michael WOOD said that he would prefer not to include Mr. Nolte's proposed language, which was not necessary or helpful in that it carried a negative implication. The Commission made clear its position with regard to environmental modification techniques in the first sentence.

98. While he agreed with the point raised by Mr. Kamto, he would not want to suggest that prudence and caution were limited to the exchange of information. He therefore proposed that the language used by the Tribunal in *The MOX Plant Case* and, if appropriate, in the other two cases cited, should be quoted in a footnote.

99. Mr. KAMTO said that, if the Commission cited the three cases, it should quote directly from the relevant judgments in the text of the paragraph, particularly as the Tribunal had been consistent in its use of the words "prudence and caution".

100. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. Nolte's proposal, which reflected the debate that had been held within the Commission. He also supported the proposal made by Mr. Kamto.

101. Mr. NOLTE said that the first sentence of the paragraph set out the Commission's formal position. One of the Commission's concerns was, however, to ensure that prudence and caution were exercised not only when an activity was being carried out, but also when the decision was taken whether to engage in an activity. He hoped that Sir Michael would find the phrase "if undertaken," more acceptable, as it was less negative than the wording which he had initially proposed.

102. Mr. McRAE supported that amendment.

103. Mr. MURASE (Special Rapporteur) agreed to the new amendment proposed by Mr. Nolte and the insertion of the quotation taken from the order of the International Tribunal for the Law of the Sea in *The MOX Plant Case*, as proposed by Mr. Kamto.

Paragraph (9), as amended, was adopted.

Paragraph (10)

104. Mr. MURASE (Special Rapporteur) said that the second sentence should be deleted.

105. Mr. NOLTE proposed that the final sentence read: "It is understood that international law would continue to operate in the field of application of the draft guidelines".

Paragraph (10), as amended, was adopted.

Paragraph (11)

106. Mr. MURPHY said that the final phrase of the first sentence should state that "a draft guideline may be required", as an environmental impact assessment probably had to be conducted for some types of activities, such as geoengineering, not because they would adversely affect the atmosphere, which was the subject of draft guideline 4, but rather because they would for example affect the lithosphere and maritime environment. In the final sentence, the words "'widespread, long-term and'" should be deleted in the phrase in quotation marks.

107. Mr. MURASE (Special Rapporteur) agreed to the amendments proposed by Mr. Murphy and suggested that, in the last sentence, "is likely to" should be changed to "may well".

Paragraph (11), as amended, was adopted.

108. Mr. VÁZQUEZ-BERMÚDEZ, referring to Mr. Park's proposal to insert a new sentence which would become paragraph (12) of the commentary, recalled that

some members were of the opinion that the draft guideline in question was no more than a common denominator and could be improved on second reading. He therefore proposed the addition, at the end of the sentence proposed by Mr. Park, of the phrase “other members were of the view that the draft guideline could be improved during the second reading”.

109. Mr. TLADI said that States might well be under more obligations than those specified in the draft guidelines. For that reason, he proposed the phrase “the draft guideline could be enhanced during the second reading”.

The new paragraph (12) proposed by Mr. Park, as amended by Mr. Vázquez-Bermúdez and further amended by Mr. Tladi, was adopted.

The commentary to draft guideline 7, as amended, was adopted.

Commentary to draft guideline 3 (Obligation to protect the atmosphere) (concluded)

Paragraph (5) (concluded)

110. Mr. MURASE (Special Rapporteur) said that, in the fifth sentence, “actual adverse effects” should read “significant adverse effects” and that the word “significant” should also be inserted in the seventh sentence before the words “adverse effects”.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

111. The CHAIRPERSON invited the members of the Commission to resume their consideration of the portion of chapter VIII contained in document A/CN.4/L.886.

B. Consideration of the topic at the present session (concluded)*

112. Mr. MURASE (Special Rapporteur) said that the footnotes to paragraph 3 should be deleted.

It was so decided.

Paragraph 9 (concluded)*

Paragraph 9 was adopted.

Section B, as amended, was adopted.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (concluded)

1. TEXT OF THE DRAFT GUIDELINES, TOGETHER WITH PREAMBULAR PARAGRAPHS (concluded)* [A/CN.4/L.886]

113. Mr. LLEWELLYN (Secretary to the Commission), referring to a question that had been raised previously by Mr. Murphy concerning the footnotes to the draft guidelines and preambular paragraphs previously adopted, said that it was not the Commission’s usual practice to attach such footnotes.

114. The CHAIRPERSON took it that the Commission wished to delete all the footnotes in the subsection.

It was so decided.

Section C, as amended, was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER IX. Jus cogens (A/CN.4/L.887)

115. The CHAIRPERSON invited the members of the Commission to consider chapter IX of the draft report contained in document A/CN.4/L.887.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 5

Paragraphs 2 to 5 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIRST REPORT

Paragraph 6

116. Mr. MURPHY said that the paragraph would probably read better if the phrase “prior to that” was deleted in the second sentence. In the third sentence, the phrase “the Commission was invited” should be altered to “the members of the Commission were” and he proposed replacing, in the final sentence, “several themes” with “two general points”.

117. Mr. TLADI (Special Rapporteur) said that he was happy to accept the first two suggested amendments. He would, however, prefer to retain the word “themes”.

Paragraph 6, as amended, was adopted.

Paragraph 7

118. Mr. TLADI (Special Rapporteur) said that the antepenultimate sentence should refer to the “fundamentally process-oriented/methodological nature of the topic”.

Paragraph 7, as amended, was adopted.

Paragraph 8

119. Mr. MURPHY suggested that the final sentence be recast to read: “In addition, scholarly writings on the topic, while not dispositive, could also assist in analysing primary sources.”

Paragraph 8, as amended, was adopted.

Paragraph 9

120. Mr. NOLTE suggested that, for the sake of clarity, the phrase “that applied to the parties of the treaties”, in the final sentence, be deleted.

Paragraph 9, as amended, was adopted.

* Resumed from the 3341st meeting.

Paragraph 10

121. Mr. MURPHY, referring to the three footnotes to the paragraph, said that it would be best not to include references to the sources relied upon in the report or by members in their statements. One solution might be to replace those footnotes with just one footnote referring to the relevant pages in the Special Rapporteur's first report (A/CN.4/693) where those sources were mentioned.

Paragraph 10 was adopted with that amendment to the footnotes.

Paragraph 11

122. Mr. NOLTE said that he wondered whether the Commission should emphasize the fact that it had not foreseen States' acceptance of the proposition referred to in paragraph 10. He therefore proposed starting the paragraph with "Regarding the acceptance of the proposition by States, reference was made ...". In the third sentence, the word "States" should be inserted before the words "had raised" and, in the final, sentence it would be more accurate to speak of "widespread assumptions" than "popular belief".

123. Mr. TLADI (Special Rapporteur) agreed to all the suggested changes.

Paragraph 11, as amended, was adopted.

Paragraph 12

124. Mr. MURPHY suggested that the footnote to the paragraph simply refer to the relevant pages of the first report where the cases mentioned in the footnote were discussed and that, in the final sentence, the phrase "regional and national courts" be preceded by the word "by".

Paragraph 12, as amended and with an amendment to its footnote, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

125. Mr. MURPHY said that it might be helpful to insert the phrase "of the third draft conclusion" after the words "second paragraph" in the final sentence.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

2. SUMMARY OF THE DEBATE

Paragraph 16

126. Mr. VÁZQUEZ-BERMÚDEZ said that, in order to reflect the views expressed in the debate, he proposed the insertion of an additional sentence at the end of the paragraph which would read: "It was stressed that the scope of the topic extends beyond the law of treaties and includes areas of international law such as the responsibility of States for internationally wrongful acts."

127. Mr. NOLTE said that without further explanation the phrase "potentially transformational nature of peremptory norms" in the final sentence was difficult to understand.

128. Sir Michael WOOD said that he was also puzzled by the aforementioned phrase. Perhaps the best solution would be to end the sentence after the word "Commission". He supported the proposal by Mr. Vázquez-Bermúdez to add an additional sentence.

129. Mr. MURPHY suggested replacing the phrase "reference was made" with "members made reference to" in the first sentence.

Paragraph 16, as amended, was adopted.

Paragraph 17

130. Mr. MURPHY proposed the insertion of the word "reviewing" before "the practice of States" in the final sentence.

131. Sir Michael WOOD said that the third sentence could be more strongly worded by replacing "was cited in support of the assertion" with "confirmed".

132. Mr. VÁZQUEZ-BERMÚDEZ suggested inserting, in the third sentence, the phrase "and other international courts and tribunals" after the words "International Court of Justice", since they, too, had referred to the concept of *jus cogens* in their decisions.

Paragraph 17, as amended, was adopted.

Paragraph 18

133. Mr. MURPHY proposed altering "stick" to "adhere" in the fourth sentence.

134. Mr. VÁZQUEZ-BERMÚDEZ suggested the deletion of the phrase "as in the case of customary international law" in the second sentence.

135. Mr. NOLTE said that the meaning of the penultimate sentence would be clearer if it were recast to read: "It was also suggested that if the Special Rapporteur were to undertake further study on the theoretical aspects of *jus cogens*, he could look at the link between the concept of *jus cogens* and that of transnational public policy which is relevant in the field of international investment law."

136. Mr. TLADI (Special Rapporteur) said that it was important to say that the link had been invoked because Mr. Forteau had made the point that there were specific investment arbitration cases which had referred to that link and that the Commission might therefore need to look at it.

137. Mr. NOLTE said that it might be unclear whether the words "which had been invoked" in the penultimate sentence related to transnational public policy or the two concepts.

138. Mr. TLADI (Special Rapporteur), supported by Mr. McRAE, said that in order to avoid any ambiguity the sentence should end after the phrase "transnational public policy".

Paragraph 18, as amended by Mr. Nolte and by the Special Rapporteur, was adopted.

Paragraph 19

139. Mr. KITTICHAISAREE proposed the insertion of the word “international” before “public order” at the end of the first sentence.

140. Mr. VÁZQUEZ-BERMÚDEZ proposed the deletion of the three sentences preceding the final sentence and the insertion of the following text:

“It was expressed that the *jus cogens* norms are essentially norms of customary international law with an especial *opinio juris*, that is, the conviction of the existence of a legal right or obligation of a peremptory character. Accordingly, such a norm consists of a general practice accepted as a peremptory law. In other words, a general practice accompanied by an *opinio juris cogens*. It was also pointed out that treaties might be at the origin or reflect norms of *jus cogens*, and that peremptory norms might also be based on general principles of law, which deserved further study.”

141. Mr. NOLTE said that it would be better to speak of a “special form of *opinio juris*” rather than “an especial *opinio juris*”.

142. The CHAIRPERSON invited the members of the Commission to pursue their consideration of the portion of the draft report contained in document A/CN.4/L.887 at the following meeting.

The meeting rose at 1 p.m.

3344th MEETING

Wednesday, 10 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hasouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (concluded)* (A/CN.4/689, Part II, sect. H, A/CN.4/L.878)

[Agenda item 11]

REPORT OF THE PLANNING GROUP (A/CN.4/L.878)

1. Mr. NOLTE (Chairperson of the Planning Group), presenting the Planning Group’s report (A/CN.4/L.878),

said that the Group had held four meetings. It had had before it section H of chapter II, entitled “Other decisions and conclusions of the Commission”, of the topical summary of the discussion held in the Sixth Commission of the General Assembly during its seventieth session (A/CN.4/689); the part of the proposed strategic framework for the period 2018–2019,⁵²⁰ with respect to Programme 6, “Legal Affairs”; General Assembly resolution 70/236 of 23 December 2015 on the report of the International Law Commission on the work of its sixty-seventh session, and General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels.

2. The Working Group on the long-term programme of work had been reconstituted at the current session under the chairpersonship of Mr. McRae. It had submitted its report on the work of the quinquennium (section A.1 of document A/CN.4/L.878) and, in particular, it had recommended the inclusion of two topics in the long-term programme of work, namely the settlement of international disputes to which international organizations were party and the succession of States in respect of State responsibility.

3. The Planning Group had welcomed the two memoranda prepared by the secretariat (A/CN.4/679 and Add.1) and had taken note of six potential topics: (a) General principles of law; (b) International agreements concluded with or between subjects of international law other than States or international organizations; (c) Recognition of States; (d) Land boundary delimitation and demarcation; (e) Compensation under international law, and (f) Principles of evidence in international law. It had recommended that those six topics be further considered by the Working Group on the long-term programme of work at the Commission’s sixty-ninth session (in 2017).

4. At the end of every quinquennium the Commission usually included in chapter III of its annual report an invitation to States to propose possible new topics. That invitation would be made in chapter III of the draft report on the sixty-eighth session and the Commission would examine it in due course. At the request of the General Assembly, the Planning Group had considered the question of the rule of law at the national and international levels in its report. The Commission’s comments thereupon were to be found in section A.2 of that document.

5. He drew the Commission members’ attention to three points.

6. The first point concerned section A.3 of the Group’s report entitled “Consideration of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015 on the report of the International Law Commission on the work of the sixty-seventh session” and, more specifically, the possibility of holding one half session in New York. After considering all the relevant factors, the Commission recommended that in 2018 the first part of its seventieth session be held in New York and it requested the secretariat to make the requisite administrative and organizational arrangements. Emphasis was placed on the need to ensure access to

* Resumed from the 3323rd meeting.

⁵²⁰ A/71/6 (Prog. 6).