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For participants only

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International Law Commission

Sixty-eighth session (second part)

Provisional summary record of the 3343rd meeting

Held at the Palais des Nations, Geneva, on Wednesday, 10 August 2016, at 10 a.m.

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Present:

Chairman: Mr. Comissário Afonso
Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Hassouna
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

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

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

Chapter VIII. Protection of the atmosphere (continued) (A/CN.4/L.886 and Add.1)

The Chairman 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.

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

Paragraph (7) (continued)

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

Mr. Murase (Special Rapporteur) proposed that, beginning with the third sentence of the paragraph, the text should 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’,¹⁷ that the Court attaches great significance to respect for the environment ‘not only for States but also for the whole of mankind’,¹⁸ and that the ‘duty to prevent, or at least mitigate, [significant harm to the environment] ... has now become a principle of general international law’.¹⁹ 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, 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, ...’.²⁰ The preamble also noted ‘the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity ...’.²¹”

Footnotes 20 and 21 had been replaced with specific references to the 11th and 13th preambular paragraphs, respectively, of the Paris Agreement.

Mr. Petrič proposed that a footnote should 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; language along the lines of “Nonetheless, such a view is indicated” would be preferable.

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”.

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 should be deleted: “that Parties ‘should ... respect, promote and consider their respective obligations on human rights, ...’.”²⁰ The preamble also noted”.

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 relating to human rights. He had no strong views about the phrase “though coming close to”.

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”.

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.

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.

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

Sir Michael Wood said that it would be preferable to identify the courts and tribunals to which the quotations in the second sentence 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 with footnote 18 and the next sentence would begin with the phrase “The arbitral tribunal in the *Iron Rhine Railway* case has referred to the duty to prevent, or at least mitigate”.

Mr. Murphy proposed that, instead of the words “some members consider that”, the words “the views of members diverged as to whether” should 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”.

Mr. Kittichaisaree said that he supported the amendments proposed by Sir Michael Wood. However, he was concerned about the suggestion that the sentence beginning with the words “At the same time” should 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”.

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 Wood’s proposed amendments but suggested replacing his proposed phrase “has referred to the duty” with the phrase “has declared that the duty”.

Mr. Murase (Special Rapporteur) said that he supported the amendments proposed by Sir Michael Wood, 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.

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

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

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".

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).

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".

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).

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.

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-Nagymaros Project* case should be added.

Paragraph (1), as amended, was adopted.

Paragraph (2)

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)

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”.

Mr. Tladi said that, while he was not opposed to Sir Michael Wood’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”.

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”.

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

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.

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.

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)

Mr. Tladi said that, in the third sentence, the phrase “article 17 of the Rio Declaration” should be changed to “principle 17 of the Rio Declaration”.

It was so decided.

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)

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”.

Sir Michael Wood proposed that, in line with the wording used in footnote 28, the word “remains” should 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 could 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” should 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.

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.

Mr. Vázquez-Bermúdez proposed that, in order to reconcile the views of Sir Michael Wood and the Special Rapporteur, the second sentence could 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 subamended by Mr. Vázquez-Bermúdez, was adopted.

Paragraph (6)

Mr. Murphy proposed that, in the second sentence, the words “projects intended to have” should 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.

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 Kiev Protocol was not appropriate, since the scope of the Protocol was limited to transboundary atmospheric pollution; it did not address global atmospheric degradation.

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 Kiev Protocol seemed appropriate, since, among other things, it was an example of collaboration among certain States in a global context.

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.

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.

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 Kiev Protocol should be kept, as that instrument addressed global issues such as biodiversity and climate as well as transboundary issues.

Mr. Murphy said that he agreed with Mr. Park's point about the scope of the Kiev 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 should perhaps be added in a footnote rather than in parentheses.

Mr. Šturma said that he supported the statements of Mr. Park and Mr. Murphy concerning the Kiev Protocol.

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)

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

Paragraph 7, as amended, was adopted.

The commentary to draft guideline 4 as a whole, as amended, was adopted

Commentary to draft guideline 5

Paragraph (1)

Mr. Park proposed that, in order to reflect the discussions in the plenary, a sentence should 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 Chairman of the Drafting Committee.

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 ...".

Mr. Murphy said that he supported the proposals made by Mr. Park and Sir Michael Wood. 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".

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 Wood'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.

Mr. Murase (Special Rapporteur) said that he accepted Sir Michael Wood'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.

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

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.

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)

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)

Mr. Murphy said that in the final sentence, the reference to geoengineering 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.

Mr. Nolte proposed that the words "most notably in the form of aerial navigation" should be deleted from the end of the second sentence in order to avoid potential misunderstandings.

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

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.

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.

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 geoengineering in the text with a footnote.

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” should be replaced with, for example, “probably”.

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.

Mr. Murphy said that, the differences in opinion could perhaps be bridged by replacing 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.

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)

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 a whole, as amended, was adopted.

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

Paragraph (1)

Sir Michael Wood proposed the deletion of the last sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Kamto proposed that footnote 37 should 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 footnote 37.

Paragraph (3)

Mr. Murase (Special Rapporteur) said that a cross reference to footnote 2 should be added to footnote 38.

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 a whole, as amended, was adopted.

*Commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere)**Paragraph (1)*

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

Mr. Park suggested that, for the sake of transparency and in line with the custom of the Commission, a new sentence should 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 Chairman of the Drafting Committee at the current session.

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.

Mr. Nolte suggested that the sentence proposed by Mr. Park should be placed at the end of the commentaries.

It was so decided.

Paragraph (1) was adopted.

Paragraph (2)

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

Mr. Murphy proposed that the words “any technique” should be replaced with “techniques”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

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

Mr. Murphy proposed that, in the first sentence, the word “geoengineering” should 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)

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

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.

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.

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

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.

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.

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.

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.

The Chairman 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)

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 Protocol I additional to the Geneva Conventions of 1949. The second sentence could be redrafted to include references to those two instruments, without going into further detail.

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.

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

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)

Mr. Murphy proposed that, for the sake of clarity, the first sentence should be redrafted to read: “Likewise, other activities will continue to be governed by various regimes.”

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Murphy proposed that the opening phrase of the first sentence should 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)

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 should be redrafted to read: “It simply sets out the principle that such activities, if undertaken at all, should be conducted with prudence and caution.”

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 Tribunal in the case concerning *Mox Plant*, ‘prudence and caution require that [States] cooperate in exchanging information concerning risks or effects [...] and in devising ways to deal with them, as appropriate’.”

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.

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 *Mox Plant* and, if appropriate, in the other two cases cited, should be quoted in a footnote.

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”.

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.

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 Wood

would find the phrase “if undertaken,” more acceptable, as it was less negative than the wording which he had initially proposed.

Mr. McRae supported that amendment.

Mr. Murase (Special Rapporteur) agreed to the fresh 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)

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

Mr. Nolte proposed that the final sentence should 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)

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 brackets.

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.

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”.

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 subamended by Mr. Tladi, was adopted.

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

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

Paragraph (5) (continued)

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.

The portion of Chapter VII contained in document A/CN.4/L.886/Add.1, as a whole, as amended, was adopted.

The Chairman invited the members of the Commission to resume their consideration of the portion of Chapter VII contained in document A/CN.4/L.886.

B. Consideration of the topic at the present session (continued)

Mr. Murase (Special Rapporteur) said that footnotes 5 to 10 should be deleted.

It was so decided.

Paragraph 9

Paragraph 9 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 (continued)

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.

The Chairman took it that the Commission wished to delete footnotes 12 to 24.

It was so decided.

The portion of Chapter VII contained in document A/CN.4/L.886, as a whole, as amended was adopted.

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

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

The Chairman 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.

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

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 Commission was

invited” should be altered to “the members of the Commission were” and in the final sentence he proposed replacing “several themes” with “two general points”.

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

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

Paragraph 7, as amended, was adopted.

Paragraph 8

Mr. Murphy suggested that the final sentence should 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

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

Paragraph 9, as amended, was adopted.

Paragraph 10

Mr. Murphy, referring to footnotes 3, 4 and 5, 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 where those sources were mentioned.

Paragraph 10 was adopted with that amendment to the footnotes.

Paragraph 11

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”.

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

Paragraph 11, as amended, was adopted.

Paragraph 12

Mr. Murphy suggested that footnote 8 should 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” should be preceded by the word “by”.

Paragraph 12, as amended and with an amendment to footnote 8, was adopted.

*Paragraph 13**Paragraph 13 was adopted.**Paragraph 14*

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*

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”.

Mr. Nolte said that without further explanation the phrase “potentially transformational nature of peremptory norms” in the final sentence was difficult to understand.

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.

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*

Mr. Murphy proposed the insertion of the word “reviewing” before “the practice of States” in the final sentence.

Sir Michael Wood said that the third sentence could be more strongly worded by replacing “was cited in support of the assertion” with “confirmed”.

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*

Mr. Murphy proposed altering “stick” to “adhere” in the fourth sentence.

Mr. Vázquez-Bermúdez suggested the deletion of the phrase “as in the case of customary international law” in the second sentence.

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”.

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.

Mr. Nolte said that it might be unclear whether the words “which had been invoked” related to transnational public policy or the two concepts.

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

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

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.”

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

The Chairman 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.