

Document:-  
**A/CN.4/3386**

**Summary record of the 3386th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**2017, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://legal.un.org/ilc/>)*

111. Mr. MURPHY, referring to the first sentence, said that he did not think that the draft guideline actually stated that provisional application was governed by international law. He therefore proposed that the first and second sentences be reformulated and combined to read: “Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty cannot depend on, or be conditioned on, their respective internal laws.”

112. Sir Michael WOOD proposed the deletion of the word “internal” before the words “rules of an international organization” in the third sentence.

113. Mr. JALLOH said that, in the third sentence, the word “failure” might be more suitable than “failing”.

114. The CHAIRPERSON said that, while he agreed with Mr. Murphy that draft guideline 9 did not explicitly state that the provisional application of a treaty or a part of a treaty was governed by international law, he considered that it implied that statement. He therefore suggested simply replacing the word “states” with “implies” in the first sentence, with the rest of the sentence to remain unchanged. In his view, it was important to state that provisional application was governed by international law.

115. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he agreed with the proposal to replace the word “states” with “implies” and otherwise leave the first sentence unaltered, as it contained an important statement. He could accept Mr. Jalloh’s proposal.

116. The CHAIRPERSON said that he himself had another proposal, namely, the insertion, in the second sentence, of the words “as a general rule” after the word “cannot”, since the current formulation was, in his view, too absolute. The proposed wording would serve as an implicit reference to the important exception dealt with in draft guideline 11 [12].

117. Sir Michael WOOD said that he did not think that the word “implies” was appropriate in the context of the first sentence. In his view, that sentence should be recast to read: “Like the general rule in article 27, draft guideline 9 [10] reflects the principle that the provisional application of a treaty or a part of a treaty is governed by international law.” At the end of the fourth sentence, the words “their breach” should be replaced with “the breach of such obligations”, which referred back to the international obligations arising from provisional application.

118. Mr. MURPHY proposed that the first sentence be split into two sentences. The first would read: “The provisional application of a treaty or a part of a treaty is governed by international law.” The second would read: “Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty cannot as a general rule depend on, or be conditioned on, their respective internal laws.”

119. Ms. GALVÃO TELES, referring to Mr. Murphy’s proposed second sentence, said that the final phrase “their respective internal laws” should be replaced with “the internal law of the parties”.

120. Sir Michael WOOD proposed that the final phrase of that sentence read: “the internal law or rules of the parties”.

121. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (3) at the next plenary meeting.

*The meeting rose at 1 p.m.*

## 3386th MEETING

*Wednesday, 2 August 2017, at 3 p.m.*

*Chairperson:* Mr. Georg NOLTE

*Present:* Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

#### **CHAPTER V. Provisional application of treaties (concluded) (A/CN.4/L.901 and Add.1-2)**

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.901/Add.2.

#### **C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission (concluded)**

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION (concluded)

*Commentary to draft guideline 9 [10]\* (Internal law of States or rules of international organizations and observance of provisionally applied treaties) (concluded)*

Paragraph (3) (concluded)

2. The CHAIRPERSON invited the Commission to consider the Special Rapporteur’s new version of paragraph (3), which had been circulated to members and read:

“The provisional application of a treaty or a part of a treaty is governed by international law. Like the general rule in article 27, draft guideline 9 [10] states

\* The numbers in square brackets refer to the numbering of draft guidelines in document A/CN.4/L.901/Add.2 discussed at the present meeting.

that the execution of a treaty provisionally applied by the parties cannot, as a general rule, depend, or be conditioned, on their respective internal law or rules. Whatever the provisions of the internal law of a State or the rules of an international organization, they may not be invoked as a justification for failure to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations. However, as indicated in draft guideline 11 [12], the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application."

3. Mr. MURPHY proposed that, in the second sentence, the phrase "the execution of a treaty provisionally applied by the parties" be replaced with "the provisional application of a treaty by a State or international organization" and that the words "their respective" be replaced with the word "its".

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

4. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, in the first sentence, the words "a violation of" should be replaced with "an inconsistency with" and that, in the last sentence, the words "would be unlawful under international law" should be replaced with "would not be in accordance with international law".

5. Sir Michael WOOD proposed deleting, in the first sentence, the phrase "and if so according to which conditions", which seemed to suggest that a State had the right to impose conditions or limitations that were not provided for in agreements for provisional application.

6. The CHAIRPERSON said that it was his understanding that a number of States had adopted internal legislation that set out conditions under which a treaty might be provisionally applied. It was therefore not merely a question of whether a State agreed to the provisional application of a treaty, but also of how it did so. Nevertheless, if the Commission did not object to the deletion, he would not oppose it.

*Paragraph (4), as amended by the Special Rapporteur and Sir Michael Wood, was adopted.*

Paragraph (5)

7. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, at the start of the second sentence, the words "Any other view" should be substituted for "Assuming otherwise".

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

8. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, in the first sentence, the phrase "clarifies that the obligation flows not from the treaty itself, but from the agreement" should be replaced with the phrase "is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement".

*Paragraph (7), as amended and with several editorial adjustments, was adopted.*

*The commentary to draft guideline 9 [10], as amended, was adopted.*

*Commentary to draft guideline 10 [11] (Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties)*

Paragraphs (1) to (4)

9. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, in the last sentence of paragraph (2), the phrase "interpreted in accordance with" should be replaced with "considered along with" and that, in paragraph (4), the phrase "and, where appropriate" should be replaced with "or, as the case may be". In paragraphs (1) to (3), the references to "draft guideline 11" should be updated to reflect the current numbering of the draft guidelines.

10. Sir Michael WOOD said that he supported the amendment to paragraph (2) but that, in line with the language previously adopted by the Commission, the words "along with" should be changed to "together with".

*Paragraphs (1) to (4), as amended, were adopted.*

*The commentary to draft guideline 10 [11], as amended, was adopted.*

*Commentary to draft guideline 11 [12] (Agreement regarding limitations deriving from internal law of States or rules of international organizations)*

Paragraph (1)

11. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, in the last sentence, the words "while taking those limitations into account" should be replaced with "subject to limitations which derive from internal law".

12. The CHAIRPERSON said that the terms of a treaty on provisional application were often not specific regarding existing internal laws or rules. Therefore, he suggested either deleting the words "the terms of" in the last sentence or redrafting that sentence to include language to the effect that any limitations deriving from internal law needed only to be sufficiently clear in the treaty.

13. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that he was not opposed to the deletion of the words "the terms of" and would suggest inserting the words "or rules" after "subject to limitations which derive from internal law".

*Paragraph (1), as thus amended, was adopted.*

Paragraph (2)

14. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, at the end of the paragraph, the phrase “as can be found in some cases” should be deleted.

15. Mr. NGUYEN proposed adding, in the first sentence, the words “or a part of a treaty” after the second occurrence of the words “the provisional application of a treaty”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

16. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, at the beginning of the paragraph, the words “The reference to the word ‘right’” should be replaced with “The draft guideline”. In addition, the second sentence should be reworded to read: “The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to provisionally apply a treaty or a part of a treaty.”

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

17. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that the paragraph should be changed to read: “The present draft guideline should not be construed as encouraging States or international organizations to include in the agreement on provisional application limitations derived from the internal law of the State or from the rules of the organization.” In the footnote to paragraph (2), he suggested adding the following text after the first sentence:

“See also the several examples of free trade agreements between the European Free Trade Association States and other numerous States (Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, the Republic of Korea, Lebanon, the former Yugoslav Republic of Macedonia, Mexico, Montenegro, Peru, the Philippines, Serbia, Singapore, Tunisia, the Central American States, the Gulf Cooperation Council member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: ‘if its constitutional requirements permit’, ‘if its respective legal requirements permit’ or ‘if their domestic requirements permit’ (www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the European Free Trade Association States and the Southern African Custom Union States, reads as follows:

“Article 43 (Entry into force)

“...

“2. If its constitutional requirements permit, any [European Free Trade Association] State or [Southern African Custom Union] State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

“...”

*Paragraph (5), as amended and subject to the requisite editorial adjustments, was adopted.*

*The commentary to draft guideline 11 [12], as amended, was adopted.*

*Section C, as amended, was adopted.*

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

#### **CHAPTER VI. Protection of the atmosphere (A/CN.4/L.902 and Add.1–2)**

18. The CHAIRPERSON invited the Commission to consider chapter VI of its draft report, beginning with the text contained in document A/CN.4/L.902.

##### **A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

##### **B. Consideration of the topic at the present session**

Paragraphs 3 to 7

*Paragraphs 3 to 7 were adopted.*

Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted, subject to their completion by the Secretariat.*

*Section B was adopted.*

19. The CHAIRPERSON invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.902/Add.1.

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

1. TEXT OF THE DRAFT GUIDELINES, TOGETHER WITH PREAMBULAR PARAGRAPHS

Paragraph 10

*Paragraph 10 was adopted.*

20. The CHAIRPERSON invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.902/Add.2.

2. TEXT OF THE DRAFT GUIDELINE, TOGETHER WITH PREAMBULAR PARAGRAPHS, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION

Paragraph 11

*Paragraph 11 was adopted.*

*Commentary to the preambular paragraph beginning with the words "Noting the close interaction")*

Paragraph (1)

21. Sir Michael WOOD proposed retaining only the first two sentences of paragraph (1). The rest of the paragraph referenced scientific papers that he was not in a position to endorse; he would prefer, in line with past practice, to retain references to United Nations documents alone.

22. Mr. MURASE (Special Rapporteur) said that the protection of the atmosphere was a science-dependent topic; without references to scientific information, the commentaries did not provide much added value. The phrase "According to a scientific study" had been included in the penultimate footnote to paragraph (1) in order to make it clear that the findings were based on input from scientists rather than from the Commission itself.

23. Mr. TLADI said that the finding referred to in the penultimate sentence—that human activities were also responsible for global warming—was an important and very basic scientific concept and he would advise against removing the reference to it.

24. Mr. MURPHY said that the fourth and fifth sentences of paragraph (1) seemed merely to repeat the content of the third sentence. In addition, it was unclear how the first two sentences in the penultimate footnote to the paragraph related to the focus of the preambular clause, namely, the interaction between the atmosphere and oceans. He also had reservations about the citation, in the first footnote to the paragraph, of an article whose title, "The importance of atmospheric deposition for ocean productivity", seemed to suggest that atmospheric deposition was a desirable phenomenon. He therefore proposed deleting the fourth and fifth sentences of paragraph (1); placing the markers for the first two footnotes to the paragraph at the end of the third sentence; and, in the penultimate footnote, deleting the content and citations before the sentence that began "See also Ø. Hov". With respect to the last sentence of paragraph (1), he proposed replacing the footnote referring to paragraphs 185 to 196 of General Assembly resolution 71/257 with a reference to paragraph 279, which specifically addressed the interaction between the atmosphere and oceans, and redrafting the last sentence to read: "In its resolution 71/257 of 23 December 2016, the General Assembly stressed the importance of increasing the scientific understanding of the oceans-atmosphere interface."

25. The CHAIRPERSON suggested that the Commission should take the time to check whether the citations in the four footnotes to the paragraph were actually relevant to the preambular clause and whether the concepts outlined in paragraph (1) of the commentary were generally accepted as undisputed. Although some scientific concepts went beyond the Commission's expertise, the topic itself required scientific support; it should be possible to find a middle ground. Perhaps the Special Rapporteur, together with those Commission members most interested, could arrive at a new formulation for the paragraph and the footnotes.

26. Ms. LEHTO said that she found the citations of scientific findings useful and not overly technical and she supported the text as proposed by the Special Rapporteur.

27. Mr. SABOIA said that he agreed with Mr. Tladi and Ms. Lehto. The commentaries and accompanying references were relevant to the topic and were not unduly scientific. Moreover, the Commission had included similar scientific references in previous documents.

28. Mr. PARK said that he had concerns about the scientific studies cited in the penultimate footnote to the paragraph, especially in the second sentence, in which "[m]any scientific analyses" were said to merely "suggest" a scientific risk. It was important to bear in mind that, once adopted, the commentaries would be considered as the work of the Commission as a whole.

29. Mr. PETER said that he supported paragraph (1) as drafted by the Special Rapporteur. The topic of protection of the atmosphere was a controversial one and required scientific background evidence; that evidence should be retained.

30. Mr. JALLOH, supported by Mr. CISSÉ, said that he agreed with Ms. Lehto. It would be odd not to include scientific evidence when dealing with a topic such as protection of the atmosphere. The scientific meetings arranged by the Special Rapporteur with scientific experts had been very useful.

31. Mr. MURASE (Special Rapporteur) said that the scientific materials cited in the commentary had also appeared in his fourth report, for which he had consulted a number of experts. As for the text of paragraph (1) itself, it was sometimes necessary to explain one concept in several ways. The sixth sentence had been included because of the definition of human activities in draft guideline 1 and the Commission's emphasis on human activities as a cause of transboundary air pollution and global degradation. The paragraph should be approved as currently drafted, with the exception of the last sentence, at the end of which a reference to paragraph 279 of General Assembly resolution 71/257 could be added; the last footnote to the paragraph should be amended accordingly.

32. Ms. ORAL said that she was in favour of including references to scientific findings. She suggested adding a reference to a recent report by the Intergovernmental Panel on Climate Change that stated very clearly that the oceans were getting warmer and that human activities were involved.

33. Mr. VÁZQUEZ-BERMÚDEZ said that paragraph (1) provided useful context for the preambular clause in question and made it clear that the findings offered in support of the draft guidelines were those of scientists and not of the Commission itself.

34. Mr. PETRIČ said there was a panoply of literature on the topic; therefore, it was somewhat surprising that the citations in the footnotes were solely English-language sources. In any case, perhaps a better text for paragraph (1), as a whole, could be found.

35. Sir Michael WOOD said that he largely supported the amendments proposed by Mr. Murphy, with the exception of the proposed retention of the third sentence. He was also in favour of mentioning the report recently published by the Intergovernmental Panel on Climate Change.

36. The CHAIRPERSON, speaking as a member of the Commission, said that the Commission could, and should, responsibly provide scientific evidence in support of its work on the topic. He agreed that the relevance of the penultimate footnote to the paragraph for the interaction between the atmosphere and the oceans was not immediately obvious. That and other points should be dealt with before the Commission could adopt a final version of the paragraph.

37. Mr. MURASE (Special Rapporteur) said that he would consult other members and provide a revised text of paragraph (1) for the Commission's consideration at a future meeting.

*Paragraph (1) was left in abeyance.*

Paragraph (2)

38. Mr. MURPHY suggested that, in the first sentence, the words “of the substances” should be changed to “on the state of the marine environment, including a chapter addressing, in particular, substances”, since the Global Integrated Marine Assessment had covered more than just substances polluting the oceans from land-based sources through the atmosphere.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

39. Mr. PARK suggested that the third sentence of the second footnote to the paragraph should be deleted, because its content was already reflected in the body of paragraph (3).

40. Mr. MURPHY echoed that suggestion and added that, in the first sentence of paragraph (3), the words “greenhouse gas emissions from ships have been increasing in recent years at a high rate, contributing to global warming” should be altered to read “greenhouse gas emissions from ships contribute to global warming”, especially as no source was given for that statement. He queried the reference in the second sentence to the 2000 study by IMO: it would be more appropriate to refer to the 2009 version of that study. Some of the works cited towards the end of the second footnote to the paragraph did not deal directly with emissions from ships and could be deleted.

41. Mr. MURASE (Special Rapporteur) said that the report had referred to the 2000 IMO study because it was the first in the series, but he had no objection to citing a later work.

42. The CHAIRPERSON said that the works cited in the second footnote to the paragraph were sufficiently relevant for the references to be maintained.

43. Mr. SABOIA suggested that the Commission defer to the informed opinion of the Special Rapporteur. Emissions from ships had long contributed to marine pollution. The original wording in the first sentence of paragraph (3) should not be replaced unless the Special Rapporteur agreed.

44. Mr. MURASE (Special Rapporteur) indicated that he agreed to the change proposed by Mr. Murphy.

45. The CHAIRPERSON said that he took it that the Commission wished to amend paragraph (3) as proposed by Mr. Murphy and the second footnote to the paragraph as suggested by Mr. Park.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

46. Mr. PARK suggested that paragraph (4) be placed between paragraphs (1) and (2) of the commentary on the next preambular paragraph beginning with the words “Aware also, in particular, of ...”, which dealt with the issue of sea-level rise.

47. Mr. MURPHY drew attention to an inconsistency between the body of the paragraph, which referred to the General Assembly, and its footnote, which cited a report of the Secretary-General.

48. The CHAIRPERSON suggested that a reference to relevant resolutions of the General Assembly be added to the footnote.

49. Mr. MURASE (Special Rapporteur) said that the text of the paragraph could instead be altered to refer to the Secretary-General. He added that, since paragraph (4) dealt with ocean acidification as well as sea-level rise, it should remain where it was in the text.

50. Sir Michael WOOD said that the section of the Secretary-General's report cited in the footnote to the paragraph quoted extensively from the 2030 Agenda for Sustainable Development.<sup>428</sup> Citing the latter, rather than the Secretary-General's report, would render the reference to the General Assembly in the body of paragraph (4) correct.

51. The CHAIRPERSON welcomed that suggestion and took it that the Commission agreed to amend the footnote to that effect but to leave the paragraph otherwise unaltered.

*It was so decided.*

Paragraph (5)

52. The CHAIRPERSON suggested that the words “forms the basis” should be changed to “forms the factual basis”, in line with the second sentence of paragraph (1).

53. Mr. MURASE (Special Rapporteur) suggested the use of the word “physical” instead of “factual”.

*With those amendments, paragraph (5) was adopted.*

*Commentary to the preambular paragraph beginning with the words “Aware also, in particular”*

Paragraph (1)

54. Mr. PARK, referring to the third and fourth sentences of paragraph (1), said that it seemed incongruous to mention specific figures for likely sea-level rise but

<sup>428</sup> General Assembly resolution 70/1 of 25 September 2015.

then to state that the figures remained uncertain. He suggested that the content of the third sentence be moved to a footnote.

55. The CHAIRPERSON, Ms. ORAL and Mr. Cissé expressed the view that there was no inherent contradiction in referring to a range of estimated figures and then stating that exact figures and rates of change remained uncertain.

56. Mr. RAJPUT suggested a textual amendment with a view to responding to Mr. Park's concern.

57. Mr. MURPHY said that, in the phrase "exact absolute figures" in the fourth sentence, the word "absolute" should be deleted to avoid tautology. Referring to the last footnote to the paragraph, he questioned the use of the phrase "an urgent problem for the law of the sea": sea-level rise was even more of a problem for those affected. As such issues were covered in the body of paragraph (1), he suggested that the footnote should begin at "See A. H. A. Soons".

58. Mr. MURASE (Special Rapporteur) agreed to those suggestions.

59. Mr. RUDA SANTOLARIA echoed those who saw no inherent contradiction in the paragraph, adding that it was important to retain the reference to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change in the third sentence of paragraph (1).

60. Mr. TLADI endorsed the view that there was no contradiction in the paragraph but supported calls to delete the word "absolute". Apart from that, the passage should remain unchanged.

61. Mr. MURASE (Special Rapporteur) said he agreed that the word "absolute" should be deleted.

62. After further discussion of terminology in which Ms. ORAL and Mr. OUAZZANI CHAHDI participated, the CHAIRPERSON said he took it that the Commission agreed to delete the word "absolute" but to otherwise leave the paragraph unaltered.

*Paragraph (1), as thus amended, was adopted.*

Paragraph (2)

63. Mr. PARK asked whether the phrases "the rules of law relating to the protection of the atmosphere", "the rules relating to the protection of the atmosphere" and "the law of the atmosphere" were intended to mean the same thing and suggested that the phrase "the rules of the law of the sea" be shortened to read "the law of the sea".

64. Mr. MURASE (Special Rapporteur) said that the various expressions were intended to refer to the same concept. The terminology could be unified if it was confusing.

65. Mr. OUAZZANI CHAHDI expressed the view that the phrase "the rules of the law of the sea" was clear; however, the word "rules" [*règles*] should perhaps be altered to "provisions" [*dispositions*].

66. The CHAIRPERSON pointed out that elsewhere, the Commission had used the wording "the rules of international law relating to the protection of the atmosphere", which might prove more acceptable to members.

67. Mr. RUDA SANTOLARIA welcomed that suggestion, which would bring the text into line with the wording of draft guideline 9, paragraph 1.

68. The CHAIRPERSON said he took it that the Commission agreed to amend the paragraph to align the terminology as suggested.

*Paragraph (2), as amended, was adopted.*

*The commentary to the preambular paragraph beginning with the words "Aware also, in particular" was adopted.*

*Commentary to the preambular paragraph beginning with the words "Noting that the interests"*

Paragraph (1)

69. Sir Michael WOOD suggested that, in the first sentence, the words "in the context of human rights protection", which seemed overly restrictive, be deleted or amended.

70. The CHAIRPERSON proposed the alternative wording "particularly with a view to human rights protection".

71. Mr. MURPHY suggested that the phrase instead be changed to read "in the context of protection of the atmosphere". In order to closely mirror the wording of the Paris Agreement under the United Nations Framework Convention on Climate Change of 2015 on climate change, the third sentence of the paragraph should be altered to read: "The Paris Agreement under the United Nations Framework Convention on Climate Change of 2015 on climate change, in its preamble, after acknowledging that climate change is a common concern of humankind, provides that parties should, when taking action to address climate change, respect, promote and consider, among other things, their respective obligations on human rights, as well as intergenerational equity."

72. The CHAIRPERSON, referring to the judgment of the International Court of Justice cited in the last sentence of the paragraph, suggested amending that sentence to avoid the implication that the Court's concern for intergenerational equity revolved solely around the use of nuclear weapons. He proposed the following wording: "The International Court of Justice has recognized the relevance of intergenerational considerations in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case by noting the imperative to take into account 'in particular ... their ability to cause damage to generations to come'."

73. Mr. MURASE (Special Rapporteur) expressed support for the amendments to the first and last sentences of the paragraph proposed by the Chairperson.

74. Mr. PARK questioned the relevance of the Court's judgment to the topic of protection of the atmosphere,

which dealt with peacetime activities rather than the use of force.

75. The CHAIRPERSON pointed out that the international community had a common interest in survival, whether in peacetime or in time of war.

76. Sir Michael WOOD suggested that, in the first sentence, the words “in the context of human rights protection” be changed to “including with a view to human rights protection”, to emphasize the fact that the issue was much broader. Turning to the last sentence, he suggested that the Chairperson’s concern might be met by simply deleting the words “the unique characteristics of”.

77. The CHAIRPERSON, supported by Mr. MURASE (Special Rapporteur), agreed to that suggestion. He took it that the Commission agreed to accept Sir Michael’s amendments to the first and last sentences of paragraph (1) and Mr. Murphy’s amendment to the third sentence.

*Paragraph (1), as thus amended, was adopted.*

Paragraph (2) and new paragraph (3)

78. The CHAIRPERSON, noting that paragraph (2) consisted of two indents, suggested that the second indent should be transformed into a new paragraph (3), with the remaining paragraphs to be renumbered accordingly.

*It was so decided.*

79. Mr. TLADI queried the opening phrase of paragraph (2), which read: “Given that there are as yet no decisions by international tribunals conferring customary international rights”. He suggested that it be deleted.

80. Sir Michael WOOD endorsed that proposal but said that if the phrase was retained, the word “conferring”, which was obviously an editorial error, should be amended to read “concerning”.

81. Ms. ORAL, commenting on the second footnote to the new paragraph (3), which referred to certain recent domestic court decisions on the human rights of minors, said that the first citation would be better placed in the following footnote, which brought together several references to the literature on the public trust doctrine.

82. Mr. PARK said that he concurred with Mr. Tladi that the opening phrase was not correct. Referring to the statement on the item by the Chairperson of the Drafting Committee in 2016,<sup>429</sup> he said that the reason why the Commission had used the term “interests” rather than “benefits” had been to signal the integrated nature of the atmosphere. He proposed that similar language be inserted after the deletion proposed by Mr. Tladi.

83. Mr. CISSÉ endorsed Mr. Tladi’s amendment to paragraph (2). With regard to Mr. Park’s comment, he said that whether “interests” or “benefits” was used was more of a linguistic than a legal question.

<sup>429</sup> See *Yearbook ... 2016*, vol. I, 3314th meeting, p. 206, paras. 59 *et seq.*

84. Mr. MURPHY said that Mr. Tladi’s amendment was fully justified, for the reasons outlined by Mr. Park; the language suggested by Mr. Park should indeed be included in the text.

85. Mr. OUZZANI CHAHDI said that, in the reference to the decisions of international tribunals in the French text of the first sentence, the words *ne reconnaît pas* should be replaced with *ne semble pas reconnaître*.

86. Mr. TLADI said that the entire first sentence should be deleted; alternatively, wording could be included to indicate that although there had been no decisions yet by international tribunals concerning customary intergenerational rights, there had been many domestic court cases that had recognized such rights.

87. Mr. MURASE (Special Rapporteur) said that the background to the sentence was that if international courts and tribunals had referred to the notion of intergenerational rights as part of customary international law, then it would have been possible to speak of “benefits” rather than “interests”—but that was not the case. He proposed that the opening phrase flagged by Mr. Tladi, “Given that there are as yet no decisions by international tribunals conferring customary intergenerational rights” be moved to the first footnote to the paragraph, which contained the reference to the article by C. Redgwell on intra- and inter-generational equity.

88. The CHAIRPERSON suggested that paragraph (2), together with its first footnote, be left in abeyance while the Special Rapporteur conferred with interested members to find an alternative formulation.

*It was so decided.*

89. Mr. PARK, referring to the new paragraph (3), said that the reference in the first sentence to “‘guardian’ or representative of future generations” was vague and abstract. He questioned the need to retain the new paragraph.

90. Mr. MURPHY endorsed that remark. The first sentence of the new paragraph (3) indicated that it had been speculated in the literature that future generations might have some legal standing to invoke human rights. The second sentence talked about guardians representing the rights of minors. The third sentence referred to the ability of Governments to act as trustees for the management of environmental resources. The three sentences were on three completely different subjects, and the second sentence was irrelevant. He would prefer to delete the entire paragraph, but if it was retained, it should be in the form of a footnote noting a few theories and issues that had been discussed in the literature.

91. Mr. MURASE (Special Rapporteur) said he agreed with Mr. Murphy that the paragraph should be transformed into a footnote; it was true that intergenerational rights had not yet become part of customary international law.

92. Sir Michael WOOD endorsed that suggestion and pointed out that the cases on the “children’s atmospheric trust” mentioned in the second footnote to new

paragraph (3) were domestic law, not international law, and even as such, their authority seemed questionable.

93. Mr. RAJPUT said that the paragraph was not about international law, but about trends in domestic law. The first sentence might be problematic, but the second sentence made the useful point, not exclusively in the context of environmental law but in general, that claims could be brought on behalf of minors. The third sentence, concerning the “public trust doctrine”, was likewise important. He was in favour of retaining the second and third sentences, deleting the first and adding a final sentence, to which the first footnote to new paragraph (3) would be transposed, to say that the principle of intergenerational equity had been acknowledged in the academic literature.

94. Mr. GROSSMAN GUILOFF said that he had no objection to the first sentence. The first part merely stated a fact: there were no rights-holders at present with the legal standing to invoke obligations in the context of intergenerational rights. The second part referred to what had been “suggested” in the literature, and thus merely described ongoing academic discussions.

95. Ms. ORAL supported the comments made by Mr. Rajput. The first sentence identified an important trend which was likely to continue.

96. The CHAIRPERSON said that the discussion had facilitated the identification of relevant issues. He suggested that the Special Rapporteur and any other interested members work out the wording of a new footnote and a new text of paragraph (3).

*It was so decided.*

*Commentary to draft guideline 9 (Interrelationship among relevant rules)*

Paragraph (1)

97. Mr. MURPHY proposed that, in the final sentence, the phrase “the Commission’s conclusions on the work of its Study Group” be replaced with “the conclusions reached by the Commission’s Study Group”.

98. After a discussion in which Mr. TLADI, Mr. MURPHY, Ms. LEHTO and Mr. MURASE (Special Rapporteur) participated, the CHAIRPERSON said he took it that the Commission wished to adopt the amendment put forward by Mr. Murphy.

*It was so decided.*

99. The CHAIRPERSON suggested that, in the antepenultimate sentence, the words “conflicts and” be inserted before “tensions”.

100. Mr. NGUYEN said that in the first sentence, for the sake of consistency, the phrase “rules of international law concerning the atmosphere” should be replaced with “rules of international law relating to the protection of the atmosphere”, as had been done elsewhere.

*With those amendments, paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

101. Sir Michael WOOD said that the antecedent of the third sentence, “That is indicated by the term ‘identified’”, should be clarified, and the final sentence should either be clarified or deleted.

102. Mr. MURPHY said that he, too, had been perplexed by those two sentences. In the first sentence, the word “Commission’s” should be replaced with “Study Group’s” and in the penultimate sentence, the abbreviation “etc.” should be deleted.

103. The CHAIRPERSON said that in the phrase “In coordinating conflicting norms” in the fourth sentence, the word “conflicting” should be deleted, because the reference was to both norms that could be harmonized and to those regarding which conflicts were identified.

*Those amendments were adopted.*

104. Mr. MURASE (Special Rapporteur), responding to the questions raised earlier by Sir Michael, said that paragraph (3) focused on the identification of relevant rules, rather than on their interpretation and application. In the third sentence, the word “That” referred to the use of the word “identified” in the first sentence of draft guideline 9, paragraph 1, and to the explanation given in the first sentence of paragraph (3). The final sentence had been inserted to indicate that the identification of customary international law was a prerequisite to its application.

105. Sir Michael WOOD, having thanked the Special Rapporteur for those explanations, said that in the final sentence, the words “customary rules of interpretation” should accordingly be replaced with “rules of customary international law for the purposes of interpretation”. In the second sentence, the words “It refers to” should be replaced with “The term ‘identified’ is particularly relevant in relation to”, and the third sentence should be deleted.

106. The CHAIRPERSON, responding to a comment by Mr. MURPHY, said that the word “particularly” in Sir Michael’s amendment made it clear that rules arising from treaty obligations were to be identified and also to be interpreted and applied. If he heard no objection, he would take it that the Commission wished to adopt the amendments proposed by Sir Michael.

*It was so decided.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

107. The CHAIRPERSON suggested that, in the fourth sentence, the words “traditional methods” be replaced with

the word “rules”. In the fifth sentence, the word “explicit” seemed unnecessary and could perhaps be deleted.

108. Mr. OUAZZANI CHAHDI proposed deleting the phrase in parentheses in the first sentence “(hereinafter, ‘1969 Vienna Convention’)”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

109. Mr. TLADI suggested adding a new sentence between the second and third sentences, to read: “Furthermore, nothing in draft guideline 9 should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere or vice versa.”

110. Mr. RUDA SANTOLARIA said that, for the sake of consistency, the reference to “the law relating to the protection of the atmosphere” in the last sentence should be replaced with “the rules of international law relating to the protection of the atmosphere”.

111. The CHAIRPERSON suggested that, in order to improve the flow of the paragraph, the order of the second and third sentences should be inverted.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

112. Sir Michael WOOD said that, in the first sentence, the words “trade/investment” should perhaps be replaced with “trade”, as investment was dealt with in the next paragraph. He was not convinced that the fifth sentence was necessary, since it was immediately preceded by an authoritative quotation from the Doha Ministerial Declaration and followed by references to WTO dispute settlement cases.

113. Mr. MURPHY said that he agreed with the proposal to delete the word “investment” in the first sentence. In the same sentence, he proposed deleting the final words, “in general and the atmospheric environment in particular”, since the references that followed did not deal with the atmosphere *per se*. Given that the antepenultimate footnote to the paragraph cited scholarly views, he suggested the addition, in the fourth sentence, of the phrase “in the literature” between “As the concept of ‘mutual supportiveness’ has become gradually regarded” and “as ‘a legal standard *internal* to the WTO’”.

114. The CHAIRPERSON said that, traditionally, if a statement was substantiated by a footnote, the implication was that it was based on the footnote; in the present case, the footnote cited scholarly writings. It was not necessary to flag the nature of the source in the text of the commentary.

115. Mr. PARK said that he had concerns about the penultimate sentence and the controversial issue of mutual supportiveness. If the Special Rapporteur’s intention was not simply to limit mutual supportiveness to international trade law, he would propose deleting the sentence. If it was maintained, however, it should

be amended to read: “Mutual supportiveness in international trade law is considered by some scholars as part of the principle of harmonization ...”.

116. Mr. JALLOH said that he had reservations about the treatment of “mutual supportiveness” and some of the authorities cited in the footnotes, which could give rise to confusion. Given that the first sentence, which emphasized institutional and jurisprudential references to the concept of mutual supportiveness, was immediately followed by a citation from the Marrakesh Agreement Establishing the World Trade Organization, that seemed to suggest that the authority for the concept was that Agreement, which was clearly not the case. He therefore proposed deleting the second sentence.

117. The CHAIRPERSON said that, as he understood it, the Special Rapporteur had included the reference to the Marrakesh Agreement Establishing the World Trade Organization because, although it did not explicitly mention mutual supportiveness, it had been the point of departure for the development of the principle by WTO.

118. Mr. RAJPUT said that he did not agree with Mr. Jalloh and supported the formulation of paragraph (7) as it stood. The reference to “trade/investment” should be maintained in the first sentence, because one of the multilateral agreements annexed to the Agreement was on trade-related investment measures.

119. Mr. MURPHY said that he agreed with Mr. Jalloh’s point. The paragraph began with the statement that there were a number of institutional and jurisprudential references to the concept of mutual supportiveness in international trade law, yet the very next instrument mentioned did not contain such a reference. Perhaps that concern and his own about the literature could be resolved by amending the first sentence to read: “In international trade law, there has emerged a concept of mutual supportiveness between the fields of trade and the environment.”

120. Mr. MURASE (Special Rapporteur) said that he could agree to deleting the word “investment” in the first sentence. As to the quotation from the Marrakesh Agreement Establishing the World Trade Organization, the notion of sustainable development was always associated with the concept of mutual supportiveness in WTO texts, and he therefore would not support deleting the second sentence. He was not in favour of inserting “in the literature” in the fourth sentence, but could go along with Mr. Park’s amendment to the penultimate sentence.

121. Mr. GROSSMAN GUILOFF said that, while it was important to mention investment law, an explicit justification for doing so must be provided, perhaps by referring to specific trade agreements. He proposed amending the first sentence to make it more general: “In international law, there are a number of developments related to the concept of mutual supportiveness ...”. He supported maintaining the reference to the Agreement but thought it should be stated clearly that the goal of mutual supportiveness was sustainable development.

122. Mr. SABOIA said that he agreed with Mr. Rajput and the Special Rapporteur about the need to keep the

reference to the Marrakesh Agreement Establishing the World Trade Organization.

123. The CHAIRPERSON proposed that paragraph (7) be left in abeyance to allow the Special Rapporteur and any interested members to prepare a new draft.

*It was so decided.*

Paragraph (8)

124. Mr. MURPHY proposed that the words “largely echo the WTO standard” in the second sentence be replaced with “also contain standards”.

125. Mr. RAJPUT said that in the last sentence, it would be preferable to replace “Such investment tribunals” with “Some investment tribunals”. The references in the second and third footnotes to the paragraph should be expanded to give specific examples of bilateral investment treaties.

*It was so decided.*

Paragraph (9)

126. Ms. ORAL said that, as currently formulated, the fourth sentence seemed to suggest that the definition of pollution of the marine environment in article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea expressly referred to all airborne sources of marine pollution, including atmospheric pollution from land-based sources and vessels, which was not the case. She therefore proposed rephrasing that part of the sentence to read: “which defines the ‘pollution of the marine environment’ ... implicitly to include ...”.

127. Mr. PARK said that he had doubts about the references to the enforcement of rules in the last two sentences of paragraph (9), since draft guideline 9, paragraph 1, mentioned only identification, interpretation and application of rules.

128. Mr. NGUYEN said that he shared Mr. Park’s concerns and proposed replacing the word “enforcement” with “implementation”. In the penultimate sentence, the words “and maritime law” should be added after “applicable rules of the law of the sea”. A footnote referring to the same source as the footnote to paragraph (4) of the commentary to the preambular paragraph beginning with the words “*Noting* the close interaction between the atmosphere and the oceans” should be added.

129. Sir Michael WOOD said that he agreed with Ms. Oral’s point and proposed amending that part of the fourth sentence to read “in such a way as to include ...”. He also agreed with Mr. Nguyen but would suggest saying “effective implementation” in the last two sentences. He did not believe that an express reference to maritime law was necessary.

*Paragraph (9), as amended by Sir Michael Wood, was adopted.*

*The meeting rose at 6.05 p.m.*

## 3387th MEETING

*Thursday, 3 August 2017, at 10.05 a.m.*

*Chairperson:* Mr. Georg NOLTE

*Present:* Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

#### CHAPTER VI. *Protection of the atmosphere (continued)* (A/CN.4/L.902 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI that was contained in document A/CN.4/L.902/Add.2. He recalled that the Special Rapporteur had held consultations with a small group of interested Commission members on a number of paragraphs the adoption of which had been deferred pending some redrafting. He invited the Special Rapporteur to introduce his proposed amendments, as contained in an informal paper that had been circulated to members.

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

2. TEXT OF THE DRAFT GUIDELINE, TOGETHER WITH PREAMBULAR PARAGRAPHS, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION (*continued*)

*Commentary to the preambular paragraph beginning with the words “Noting the close interaction” (concluded)*

Paragraph (1) (*concluded*)

2. Mr. MURASE (Special Rapporteur) said that, in response to amendments suggested by members of the group, he had merged the first two sentences, deleted the word “generally” from the third sentence and changed the phrase “that is from anthropogenic activities” to “including from anthropogenic activities”, deleted the fourth and fifth sentences, added the phrase “and stressed the importance of increasing the scientific understanding of the ocean–atmosphere interface” at the end of the last sentence, merged the first two footnotes to the paragraph, and included a reference to the Intergovernmental Panel on Climate Change in the third footnote to the paragraph, which had become the second footnote to the paragraph.

*Paragraph (1), as amended, was adopted.*

Paragraph (4) (*concluded*)

3. Mr. MURASE (Special Rapporteur) proposed the insertion, in the footnote to the paragraph, of a reference