

Provisional

For participants only

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International Law Commission
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Provisional summary record of the 3357th meeting

Held at the Palais des Nations, Geneva, on Friday, 12 May 2017, at 10 a.m.

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Report of the Drafting Committee

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Present:

Chairman: Mr. Nolte

Members: Mr. Al-Marri
Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Hassouna
Mr. Hmoud
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/705)

The Chairman invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of protection of the atmosphere (A/CN.4/705).

Mr. Aurescu thanked the Special Rapporteur for organizing a meeting with major scientists in the field of environmental protection and international environmental law and for his outreach to academia. The methodology used in the report involved coordination and harmonization between norms of international environmental law and other provisions of international law: in other words, interrelationships. He himself would have preferred to see greater emphasis placed on the distinction between relationships of interpretation and relationships of conflict. Such a distinction was all the more relevant with reference to the concept of mutual supportiveness outlined in paragraph 14 *et seq.* of the report. The Special Rapporteur saw that concept as a useful tool in solving conflicts between norms relating to the protection of the atmosphere and norms belonging to other sub-branches of international law, with the former to be accorded priority. Neither interrelationship nor mutual supportiveness had yet become a principle, however; rather, they were methods of interpretation or of resolution of conflicts between norms.

The report should have gone into greater detail about the link between interrelationship and mutual supportiveness, on the one hand, and the rules on interpretation set forth in the Vienna Convention on the Law of Treaties and in the relevant customary international law, on the other. In cases of conflicts between norms, there was a need to point out which was the prevailing norm; otherwise, the technique of mutual supportiveness would work like a two-way street. Of greatest relevance for the topic were examples when the prevailing norm was one relating to the protection of the environment; however, some of the examples in the report did not fall into that category. The question of whether the law on the protection of the atmosphere existed as a distinct sub-branch of international law was a secondary issue; what was really important was to identify the proper way of drafting guidelines enabling the international community to ensure the best protection of the atmosphere.

Turning to draft guideline 9, which he saw as a chapeau to draft guidelines 10 to 12, he said that that aspect should be stressed in the text. The title needed to be changed, since the subject was not interrelationship in general, but the concept of interrelationship as it applied to the protection of the atmosphere in international law. The reference to principles should be removed; the final phrase, “from atmospheric pollution and atmospheric degradation”, should be deleted; and the purpose of the draft guideline should be more clearly expressed.

The first part of draft guideline 10 appeared to subordinate the efforts of States to protect the atmosphere to certain requirements of investment and trade law. The final sentence could be deleted, since its subject was already covered in draft guideline 9. In the first paragraph of draft guideline 11, the words “to protect the atmosphere” should be replaced with “to the purpose of protecting the atmosphere” and the final sentence of that paragraph could be deleted, for the same reason as in draft guideline 10. He fully backed the idea expressed in paragraph 2 of the draft guideline, namely support for small island States and low-lying States. Clearly, the rise of the sea level as a result of climate change had a huge negative impact upon those States, with a whole series of consequences related to international law, for instance the effect upon territory and population, the effect upon baselines and entitlement to maritime spaces, the exercise of sovereign rights and jurisdiction in maritime spaces, especially the exploration and exploitation of their resources, the validity of maritime delimitations that had already been performed and the impact upon future delimitations. What was missing in that paragraph, however, was a reference to the legal regime for protection of the atmosphere. The latter’s relationship with the problems of small island States and low-lying States should be made a separate topic, so that the Commission could consider all the legal aspects and consequences.

In the first paragraph of draft guideline 12, the words “with a view to effectively protecting the atmosphere” should be replaced with “with the purpose of effectively

protecting the atmosphere” and the phrase “make best efforts” should be deleted, since it contradicted the concept of mutual supportiveness that was mentioned in the same paragraph. Concerning the second paragraph, he agreed with Sir Michael Wood that the reference to the human rights of vulnerable groups of people invoked collective rights, a concept not accepted in international human rights law, which only knew individual rights. An option would be to speak of the human rights of persons belonging to vulnerable groups. His earlier comments about small island States and low-lying States were equally applicable to paragraph 3 of the draft guideline. Paragraph 4 was more a policy statement than a guideline as such and would be much better placed in the preamble.

Since all the draft guidelines proposed in the report had a similar structure and wording, it might be possible, as others had suggested, to replace them all with a single one. Another option might be to have two guidelines, the first one based on a revision of draft guideline 9 to become a general chapeau concerning the concepts of interrelationship and mutual supportiveness as they applied to norms on protection of the atmosphere in relation to those of other sub-branches of international law. The second text could be a consolidated version of draft guidelines 10 to 12.

With those remarks, he said he was in favour of referring the draft guidelines to the Drafting Committee.

Mr. Hassouna thanked the Special Rapporteur for his fourth report, a comprehensive and well-argued document, and commended him for seeking to promote and explain the project to Governments, organizations and academic institutions. The informal dialogue between scientists and members of the Commission had certainly enhanced the latter’s knowledge of the scientific and technical aspects of the topic. Although some States had questioned the suitability of the topic, he himself believed that the Commission should build on the progress made to date. In line with the 2013 understanding, it should continue to adopt a balanced approach, identifying the legal principles applicable to the protection of the atmosphere while avoiding policy debates related to political negotiations on environmental issues.

During the discussions in the Sixth Committee, some delegations had expressed the hope that the Commission’s work would counteract the increasing fragmentation of environmental law and had underlined the need to produce a comprehensive regulatory framework. The Special Rapporteur had attempted to address those concerns by referring in his report to “principles” of interrelationship and mutual supportiveness. However, no “principle” of interrelationship existed in any of the main treaties on international environmental law, in the law of treaties or in State practice, nor did scholars recognize it as principle. It was likewise doubtful whether mutual supportiveness was a legal principle.

Despite those reservations, he agreed that the draft guidelines should note the relationship between various branches of international law with respect to the protection of the atmosphere and encourage States to harmonize potential conflicts between norms in different branches with a view to ensuring the effective protection of the atmosphere. The reference in draft guideline 9 to a “principle” of interrelationship could be rectified by citing instead the well-established principle of normative or systemic integration, which was based on two key provisions, article 31 (3) (c) of the Vienna Convention on the Law of Treaties and principle 4 of the 1992 Rio Declaration on Environment and Development. Draft guideline 9 should also state that the rules of international law relating to the protection of the atmosphere must be interpreted based on the provisions of the Vienna Convention and customary international law.

Concerning draft guideline 10 on the interrelationship between the law on the protection of the atmosphere and international trade and investment law, he said that it reflected prevalent practice regarding fair and equitable treatment obligations but neglected to mention sustainable development: that omission should be remedied. The term “appropriate measures” was rather vague and required clarification in the commentary. On draft guideline 11, interrelationship with the law of the sea, he said the term “appropriate measures” in paragraph 1 likewise required clarification in the commentary. Did it refer to a due diligence standard, as in the United Nations Convention on the Law of the Sea; to an obligation of States to cooperate with each other in good faith; or to an obligation to pass

legislation to address the new issues of atmosphere pollution? Moreover, he did not see how draft guideline 11 (2) related to the protection of the atmosphere, and the specific reference to small island States and low-lying States overlooked the fact that all States with coastlines were affected by rising water levels. If the Special Rapporteur was trying to emphasize the special circumstances of small island States and low-lying States, he could have inserted the word “particularly” before “consider the situation”. He would support the inclusion of a sentence acknowledging the difference between developed and developing nations, particularly with regard to technical capabilities and resources. In their comments on previous reports, States had indicated that the guidelines did not take that difference sufficiently into account. As the Special Rapporteur suggested in his fourth report, developing States had fewer tools for adequately responding to transboundary pollution.

Referring to draft guideline 12 on the interrelationship with international human rights law, he said that the Special Rapporteur did not make it clear why provisions on the protection of the atmosphere were necessary when the equivalent seemed to exist in human rights treaties and decisions of tribunals. The draft guideline failed to mention the three minimum requirements applied by international courts in finding violations of the most commonly cited human rights: a “direct link” between atmospheric pollution or degradation and the impairment of a protected right; a “certain minimum level” attained by the adverse effects of atmospheric pollution or degradation; and a “causal link” between an action or omission of a State and atmospheric pollution or degradation.

Draft guideline 12 was likewise silent on how the rights were interpreted at the regional or local level compared with the international level. For example, as the Special Rapporteur pointed out in paragraph 73 of his report, the European Court of Human Rights was mainly concerned with individual rights, whereas the jurisprudence of the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights focused more on the collective rights of indigenous or tribal peoples. It would be appropriate to include in the commentary a non-exhaustive list of the human rights generally cited by international courts, namely the rights to life, property and private and family life, in order to make States better aware of how to fulfil their obligations to protect the atmosphere. Clarification in the commentary was also needed of the phrase “make best efforts” in paragraphs 1 and 2, and of what was meant by “international human rights norms” in paragraph 2. The commentary to paragraph 4 could list factors that should be taken into account in the interests of future generations, with examples derived from specific cases such as those of the Ganges and Yamuna rivers. Finally, a definition of the term “indigenous peoples” should be included in the commentary.

Overall, the draft guidelines appropriately addressed the lack of harmonization in existing conventions on the protection of the atmosphere, but many of them would benefit from further clarification, and some could be deleted or merged with others. He did not think that a dispute settlement clause would be appropriate for inclusion and would like to know which features of dispute settlement were to be dealt with in the next report. He supported the Special Rapporteur’s aim of concluding the consideration of the topic on first reading in 2018 and finalizing the topic in 2020, although the project might need to be updated by then to take account of scientific and technical developments.

In conclusion, he recommended referring the draft guidelines to the Drafting Committee, on the understanding that the Special Rapporteur would take account of all the comments made by members of the Commission by submitting a revised text as a basis for the Drafting Committee’s work.

Ms. Galvão Teles said that she wished to join with others in expressing her appreciation to the Special Rapporteur for organizing the recent informal meetings with scientific experts on the protection of the atmosphere. The meetings had provided a very useful background for the Commission’s consideration of what was an important but difficult and complex topic.

The proposals put forward by the Special Rapporteur in his fourth report needed to be considered with some caution. In the first place, the areas of international law where he suggested that an intrinsic link had been established with the protection of the atmosphere were perhaps only some of those where one did exist. Secondly, the interrelationship was

envisaged not in terms of specific rules but as relationships between whole bodies or areas of international law. Thirdly, the subject was addressed in terms of what was described as the “principles” of interrelationship and mutual support. However, it was questionable whether those were autonomous legal principles or just a conceptual framework for analysis.

It might be better to approach the topic on the basis of the conclusions of the Study Group on fragmentation of international law, particularly conclusions (2), (3) and (4). Conclusion (2) drew a distinction between relationships of interpretation, when a norm could assist in the interpretation of another norm, and the two norms were applied in conjunction, and relationships of conflict, when two norms were both valid and applicable but pointed to incompatible decisions, so a choice had to be made between them. According to conclusion (3), the norms must be interpreted in accordance with or analogously to the Vienna Convention on the Law of Treaties. Conclusion (4) mentioned the generally accepted principle that when several norms bore on a single issue they should be interpreted so as to give rise to a single set of compatible obligations. In the light of those conclusions, she supported the suggestion that the four draft guidelines proposed by the Special Rapporteur should be condensed into one that addressed the protection of the atmosphere in the context of other rules of international law.

At the same time, the preamble could refer to the policy objective of endeavouring, when developing new rules of international law, to do so as far as possible in a manner that was supportive of the protection of the atmosphere. A more thorough explanation of the different areas of international law that were intrinsically linked with the protection of the atmosphere could then be provided in the commentary.

Although the four draft guidelines proposed by the Special Rapporteur highlighted some extremely important issues, she shared the concern expressed by some members of the Commission about whether the topic under discussion was the right place to address them. Some of them could perhaps form a separate topic. For instance, the rise in sea levels, covered in draft guidelines 11 (2) and 12 (3), was cited as one of the adverse impacts of climate change in the 2030 Agenda for Sustainable Development. It was one of the challenges currently facing the international community, affecting coastal States and low-lying coastal countries in general and small island developing States in particular. The Committee on Baselines under the International Law of the Sea and the Committee on International Law and Sea Level Rise, of the International Law Association, had insisted that sea-level rise was a cross-cutting issue, with legal implications and ramifications in different areas of international law — not only the law of the sea, human rights law and migration law, but also population, territory, statehood and State responsibility. Perhaps, therefore, a more holistic approach to such a pressing and fundamental challenge would be better advised than the one taken in the report.

Like the Special Rapporteur, she hoped that the Commission would be able to conclude its first reading of the draft articles in 2018. She would join any consensus to submit the four draft guidelines to the Drafting Committee, though her strong preference was for the Drafting Committee to look into the possibility of merging them into one concise text.

Ms. Escobar Hernández said that the Special Rapporteur was to be commended on his initiative to organize the meetings with scientific experts, as well as legal experts, who had provided the Commission with new insights that would enable it to make progress in its work.

The focus in the fourth report on the interrelationship between the so-called “law on the protection of the atmosphere” and other branches of international law was somewhat surprising. That type of interrelationship was a general topic applicable to all areas of international law, not just to the law on the protection of the atmosphere. Nevertheless, she fully endorsed the starting point of the report, namely the systemic nature of international law. As had been pointed out by previous speakers, however, the approach to that issue in the report was too limited, insofar as it focused on “mutual supportiveness” at the expense of other important aspects.

Another problem with focusing on mutual supportiveness was that it was not a clearly defined concept. It could undoubtedly play an important role in the interpretation of international law and in dispute settlement, but it could not be described as a principle of international law in the usual sense of the term. Moreover, mutual supportiveness, as defined in the context of the World Trade Organization (WTO), was basically a tool with which to achieve certain objectives. While those objectives undoubtedly affected the relationship between the protection of the atmosphere and important areas of contemporary international law, mutual supportiveness belonged more to the sphere of policy options than to the legal sphere, unless it was defined more narrowly to identify it with the concept of systemic interpretation or consistent interpretation, which was not the case in the report.

The Special Rapporteur's analysis of the impact of climate change and global warming on coastal States was especially interesting. However, it was not clear that it was relevant to the specific issue analysed in the report, namely, the interrelationship between rules of international law. That did not mean it was unimportant, especially in view of the challenges for small island States, to which the Special Rapporteur referred in paragraphs 66 and 67. Nevertheless, it was undoubtedly a topic that deserved detailed study in the future work of the Commission.

Some of the references to specific cases or developments were not really relevant to the protection of the atmosphere. For example, paragraphs 35 and 44 mentioned various arbitral awards concerning Spain in respect of changes in electricity tariffs and their impact on investment in the renewable energy sector. While they were related to environmental questions and the protection of the atmosphere to some extent, they bore little connection to the specific topic of the interrelationship between rules of international law.

As for the draft guidelines themselves, in some cases they overlapped and their language was strongly prescriptive, which seemed incompatible with the very nature of a guideline and in places obscured their meaning. They also covered certain issues that did not fully correspond to the stated aim of the guidelines which, if she had understood correctly, was basically to ensure the application of the rules relevant to interrelationships and systemic integration to the topic of the protection of the atmosphere. In that context, it would perhaps be preferable to produce simpler, less elaborate draft guidelines. Such an approach would clarify the objective pursued by the Special Rapporteur and would avoid blurring it with references to collateral issues.

Those collateral issues might well be addressed in the commentary. However, in view of the Special Rapporteur's preference for having several guidelines based on their content, consideration could be given to drafting two draft guidelines to address the issue from two complementary perspectives, treating separately the interrelationship criteria and the areas covered by the interrelationship. In any case, the Drafting Committee was best placed to take a decision on that question, and she was therefore in favour of sending the draft guidelines to it.

Mr. Murphy said that, during the debate in the Sixth Committee at the seventy-first session of the General Assembly, a number of States had expressed serious doubts about the Commission's work on the topic of protection of the atmosphere. Concern had been expressed, for example, that the development of the guidelines might go beyond the mandate of the Commission, duplicate existing regulations concerning environmental protection and interfere with ongoing political negotiations or the application of existing agreements such as the Paris Agreement or the Montreal Protocol on Substances that Deplete the Ozone Layer. The Commission should keep those concerns in mind and be very cautious in its approach to the topic. Moreover, given that several speakers in the Sixth Committee had again welcomed the constraints indicated in the 2013 understanding, the Commission would be wise to continue to abide by it, for that was the basis upon which the topic had gone forward. In that context, it was unfortunate that the fourth report embarked on a discussion of matters such as "common but differentiated responsibilities". To be consistent with the 2013 understanding, such matters should neither be addressed in the reports nor make their way into the commentary.

Draft guideline 9 was entitled "guiding principles on interrelationship", which suggested the existence of at least two principles. The text of the guideline, however, only

identified one: a so-called “principle of interrelationship”. The Special Rapporteur provided no legal basis for any such principle. He cited no treaties asserting the existence of such a principle, nor State practice articulating it. One scholarly source cited — written by Professor Alan Boyle and entitled “Relationship between international environmental law and other branches of international law” — did not actually identify a “principle of interrelationship”.

To be sure, some authors did discuss the interrelationship between environmental law and other areas of law, but in those cases, the word “interrelationship” was simply used interchangeably with words such as “interaction”; the authors did not identify any principle, let alone a legal principle. The same was true of scholarly articles on subjects such as trade and the environment. The use of the word “interrelationship”, even repeatedly, did not make it into a legal principle. Perhaps that was why the Special Rapporteur himself at times referred to it as a “concept”.

Other guidelines articulated the so-called “principle of mutual supportiveness”, but again, one had to ask where the support was for that designation. No treaty was cited and no State practice was identified that articulated such a principle. None of the major treatises on environmental law, the law of treaties or general international law, as far as he could tell, mentioned a “principle” of mutual supportiveness. Perhaps, again, that was why the Special Rapporteur himself referred to it as a “concept” when it was introduced in paragraph 14 of the report, and why the basis for it appeared to be just a series of political references to the need for mutual supportiveness in some treaties and cases. For example, the Comprehensive Economic and Trade Agreement (CETA) — which was not yet in force — referred to mutual supportiveness but said nothing about a “principle” of mutual supportiveness.

Admittedly, there were a few academic writers who had tried to argue that, by some strange alchemy, those disparate references to mutual supportiveness had brought forth a legal “principle”, but that smattering of scholars was counterbalanced by others who said it lacked an authoritative formulation. The aforementioned piece by Alan Boyle, for example, did not proclaim a principle of mutual supportiveness, but rather noted that: “Rules of interpretation, priority of treaties, or a balancing of competing interests have generally provided an ample range of techniques for promoting coherence in the application of international law.”

Assuming for the sake of argument that a “principle of mutual supportiveness” did exist, what exactly did it mean? According to paragraph 15 of the report, it had “at least” two dimensions. First, it required States “to negotiate in good faith with a view to preventing *ex ante* possible conflicts”. The idea that States were under some legal obligation as soon as they began negotiating a treaty, or even before, was a rather striking claim. In the original drafts of what had become article 18 of the Vienna Convention on the Law of Treaties, the Commission had played around with the idea of imposing upon States, right at the start of the negotiations, an obligation not to defeat the object and purpose of an agreement, and States had rather emphatically said “No thanks”. That was why article 18 of the Vienna Convention made the obligation come into play at the time of signature.

The second dimension of the alleged “principle” of mutual supportiveness, namely that States were required “to interpret, apply and implement relevant rules in a harmonious manner in order to resolve *ex post* actual conflicts to the extent possible”, was also a rather odd claim; why should that be the sole legal principle to be applied when legal rules collided? What about the “later-in-time rule”, *lex specialis* in comparison with *lex generalis* and the peremptory effects of *jus cogens*? The central problem with insisting upon that dimension was that there was already a tried and tested set of legal rules for the interpretation of treaties, set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties. An especially relevant element in that context was article 31 (3) (c), according to which the interpretative process should take into account “any relevant rules of international law applicable in the relations between the parties”. He did not see how the Commission would help the international legal community by clouding matters with an entirely new principle of mutual supportiveness under a topic on protection of the atmosphere rather than on treaty interpretation.

The 2006 report of the Commission's Study Group on fragmentation of international law considered such issues with a much wider lens, and did not conclude that a "principle of mutual supportiveness" should be a featured element for dealing with fragmentation. Indeed, it said nothing at all about a "principle of mutual supportiveness". As Mr. Park had noted, that report contained the words "mutual supportiveness" in only in two instances, neither of which made reference to a "principle" and neither of which gave those words any special significance. Indeed, the Study Group had downplayed the concept so much that two scholars had written a piece saying that the report reduced mutual supportiveness to a footnote to history.

As others had noted, draft guideline 9 was somewhat contradictory: it emphasized harmonious interpretation and mutual accommodation, but at the same time seemed to give pride of place to obligations relating to protection of the atmosphere, contrary to the affirmation by Alan Boyle that "what cannot be supposed is that environmental rules have any inherent priority over others". It was well settled in international law that States retained the discretion to depart, by mutual consent, from any rule that was not *jus cogens*, and could choose, for example, to privilege trade law or the law of the sea over rules protective of the atmosphere and vice versa. If protection of the atmosphere were really to take precedence over human rights, one wondered where that would lead. In light of those observations, he did not favour sending draft guideline 9 to the Drafting Committee.

As others had noted, the problem with mutual supportiveness pervaded the other draft guidelines. He and other members had indicated very strong reservations during previous discussions of the programme of work when it came to the Special Rapporteur's plans to address different fields of international law. Referring to draft guideline 10, he said that many of the relevant treaties did evince an objective of encouraging trade and investment consistent with environmental protection. However, it was a considerable jump to claim that such an objective meant that there existed a systemic principle of mutual supportiveness, and an even greater leap to claim that such a principle operated so as to favour rules on protection of the atmosphere. Neither the primary instruments themselves nor arbitral awards privileged rules on environmental protection, much less rules specifically relating to protection of the atmosphere.

He agreed with others that the discussion in the report of various trade and investment cases was oversimplified, confusing or incomplete. For example, in both *S.D. Myers, Inc. v. Government of Canada* and *Bilcon of Delaware and others v. Canada*, the tribunals had found that the relevant environmental protection measures violated international investment law obligations. It was not clear how those cases supported a mutually supportive or harmonious approach to the two fields of international law. The discussion of particular agreements was also oversimplified, confusing and incomplete. For example, a specific exception relating to environmental measures, such as that found in article 1106 (6) of the North American Free Trade Agreement, was not the same as a generally applicable principle addressing environmental concerns, such as that found in article 1114 (1) of the same Agreement. The report failed to recognize that those were sophisticated treaty regimes that differed considerably in how they calibrated their relationship to environmental matters. Similarly, investor rights and fair and equitable treatment were two very different things, but the former was inexplicably described in paragraph 31 as guaranteeing the latter.

The boldest move was probably in the text of draft guideline 10, which imposed a portion of the chapeau of article XX of the General Agreement on Tariffs and Trade (GATT) not just on all trade treaties worldwide, but on all investment treaties and customary international law in those fields. The Special Rapporteur had been selective in that he had chosen not to use the rather important phrase from the chapeau "between countries where the same conditions prevail". Missing too, of course, were the subparagraphs of article XX, which contained important requirements concerning necessity and relatedness when considering environmental and conservation matters, but which said nothing about the atmosphere. Draft guideline 10 was not even accurate with respect to GATT, let alone other treaties or customary rules. Consequently, he did not favour sending it to the Drafting Committee.

With regard to draft guideline 11, he said that in general, too much was made in the report of a purported connection between the law of the sea and protection of the atmosphere. As had already been noted, articles 212 and 222 of the United Nations Convention on the Law of the Sea should be the principal focus, since they were the only two provisions dealing directly with pollution and the atmosphere, and they dealt only with pollution of the marine environment from or through the atmosphere and not with pollution of the atmosphere, as seemed to be suggested in paragraph 57 of the report. Likewise, the report improperly characterized the various sources of pollution identified in Part XII of the Convention as relating to atmospheric pollution. The Convention did not address climate change or atmospheric degradation, but focused solely on sources of pollution that affected the marine environment.

Draft guideline 11 (2) called upon States to consider the situations of small island States and low-lying States. Of course, no one could deny that those States faced acute problems from global climate change, but issues of baselines and delimitation of maritime zones relating to sea level rise were not unique to them. Moreover, those issues were far too important to be addressed in such a cursory manner, and they did not relate to protection of the atmosphere as such but rather to sea level rise. For that reason, he agreed with others that the situation of those specific States fell outside the scope of the topic, and he did not favour sending draft guideline 11 to the Drafting Committee.

As for draft guideline 12, the report's discussion of the relationship between human rights and the environment suffered by comparison with the very detailed work of the Special Rapporteur on human rights and the environment of the Human Rights Council, who had issued a series of sophisticated reports on the subject. In paragraph 71 of the fourth report of the Commission's Special Rapporteur, it was incorrectly stated that article 2 of the Convention on Long-range Transboundary Air Pollution "obliged" the parties to protect man and his environment against air pollution, when in fact that article provided that they were "determined" to do so and would "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution". The human rights analysis in paragraphs 82 and 83 was very unclear as to the scope of the positive and negative legal obligations of States as they related to protection of the atmosphere. If that idea were pursued to its logical extreme, it would hold States responsible for incremental contributions to atmospheric degradation from everyday private activity that could, collectively, affect others. That seemed to be a radical and unsupported claim.

With respect to the individual paragraphs of draft guideline 12, he considered paragraphs 1 and 2 to be incorrect for the reasons previously noted. States must interpret and apply their international human rights obligations under the treaties to which they were party in accordance with established rules of treaty interpretation rather than with a view to achieving an objective that was not directly related to the human rights at issue. States were under no obligation to develop new international human rights obligations that were "mutually supportive" of the international legal obligations related to the protection of the atmosphere. Paragraph 3 had the same problems as paragraph 2. Paragraph 4 was based on paragraph 88 of the report, which referred to the standing of persons to bring human rights claims on behalf of future generations — a reference that was unwise. Certainly none of the sources cited in the report in relation to the interests of future generations was a human rights instrument, so that alone should give the Commission pause. Further, he did not see the relevance of pointing to the use of guardians acting on behalf of existing, but underage, persons in national and international law; that situation was not analogous to persons today acting on behalf of "future generations". He did not favour sending draft guideline 12 to the Drafting Committee.

With respect to the future work on the topic, he supported concluding a first reading in 2018. He had doubts, however, about the topics suggested for a fifth report. He did not see it as the Commission's role to instruct States how they should be implementing international obligations at the domestic level or complying with international obligations. Given that there were different types of compliance mechanisms in treaties relating to the atmosphere, the most the Commission could do was to issue some sort of bland admonishment. He did not know what specific features of dispute settlement the Special

Rapporteur had in mind, but he certainly hoped it was not part of a mission to encourage litigation at the national or international level.

Mr. Park had proposed that the four draft guidelines should be merged into a single draft guideline. His own concerns were such that he was not sure that a single draft guideline could be crafted that was useful and correct, but if the Special Rapporteur wished to propose one for referral to the Drafting Committee, that might be a path forward.

Mr. Al-Marri said that the report of the Special Rapporteur recalled the work of former Commission member Chusei Yamada on transboundary groundwaters. Developed countries seemed generally reluctant to accept the expansion of the topic “Protection of the atmosphere” when progress on the topic was influenced, to a large extent, by international negotiations regarding the reduction of greenhouse gas emissions, a source of tension between developed and developing countries as noted in paragraph 60 of the report. The need to achieve the Sustainable Development Goals meant that States were likely to prioritize development over environmental protection. The Commission therefore had to be open-minded when dealing with the topic, which, as highlighted by the Special Rapporteur, should be considered in relation to the broad framework of general international law.

The Special Rapporteur had conducted an accurate analysis of the interrelationship between international law relating to the protection of the atmosphere and other relevant branches of international law. Draft guideline 9 was well crafted, but draft guidelines 10 to 12 required additional work to ensure that key concepts were sufficiently clear and that appropriate emphasis was placed on the protection of the atmosphere on the basis of the concept of mutual supportiveness. Draft guideline 12 should be studied in greater depth, with due consideration given to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which had been adopted by the Commission in 2006, and, in particular, to the issue of damage caused by hazardous activities to the environment itself with or without simultaneously causing damage to persons or property.

Provisional application of treaties (agenda item 3)

Report of the Drafting Committee (A/CN.4/L.895)

The Chairman invited the Chairman of the Drafting Committee to present the report of the Drafting Committee on the topic “Provisional application of treaties” (A/CN.4/L.895).

Mr. Rajput (Chairman of the Drafting Committee) said that the Drafting Committee had held four meetings on the topic, from 2 to 9 May 2017. The focus had been on completing the consideration of the draft guidelines referred to it at the previous session, namely draft guidelines 5 and 10. At the previous session, the Drafting Committee had been unable to complete its consideration of draft guideline 5 because of a disagreement about the text as it had then stood, and the Special Rapporteur had undertaken to submit a fresh proposal at the current session. The consideration of draft guideline 10 had also been deferred because of a lack of time. At its 3349th plenary meeting, the Commission had decided to refer all the draft guidelines taken note of at the previous two sessions — draft guidelines 1 to 4 and 6 to 9 — back to the Drafting Committee with a view to having a consolidated text prepared and provisionally adopted at the current session.

The Committee had decided to consider draft guideline 10 first, to be followed by draft guideline 5, which, regrettably, it had not had time to do. It was envisaged that draft guideline 5 would be considered during the second part of the session; however, the prevailing view had been that the report of the Drafting Committee on the draft guidelines adopted thus far should be transmitted to the plenary now, so that it could take the necessary action as soon as possible in order to allow for the preparation of the commentaries. Although document A/CN.4/L.895 contained the titles and texts of draft guidelines 1 to 4 and 6 to 12 provisionally adopted by the Drafting Committee between 2015 and 2017, he would focus only on the draft guidelines provisionally adopted by the Drafting Committee at the current session, namely draft guidelines 10 to 12. His statement should be read together with the statements of his two predecessors, which were available on the Commission’s website.

The Drafting Committee had spent the time allocated to it on developing a package of three draft guidelines based on the Special Rapporteur's proposal for draft guideline 10, which had sought to reflect the provisions of articles 27 and 46 of the 1969 Vienna Convention on the Law of Treaties in a single provision. Since the scope of the draft guidelines had been enlarged at the previous session to include treaties entered into by international organizations, it had been felt that the corresponding provisions of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations should also be taken into account. To simplify matters, the Drafting Committee had decided to divide the two sets of issues relating to the operation of internal law into two separate draft guidelines — 10 and 11 — each with two paragraphs dealing with the position under the 1969 and 1986 conventions, respectively. A third draft guideline — 12 — had later been added to deal with agreement regarding the limitations deriving from the internal law of the State or from the rules of the international organization. All three provisions had undergone a series of drafting refinements, with a view to making them more specific to provisional application and aligning them as much as possible with the draft guidelines previously adopted. Nonetheless, the commentary would clarify that both draft guidelines were without prejudice to articles 27 and 46 of both conventions. The concern was that the Commission was envisaging a regime of provisional application that went beyond that provided for in article 25 of the 1969 Vienna Convention. However, according to another view, the flexibility implicit in the regime of provisional application already existed under the Vienna Conventions themselves.

Draft guideline 10 dealt with the invocation of internal law, or, in the case of international organizations, of their rules, as justification for failure to perform an obligation arising under a treaty or a part thereof that was being provisionally applied. The Drafting Committee had decided to follow the language of article 27 of the Vienna Conventions as closely as possible and, if any changes were made, to reflect them in both paragraphs of draft guideline 10. Accordingly, except where indicated otherwise, the modifications he was about to describe applied to both paragraphs.

The text in each paragraph could be divided into three parts. The opening clause, referring to a State or international organization “that has agreed to the provisional application of a treaty”, was a streamlined version of the Special Rapporteur's proposal. The earlier reference to “consent” to provisional application had been amended to “agreed” as an indication of both the voluntary nature of provisional application and the fact that it was based on an underlying agreement to provisionally apply the treaty. The Drafting Committee had included the standard reference to the provisional application of a “treaty or part of a treaty” for the sake of consistency with the draft guidelines adopted at the previous session. The middle clause in each paragraph — “may not invoke the provisions of its internal law as justification for its failure to perform” — was drawn verbatim from the respective Vienna Conventions, as a further manifestation of the position taken in draft guideline 3 that the Commission's work on the topic should be based on the 1969 Vienna Convention and other rules of international law, which would include the 1986 Convention.

The Drafting Committee had, however, departed from the language of the Vienna Conventions by replacing the concluding words, “a treaty”, with the phrase “an obligation arising under such provisional application”, which clarified that the obligation flowed not from the treaty itself but from the agreement to provisionally apply it. That formulation had its origins in the Special Rapporteur's initial proposal, which had made reference to “consent to undertake obligations by means of provisional application of a treaty, or part thereof”. It also reflected the position in draft guideline 7 that provisional application produced legal effects. The title of the draft guideline — “Internal law of States or rules of international organizations and observance of provisionally applied treaties” — had been structured to indicate that what was being referred to was not internal law about provisional application of treaties, *per se*, but rather the effect of internal law on the provisional application of treaties.

With regard to draft guideline 11, he said that in his initial proposal, the Special Rapporteur had followed the approach taken in the 1969 Vienna Convention of including a reference to article 46 only in the form of the “without prejudice” clause contained in the second sentence of article 27. However, the Drafting Committee had decided early on to

reflect the full text of the respective parts of article 46 of the two Vienna Conventions in the draft guidelines. Realizing that it would be complicated to do so within draft guideline 10, since it meant dealing with two distinct questions of internal law within a single provision, the Drafting Committee had moved the article 46 scenario of the invocation of internal law or rules regarding competence to a new draft guideline 11.

Once again, the provision was organized in two paragraphs, the first dealing with States and the second with international organizations. As with draft guideline 10, the Drafting Committee had tried as much as possible to keep to the formulation of the relevant provisions in both Vienna Conventions. Indeed, modifications had been limited to introducing express references to provisional application. Hence, the reference to “consent to be bound by a treaty” had been modified to read “consent to the provisional application of a treaty or part of a treaty”. Likewise, the phrase “competence to conclude treaties” had been rendered as “competence to agree to the provisional application of treaties”. While it had been suggested that the draft guidelines should also include article 46 (2) of the 1969 Vienna Convention, and its counterpart in article 46 (3) of the 1986 Vienna Convention, which provided a definition of a “manifest violation,” the prevailing view had been that it was not necessary to include them in the text itself and that they would be discussed in the accompanying commentary. The title of draft guideline 11 was “Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties”.

Draft guideline 12 had originated in a proposal made in the Drafting Committee to add a chapeau to earlier versions of what had become draft guidelines 10 and 11 in order to state that those provisions would apply unless and to the extent that the treaty in question provided otherwise or it had otherwise been agreed. The rationale had been to allow for the possibility that, for example, States might agree to limit provisional application so as to take into account their constitutional provisions on the competence to conclude treaties. It had also been recognized that there were treaties that expressly made provisional application subject to limitations of internal law that were not necessarily related to the competence to agree on the provisional application of treaties. For some members, the proposed chapeau had provided the necessary degree of flexibility. However, the Drafting Committee had been unable to agree on whether it should be included in draft guidelines 10 and 11, or only in the latter. The other concern had been that inserting the chapeau in either draft guideline could be seen as adding new elements to the two Vienna Conventions. As he had indicated earlier, the basic intention behind the draft guidelines had been not to prejudice existing treaty law, but to be consistent with the regime of the two Vienna Conventions.

The solution found had been to address limitations deriving from the internal law of States or the rules of international organizations in a separate provision, which had become draft guideline 12. The provision was cast as a “without prejudice” clause, applicable to the draft guidelines generally, and its purpose was to confirm that States or international organizations that agreed to the provisional application of a treaty could seek to condition that application upon limitations deriving from internal law, in the case of States, or rules, in the case of international organizations. The recognition of such a possibility had been largely supported in 2016 by members of the Commission during the plenary debate and by Member States in the Sixth Committee.

A key element of the provision was the reference to such a possibility existing as a “right” of the State or international organization. Other options considered had been “possibility”, “freedom”, “capability” and “ability”. The Drafting Committee had also contemplated a different formulation that avoided making reference to whether the State was acting as of right or otherwise by establishing that the draft guidelines were “without prejudice to States or international organizations agreeing” on provisional application. However, difficulties in rendering the text in the other official languages of the United Nations had made it impossible to pursue that proposal. None of the other options that he had mentioned had garnered the necessary support, the concern being that they seemed to refer to the factual existence of the possibility of provisional application as opposed to the exercise of a legal prerogative inherent in the Vienna Conventions. In the end, the Drafting Committee had settled on the word “right”.

The commentary would clarify that the reference to “right” should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or the rules of the international organization. It was understood that the existence of any such internal limitations on the provisional application of the treaty would be covered in the agreement to provisionally apply the treaty, and, accordingly, subject to agreement to the provisional application by the other parties. The commentary would also confirm that draft guideline 12 should not be construed as an invitation to States or international organizations to invoke their internal law or rules unilaterally to terminate provisional application.

In the title of draft guideline 12, which was “Agreement regarding limitations deriving from internal law of States or rules of international organizations,” the reference to “agreement” had been included to reflect the consensual basis of provisional application.

To conclude, he recommended that the plenary should adopt draft guidelines 1 to 4 and 6 to 12, without prejudice to the inclusion of a further draft guideline on the basis of the Special Rapporteur’s proposal for draft guideline 5, or to its location within the draft guidelines.

The Chairman invited the Commission to adopt the titles and texts of draft guidelines 1 to 4 and 6 to 12, as provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions of the Commission and contained in document A/CN.4/L.895.

Draft guidelines 1 and 2

Draft guidelines 1 and 2 were adopted.

Draft guideline 3

Mr. Murphy asked whether, in the interests of clarity and consistency with draft guideline 6, it would be advisable to insert the phrase “between the States or international organizations concerned” after the words “provisionally applied”.

Mr. Gómez-Robledo (Special Rapporteur) said that he had planned to make the same proposal during the final review of the draft guidelines by the Drafting Committee. If, however, there was a consensus among members to accept the proposal at the present meeting, he would be happy to do so.

The Chairman asked what exactly was covered by the term “States” in the proposed addition.

Mr. Murphy said that it covered only those States that had consented to the provisional application of a treaty at a certain point in time, not necessarily all the States that had signed or even ratified the treaty.

Ms. Galvão Teles said that Mr. Murphy’s proposal helped to address the important issue of consistency in the draft guidelines, but that it should be dealt with during the final review of the draft guidelines by the Drafting Committee.

Ms. Oral asked whether there was not already an implicit reference to States and international organizations in draft guideline 3, given that the provision set forth a general rule.

Mr. Rajput (Chairman of the Drafting Committee) said that the phrase proposed by Mr. Murphy could arguably also be inserted in draft guideline 1 and raised a host of issues that would be better addressed at a later stage.

Mr. Murphy said that he would not stand in the way of the provisional adoption of the draft guidelines, on the understanding that it could not be taken as a sign that the Commission was entirely satisfied with the texts as they stood.

Draft guideline 3 was adopted.

*Draft guidelines 4 to 9**Draft guidelines 4 to 9 were adopted.**Draft guideline 10*

Mr. Ouazzani Chahdi proposed the deletion of the words “and observance of provisionally applied treaties” in the title.

The Chairman said that the title juxtaposed the internal law of States or the rules of international organizations, on the one hand, and the observance of provisionally applied treaties, on the other. Removing either element would upset the balance that had been struck.

Mr. Gómez-Robledo (Special Rapporteur), supported by **Mr. Park**, said that, although some modifications had been inevitable, the Drafting Committee had endeavoured to stick as closely as possible to the wording of the title of article 27 of the Vienna Convention on the Law of Treaties.

*Draft guideline 10 was adopted.**Draft guidelines 11 and 12**Draft guidelines 11 and 12 were adopted.*

The titles and texts of draft guidelines 1 to 4 and 6 to 12, as provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions, and as contained in document A/CN.4/L.895, were adopted, on the understanding that draft guideline 5 would be considered by the Drafting Committee at a later date.

The Chairman said that the Special Rapporteur would prepare commentaries to the draft guidelines for inclusion in the Commission’s report to the General Assembly on the work of its current session. The Special Rapporteur had requested the establishment of a working group to enable interested members to consider the draft commentaries and provide relevant guidance. Following consultations, it had been agreed that Mr. Vázquez-Bermúdez would chair the working group. He took it that the Commission agreed to establish a working group on commentaries to the draft guidelines on the provisional application of treaties, under the guidance of Mr. Vázquez-Bermúdez.

It was so decided.

Mr. Vázquez-Bermúdez (Chairman of the Working Group) said that the Working Group would be composed of the following members: Mr. Gómez-Robledo (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Sir Michael Wood and Mr. Aurescu (*ex officio*).

The meeting rose at 1 p.m.