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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3563rd meeting

Held at the Palais des Nations, Geneva, on Friday, 6 August 2021, at 10 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Draft report of the Commission on the work of its seventy-second session (*continued*)

Chapter VIII. General principles of law (*continued*) (A/CN.4/L.948, A/CN.4/L.948/Add.1 and A/CN.4/L.948/Add.2)

The Chair invited the Commission to resume its consideration of chapter VIII of its draft report. He drew attention to the portion of the chapter contained in document A/CN.4/L.948/Add.2.

C. Text of the draft conclusions on general principles of law provisionally adopted by the Commission at its seventy-second session

1. Text of the draft conclusions

Paragraph 1

Paragraph 1 was adopted.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-second session

Paragraph 2

Paragraph 2 was adopted.

Commentary to draft conclusion 4 (Identification of general principles of law derived from national legal systems)

Paragraph (1)

Sir Michael Wood said that the word "basic" did not seem to add anything to the first sentence. He proposed that it should be deleted.

Mr. Forteau said that "methodology" was not a sufficiently legal term. He therefore proposed that the words "the basic methodology" in the first sentence should be replaced with "the conditions to be met" [*les conditions à remplir*].

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he accepted Sir Michael Wood's proposal. With regard to Mr. Forteau's proposal, it should be noted that the Commission had used the word "methodology" in the commentaries to the conclusions on identification of customary international law. Instead, wording such as "that is, the conditions that are required", could be added at the end of the first sentence.

Mr. Murphy proposed that, as an alternative, the word "methodology" should be replaced with "requirements".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he accepted Mr. Murphy's proposal.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Sir Michael Wood proposed that, in the second sentence, the word "This" should be replaced with "It" and the words "that may be" with "to be".

Mr. Park said that he wondered whether a footnote should be added to provide references to support the assertion, in the first sentence, that the two-step analysis was "widely accepted in practice and the literature". More generally, he wondered why the text did not contain any footnotes, since the draft conclusions would be used by both practitioners and academics.

Mr. Ouazzani Chahdi proposed that, in the French text, the words "*cette méthode*" in the first sentence should be replaced with "*la méthode*", since the word "*méthode*" had been replaced in paragraph (1).

Mr. Jalloh said that the word "methodology", which had been replaced in paragraph (1), was also used in paragraphs (2), (3) and (4). He wondered whether it would be necessary to make the same replacement in those three paragraphs. His preference would be to retain the word "methodology".

Mr. Murphy said that, in the second sentence, the word "methodology" could be replaced with "analysis", since the paragraph began with the words "This two-step analysis". The same replacement could be made in paragraphs (3) and (4).

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he accepted Sir Michael Wood's proposals. Although the word "methodology" had been replaced with "requirements" in paragraph (1), there was no need to make the same replacement in later paragraphs. He did not consider it necessary to add a footnote. The necessary references would be added to the commentaries to later draft conclusions, in which the two-step analysis would be further developed. In any case, references could always be added at the second-reading stage.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Grossman Guiloff said that, in the second sentence, it was not clear what was meant by a legal principle that was "just" or "inherent to the various legal systems" of the world. He proposed that the words "and may be considered as just or inherent to the various legal systems" should be deleted.

Ms. Escobar Hernández said that, in view of the amendments that had been introduced to paragraph (1), the first sentence of paragraph (3) could be shortened. One option would be to delete the words "the first part of the methodology for identification, namely". Another would be to reword the sentence to read: "Subparagraph (a) addresses the first of the requirements, namely, ascertainment" [*El apartado* a*) se ocupa del primero de los requisitos, es decir, de la constatación*]. The first sentence of paragraph (4) could then be amended in a similar way.

Sir Michael Wood said that he supported the proposals made by Mr. Grossman Guiloff and Ms. Escobar Hernández. He proposed that, in the second sentence, the phrase "serves to show", which was rather vague, should be replaced with "is necessary to show". He also proposed that a new sentence should be added after the current third sentence, to read: "It is an inclusive and broad expression, covering the variety and diversity of national legal systems of the world." That sentence was based on a passage from the statement on the topic by the Chair of the Drafting Committee.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he preferred Ms. Escobar Hernández's second proposal. The first sentence could be amended to read: "Subparagraph (a) addresses the first requirement for identification." He also supported the proposals made by Mr. Grossman Guiloff and Sir Michael Wood.

Mr. Jalloh asked whether the word "methodology" would be retained in the fourth sentence.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that his preference would be to retain it.

Sir Michael Wood said that another solution would be to amend the fourth sentence to read: "This subparagraph is further developed in draft conclusion 5." That solution would spare the Commission from having to decide whether to retain the word "methodology".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he would prefer to retain the original wording of the fourth sentence. It could always be amended on second reading.

Mr. Forteau said that, as the word "requirement" was used in the third sentence, the word "methodology" in the fourth could be replaced with "requirement".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he accepted Mr. Forteau's proposal.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood proposed that, in order to mirror paragraph (3), as amended, the words "refers to" in the first sentence should be replaced with "addresses" and the words "aims to show" in the second should be replaced with "is necessary to show".

Mr. Murphy said that, if the intention was to mirror paragraph (3), the first sentence of paragraph (4) should read: "Subparagraph (b) of draft conclusion 4 addresses the second requirement for identification."

Ms. Escobar Hernández said that she agreed with Mr. Murphy. The word "requirement" should be used in paragraph (4), as it had been in paragraph (3).

Paragraph (4), as amended, was adopted.

Paragraph (5)

Sir Michael Wood said that, according to the first sentence, the term "transposition" was the process of determining "whether, and to what extent", a principle common to the various legal systems could be applied in the international legal system. Such a principle could not be applied in the international legal system wholesale, but the "extent" to which it could be applied was not the only way in which it might need to be modified. He therefore proposed that the words "to what extent" should be replaced with "how", which was more general.

He also proposed that the second sentence should end with the words "transposition is required" and that the content of the rest of the paragraph should be made into a new paragraph. For greater clarity, that new paragraph could be reworded to read:

> "The term 'transposition' was preferred to 'transposability', which is sometimes used in this context. 'Transposition' necessarily encompasses 'transposability'; the latter term refers to whether or not a principle identified through the process indicated in subparagraph (a) can be applied in the international legal system but does not cover the whole process of transposition."

Mr. Grossman Guiloff said that ascertainment of transposition was one thing, but transposition itself was something else. The definition provided in the first sentence, namely, "the process of determining whether, and to what extent, a principle common to the various legal systems can be applied in the international legal system", was in fact a definition of "the ascertainment of transposition". By contrast, "transposition" itself could be defined as "the process by which the applicability of a general principle of law extends from national legal systems to the international legal system". If the Commission did not wish to include that definition in that paragraph, it should instead make clear that it was defining "the ascertainment of transposition" rather than "transposition" itself.

He agreed that "transposition" and "transposability" were two different concepts, but the distinction between them was not clear from the paragraph. It might be better simply to delete the references to "transposability".

Mr. Forteau said that, with regard to the first sentence, he could accept the insertion of the word "how", as had been proposed by Sir Michael Wood. However, he would prefer to retain the words "to what extent", which accommodated the fact that the subjects of law to whom a principle was addressed might be different in the international legal system. It would also be better to replace the word "and" with "or". He therefore proposed that the words "whether, and to what extent" should be replaced with "whether, how or to what extent".

He supported Sir Michael Wood's proposal for a new paragraph. However, he would amend the last few words of the proposed text to take into account Mr. Grossman Guiloff's comments. He thus proposed that the words "the whole process of transposition" in the

proposed text should be replaced with “the whole process of ascertaining transposition as specified in draft conclusion […]”.

Mr. Rajput said that, in the second sentence, the assertion that transposability was “sometimes” mentioned in practice and the literature was not very clear. Did the Special Rapporteur mean that often it was not mentioned? The lack of clarity on that point was a symptom of a more general problem, namely, the lack of any references in the text. It was not fair to expect readers in the outside world to accept the content of the commentaries purely because they had been produced by the Commission. References should be provided to enable such readers to understand the basis on which the Commission was making its assertions. He would have expected references to have been included in the first-reading text. Such matters could not be left entirely to the second reading.

In the Drafting Committee, he had agreed to the use of the word “transposability” on the basis of the explanation provided by Sir Michael Wood, namely that “transposition” included “transposability”. It would be unwise to reopen the debate on the distinction between those two terms. He would thus prefer to retain the text proposed by Sir Michael Wood.

Mr. Park said that he fully supported Sir Michael Wood’s proposal to have a separate paragraph on transposability. Information should be provided on that subject as it had been discussed intensively by the Drafting Committee. The use of the word “complete” was unclear in the last sentence of the paragraph and, should be replaced with “whole” or “integral”. He agreed with Mr. Rajput that the Special Rapporteur should add a footnote to the sentence that referred to practice and the literature.

Mr. Tladi said that he supported Sir Michael Wood’s proposal to create a new paragraph and his proposed wording. Although he did not entirely share Mr. Rajput’s concerns regarding the word “sometimes”, those concerns would be addressed by that wording. He agreed with Mr. Rajput and Mr. Park that it was important to include references. Regarding Sir Michael Wood’s proposal to replace “and to what extent” with “and how”, he would prefer to retain “and to what extent”, as the issue of “how” was addressed in paragraph (6) of the commentary.

Ms. Oral said that paragraph (5) properly reflected the discussion that had taken place in the Drafting Committee. The second sentence clearly indicated that “transposition” included “transposability”, as it stated that the former term encompassed the requirement of transposability. She agreed that it would be helpful for references to be added, particularly given the mention of practice and the literature in the second sentence. She did not support Sir Michael Wood’s proposal to replace “the complete process of identification”, at the end of the paragraph, because identification was precisely what the draft conclusion was about. In her view, the meaning of the word “complete” was clear, but the Commission could consider synonyms.

Mr. Zagaynov said he agreed with Mr. Oral that the paragraph proposed by the Special Rapporteur was well drafted. However, the text proposed by Sir Michael Wood more clearly presented the Commission’s understanding of the term “transposability” and its relationship to “transposition”. He supported the division of paragraph (5) into two paragraphs. Regardless of whether the wording proposed by the Special Rapporteur or by Sir Michael Wood was used, the phrase “in principle” should be inserted between “can” and “be applied” in the first sentence, and, as proposed by Sir Michael Wood, the word “identification” should be replaced with “transposition” in the last sentence, as such a formulation would be more accurate. The wording proposed by Mr. Forteau, “ascertaining transposition”, seemed to be a new formulation that had not been discussed by the Drafting Committee. He supported Mr. Forteau’s proposal to retain the phrase “to what extent” so that the relevant part of the first sentence would read “whether, how and to what extent”.

Mr. Ouazzani Chahdi said that the paragraph perfectly reflected the discussions that had taken place in the Drafting Committee. He agreed with Mr. Rajput and Mr. Park that the mention of practice and the literature called for references. The explanation of the difference between transposition and transposability should be placed in a footnote, together with the relevant references, rather than in a separate paragraph.

Mr. Nguyen, speaking via video link, said that he supported the amendment proposed by Sir Michael Wood but agreed with Mr. Forteau that the phrase "to what extent" should be retained. As he agreed with Mr. Rajput that "transposability" did not cover the whole process of transposition, he would propose that the words "the possibility of" should be inserted after the words "The term 'transposability' refers to" in the last sentence of the paragraph. At the end of that sentence, the word "identification" should be replaced with "transposition".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he would not oppose the insertion of "how" in the first sentence, with the relevant phrase then reading "whether, how and to what extent". A number of the concerns that had been expressed could be resolved by separating the paragraph into two paragraphs, as proposed by Sir Michael Wood. Taking into account that proposal, the text of the first paragraph would end with the words "transposition is required". He supported the text proposed by Sir Michael Wood for the second paragraph, which built on the second part of paragraph (5) but provided greater clarity.

Mr. Forteau, supported by **Sir Michael Wood** and **Mr. Nguyen**, said that he did not support the use of the phrase "process of transposition" because it had never been used by the Drafting Committee. Furthermore, it could cause confusion in the context of paragraph (5), since the word "process" was already used in the first sentence in reference to a "process of determining". The phrase "the whole process of transposition" should perhaps be replaced with the formulation "the whole process of determination of transposition" [*l'ensemble du processus de determination de la transposition*], which would create a link to the beginning of paragraph (5).

Mr. Grossman Guiloff said that, instead of referring to a "process of determining" in the first sentence, the Commission could perhaps use a formulation like "implies determining".

Ms. Oral said that it was appropriate to refer to the "process of identification" because draft conclusion 4 dealt with the identification of general principles of law derived from national legal systems and set out a process for their identification: the ascertainment first of their existence and then of their transposition.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that the formulation proposed by Mr. Forteau could represent a good compromise.

Mr. Zagaynov said that the language proposed by Mr. Forteau seemed to pose a problem of logic. As amended, the first sentence would say that the term "transposition" was "understood as the process of determining whether, how and to what extent, a principle common to the various legal systems can be applied in the international legal system". If the wording proposed by Mr. Forteau – "the whole process of determination of transposition" – was adopted, the last sentence would in effect refer to the whole process of determination of the process of determining whether, how and to what extent, a principle common to the various legal systems could be applied in the international legal system.

Sir Michael Wood said that, as draft conclusion 6 in the Special Rapporteur's second report (A/CN.4/741) was entitled "Ascertainment of transposition to the international legal system", the Commission could refer to the "process of ascertainment of transposition" instead of the "process of determination of transposition". If the wording of draft conclusion 6 was changed after review by the Drafting Committee, the Commission could revisit the wording of the commentary.

The Chair said he took it that the Commission agreed with Sir Michael Wood's proposal to split paragraph (4) into two paragraphs and with his proposed rewording of the second of those paragraphs, as well as with the proposal to replace "whether, and to what extent", in the first sentence, with "whether, how and to what extent".

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Sir Michael Wood said that the phrase "found in national legal systems" should be replaced with "found in the various national legal systems".

Mr. Murphy said that in the second line of paragraph (6), the words "a principle or" should be inserted immediately before "some elements of a principle" to account for the possibility that a problem with transposition could prevent not just some elements of a principle but the entire principle from becoming part of the international system.

Mr. Park said that the words "of law" should be inserted between the words "general principle" and "identified through".

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he supported the proposals made by Sir Michael Wood, Mr. Murphy and Mr. Park.

Paragraph (6), as amended, was adopted.

The Chair invited the Commission to resume its consideration of paragraph 7 of the draft report contained in document A/CN.4/L.948.

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

Paragraph 7

Paragraph 7 was adopted, subject to its completion by the secretariat.

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

Chapter III. Specific issues on which comments would be of particular interest to the Commission (*continued*) (A/CN.4/L.943)

The Chair invited the Commission to resume its consideration of the portion of chapter III of the draft report contained in document A/CN.4/L.943, beginning with paragraph 3.

B. Sea-level rise in relation to international law

Paragraph 3

Ms. Galvão Teles (Co-Chair of the Study Group) said that she had amended paragraph 3 to reflect comments made in the course of the previous meeting and comments submitted in writing after the meeting. In the revised version, the original subparagraphs (a), (b) and (d) had been deleted and subparagraph (c), which, after renumbering, would become the new subparagraph (a), had been amended to read: "(a) practice with regard to the construction of barriers to reinforce coastlines or artificial islands in order to take into account sea-level rise". She proposed no further changes.

Mr. Forteau said that the new subparagraph (a) could be misinterpreted in that the reference to artificial islands could be read as being attached either to the words "the construction of" or to the words "to reinforce coastlines". For clarity, he suggested that the reference should be brought forward so that the subparagraph referred to the "construction of artificial islands or barriers".

Sir Michael Wood said that he had concerns about the addition of the word "artificial" to qualify the word "islands", because artificial islands had no effect on baselines. He suggested that a simple reference to "coastlines or islands" would encompass all that needed to be covered – namely, coastlines and all forms of islands, as defined in article 121 of the United Nations Convention on the Law of the Sea, including rocks – and would be accurate as well as comprehensive.

Mr. Murphy said he agreed with those comments but that, since "coastlines" included the coastlines of islands, a more accurate formulation might be "coastlines, including of islands".

Mr. Forteau said that, as he understood it, the intention in the new subparagraph (a) was to refer to the construction of artificial islands to compensate for the disappearance of territory. Assuming that was the case, the reference to the construction of artificial islands should precede the reference to the construction of barriers. He suggested that the text should therefore be revised to read: "practice with regard to the construction of artificial islands to reinforce coastlines or the construction of barriers in order to take into account sea-level rise".

Mr. Ruda Santolaria (Co-Chair of the Study Group), speaking via video link, said that the intention of the new subparagraph (a) was indeed to refer to the construction of artificial islands which, at a given time, could accommodate people from small island developing States affected by sea-level rise. One such State was the Maldives, which had constructed an artificial island near its capital, Malé. As suggested by Mr. Forteau, the reference to the construction of artificial islands should precede the reference to the construction of barriers.

Mr. Nguyen, speaking via video link, said that the word "barriers" was not broad enough to cover all eventualities in practice. He wished to propose replacing "of barriers" with "measures", deleting the reference to "artificial islands", since the word "coastlines" already included both mainland and island coastlines, and deleting the words "in order to take into account sea-level rise".

Mr. Park said that there appeared to be two divergent views on the question of artificial islands. In the Study Group on sea-level rise in relation to international law, he had pointed out that the construction of artificial islands had two purposes: first, preservation and, second, the creation of artificial territorial entitlements. Paragraph 3 not only addressed questions related to the law of the sea, but also questions of statehood related to territorial entitlement. The word "artificial" in "artificial islands" should be retained.

Ms. Escobar Hernández said that her understanding of revised subparagraph (a), and of the reasons for including a reference to artificial islands in it, was the same as that of Mr. Forteau, as confirmed by Mr. Ruda Santolaria. She agreed that the issue at hand was not related to the law of the sea, but to statehood or to elements related to the status of being a State or conditions for statehood. She therefore supported the inclusion of a reference to the construction of artificial islands. She also supported Mr. Forteau's proposal to place the reference to the construction of artificial islands before the reference to the construction of barriers, as that would serve to clarify what information was being requested in the subparagraph.

Mr. Ruda Santolaria confirmed that the intention in the subparagraph was to refer to the construction of artificial islands in the context of the preservation of statehood and to address the phenomenon of sea-level rise. He said it was for that reason that he wished to take up Mr. Forteau's suggestion to place the reference to the construction of artificial islands before the reference to the construction of barriers. In keeping with the proposal made by Mr. Nguyen, reference could simply be made to "measures to reinforce coastlines" [*medidas para reforzar la línea de la costa*], which would include barriers, dykes and boulders.

Mr. Murphy said that he was still unsure as to the purpose of the subparagraph. He noted that, in paragraph 4 (e), information was already being requested on existing or projected activities related to coastal adaptation measures, which, presumably, included barriers and other measures to preserve statehood. It might be better if the new subparagraph (a) in paragraph 3 focused solely on the idea of artificial islands as a means of maintaining statehood and protecting persons. If the idea of barriers to reinforce coastlines was also included, the new paragraph 3 (a) would partially overlap with paragraph 4 (e).

Ms. Galvão Teles said it should be borne in mind that the Commission was requesting States and international organizations to provide information by 31 December 2021 on the different elements listed in paragraph 3 in connection with statehood and protection of persons, and that the information received would inform the Study Group's second issues paper. Measures to reinforce coastlines should therefore be mentioned in paragraph 3, regardless of whether they were also mentioned in paragraph 4.

Sir Michael Wood said that he found the revised wording to be clearer. He wished to propose adding the words "in each case" so that the text would read: "Practice with regard to the construction of artificial islands or measures to reinforce coastlines, in each case, in order to take into account sea-level rise".

The Chair said he took it that the Commission wished to delete subparagraphs (a), (b) and (d), to adopt subparagraph (c) as amended by Mr. Forteau, Mr. Nguyen and Sir Michael Wood, and to renumber the subparagraphs in paragraph 3.

It was so decided.

Subparagraph (c), as amended, was adopted, subject to the necessary editorial changes.

Subparagraphs (e) to (h)

Subparagraphs (e) to (h) were adopted, subject to the necessary editorial changes.

Paragraph 4

Ms. Oral (Co-Chair of the Study Group) said that subparagraph (b) should read:

> "(b) examples of practice relating to updating, and frequency of updating charts on which baselines and outer limits of the exclusive economic zone are drawn in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea and/or national legislation, including those which are deposited with the United Nations Secretary-General and given due publicity; examples of practice relating to updating, and frequency of updating navigational charts, including for purposes of evidencing changes of the physical contours of the coastal areas".

The formulation took account of the updating of charts and the frequency of updating, including with respect to charts that had been deposited with the Secretary-General of the United Nations. The subparagraph also sought to include charts that had perhaps not been deposited with the Secretary-General, and it addressed navigational charts separately.

Mr. Forteau said that the new wording proposed was clearer. Since usual practice was for States to provide lists of coordinates rather than charts, he wondered whether there was any specific reason why geographical coordinates had not been mentioned.

Mr. Aurescu (Co-Chair of the Study Group) said that the Study Group had decided, after extensive discussion, that the Commission should carry out a survey to investigate the use of charts that encompassed both navigational charts and charts deposited with the Secretary-General. That was the reason for the focus on charts, but he was not opposed to the addition of a reference to coordinates.

Sir Michael Wood said that the information being sought in the subparagraph related to charts, not coordinates. The point of departure was article 5 of the United Nations Convention on the Law of the Sea, concerning the normal baseline, which referred to "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State", and article 16 of the Convention, on charts and lists of geographical coordinates, which dealt not with the normal baseline, but with straight baselines and other special baselines. In subparagraph (b), the Commission was seeking to obtain information about charts in general, not specifically the category of charts addressed in article 16, but those charts would also fall within the scope of the survey.

Mr. Forteau said the reason for his question was that the new wording proposed for subparagraph (b) referred to charts on which baselines and outer limits of exclusive economic zones were drawn, whereas States' usual practice was to submit a list of geographical coordinates that indicated the limits of their exclusive economic zone.

Mr. Murphy said he agreed with Mr. Forteau that some clarification was needed. He noted that subparagraph (b), as currently drafted, invited States to submit information about all practice relating to the updating of charts, not specifically practice related to sea-level rise, and that such a request could yield a great deal of information. On the other hand, because, like subparagraph (a), the subparagraph began with a reference to "examples of practice", States might be inclined to provide just one or two examples rather than comprehensive details of their systematic practice. He wondered which of those two possible outcomes was the Study Group's aim.

Mr. Aurescu said that Mr. Forteau's observation on the usual practice of States was correct and that it was the Study Group's intention to ask the Division for Ocean Affairs and the Law of the Sea to provide an analysis of the use of geographical coordinates and related practice. For that reason, subparagraph (b) related solely to charts.

Ms. Oral said that Mr. Murphy was correct to question the use of the word "examples" and whether the Commission was really seeking only one or two examples of

practice. If the current formulation was thought likely to limit the scope of the information-gathering exercise, the wording of the subparagraph should be reviewed. With regard to the deletion of the part of subparagraph (b) that related to islands, the thinking behind the decision was that the aim in subparagraph (b) was to ascertain whether States were updating navigational charts to take account of changes in the physical contours of coastal areas in general, and that it was therefore important to avoid giving the impression that islands were the main or sole focus.

Sir Michael Wood said he agreed that the wording should be kept as open and general as possible in order not to limit the scope of the survey. In particular, the words "for purposes of registration of maritime zones", which had appeared in the original subparagraph (b), should not be included, since zone registration was not one of the reasons for which States deposited charts with the Secretary-General of the United Nations, and that the reference to "navigational charts" should be replaced with a simple reference to "other charts". That formulation was comprehensive, would ensure that no category was excluded and would give States a broad mandate to share any and all information related to the updating of charts that might be relevant to the topic.

Mr. Rajput said that Mr. Forteau had raised an important point in respect of coordinates. The Commission could not rely on information on coordinates provided by the Division for Ocean Affairs and the Law of the Sea because the Division could only share information submitted by States, and many States were not in a position to deposit or update such information. Given that the objective of subparagraph (b) was to obtain comprehensive information from States, a reference to geographical coordinates was needed. Article 16 of the United Nations Convention on the Law of the Sea stated that coastal States could deposit either charts or lists of geographical coordinates, and the deposition of charts could be problematic for certain States, especially developing countries who were passing on charts drawn up by their former colonizer possibly a hundred years or more previously. Most States relied on coordinates, which were much easier to provide than charts, and, accordingly, the Commission would not be obtaining a realistic picture if the study was limited to charts.

Ms. Oral said that lists of coordinates could also be mentioned if the Commission felt that would be helpful. While she agreed with Sir Michael Wood that the paragraph should be general, she was concerned that, if the reference to "navigational charts" was replaced with "other charts", States might omit to include the former in their submissions. As an alternative, she suggested the formulation "other charts, including navigational charts". Navigational charts had been a key point in discussions in the Study Group and it was important to ensure that they were not excluded from the scope of the study.

Mr. Aurescu proposed the following revised text:

> "(b) examples of practice relating to updating, and the frequency of updating, charts on which baselines and outer limits of the exclusive economic zone are drawn, as well as lists of geographical coordinates, prepared in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea and/or national legislation, including those which are deposited with the Secretary-General of the United Nations and are given due publicity; examples of practice relating to updating, and the frequency of updating, navigational charts, including for purposes of evidencing changes of the physical contours of the coastal areas of islands."

That text addressed Sir Michael Wood's concern about the "registration of maritime zones" and took account of Mr. Forteau's observation regarding the need for a reference to coordinates. In addition, the language had been aligned with articles 3 and 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone and with the relevant provisions of the United Nations Convention on the Law of the Sea, including articles 16, 47 and 75, which mentioned that due publicity must be given to charts.

Mr. Rajput said that he supported the formulation proposed but was wondering whether a reference to the continental shelf should also be included.

Mr. Aurescu, recalling that article 76 (9) of the United Nations Convention on the Law of the Sea required coastal States to deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the

outer limits of its continental shelf, said that, once deposited with the Secretary-General, such charts and information were not subject to update. Accordingly, they did not fall within the scope of subparagraph (b).

Mr. Rajput said that article 76 (9) concerned submissions to the Commission on the Limits of the Continental Shelf, which were indeed permanent, and were required only when a State had a continental shelf at a distance of more than 200 nautical miles that had been geographically established. However, there were a number of States that would not have the coastal geography charted beyond 200 nautical miles and would have to rely exclusively on distance criteria. That was a very distinct situation that was effectively excluded from the scope of the subparagraph at present. The problem with having a reference to exclusive economic zones was that such zones were not established *ipso facto*; they had to be claimed, and not all States were interested in making such claims. Continental shelves, on the other hand, were an inherent right and would always exist, whether or not an exclusive economic zone had been claimed. As the subparagraph was currently formulated, States that had not declared an exclusive economic zone might not submit the comments requested on the grounds that there was no reference to continental shelves. Therefore, the exclusion of such a reference could result in the exclusion of a certain amount of important State practice.

Ms. Oral said that she wished to clarify that the previous reference to the continental shelf had been deleted in the light of article 76 (9) of the United Nations Convention on the Law of the Sea. However, taking into account paragraph 8 of that article, the situation regarding non-States parties and the fact that not all States parties deposited the relevant information with the Secretary-General, a reference to the continental shelf could be included.

Mr. Aurescu said that the text of subparagraph (b) would then read:

> "(b) practice relating to updating, and frequency of updating charts on which baselines and outer limits of the exclusive economic zone and of the continental shelf are drawn, as well as lists of geographical coordinates prepared in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea and/or national legislation, including those which are deposited with the United Nations Secretary-General and given due publicity; examples of practice relating to updating, and frequency of updating navigational charts, including for purposes of evidencing changes of the physical contours of the coastal areas."

Mr. Rajput said that he was grateful to the co-chairs of the Study Group for having accommodated his proposal and supported the revised text. On a point of information, he wished to point out that article 84 of the United Nations Convention on the Law of the Sea was the general provision governing charts and lists of geographical coordinates and their deposit with the Secretary-General.

Mr. Murphy said that, as the final, unnumbered, clause of paragraph 4 appeared to be relevant to both paragraphs 3 and 4, he wished to propose making it into a separate paragraph 5 so that it would address both of the preceding paragraphs.

The Chair said he took it that the Commission wished to adopt the revised text of subparagraph (b), as proposed by Mr. Aurescu, and to create a new paragraph 5, as proposed by Mr. Murphy.

It was so decided.

Subparagraph (b), as amended, was adopted.

Subparagraph (c)

Mr. Murphy, noting that practice related to maritime boundaries delimitation treaties, which was the focus of subparagraph (c), was not limited to practice that had a particular connection to sea-level rise, said that the Commission should possibly be more specific, and should not call on States to provide information on all practice related to such treaties. Based on discussions with the co-chairs of the Study Group, his understanding was that their intention was to limit submissions to examples related to sea-level rise and to the modification of boundaries and treaties as a result of sea-level rise. He therefore proposed a

simpler formulation for the subparagraph, which would read: “examples of the modification of maritime boundaries delimitation treaties due to sea-level rise”.

Mr. Aurescu said he agreed that the original text was too broad and he was willing to accept the amendment proposed by Mr. Murphy.

Mr. Rajput said that he supported Mr. Murphy’s proposal to add the word “modification” but that the suggested new formulation excluded maritime boundaries delimitation negotiations in which sea-level rise might have been taken into account. He therefore proposed replacing “examples of the modification” with “examples taking into account or just before modification”.

Sir Michael Wood said that he had no problem with those proposals, but the subparagraph might be clearer if it began with the words “any examples of”. As currently drafted, the text might be interpreted as implying that the Commission expected to find such examples, whereas in practice they should be extremely rare and the Commission should not appear to be encouraging State to begin modifying treaties and boundaries.

Mr. Aurescu indicated that he supported that proposal.

Subparagraph (c), as amended by Mr. Murphy, Mr. Rajput and Sir Michael Wood, was adopted.

Subparagraph (d)

Mr. Murphy said that the words “to the extent available” in parentheses should be deleted, and that, if the intention of the subparagraph was to elicit information on coastal regression caused by sea-level rise, sea-level rise should be expressly mentioned. He suggested that the words “due to sea-level rise” should be inserted after “coastal regression”.

Mr. Rajput said that the current wording was sufficient, as the reference to the measurement of the territorial sea captured the notion of sea-level rise, but that he was not strongly opposed to the addition. To broaden the scope of the subparagraph, a reference to “basepoints” should be added before “baselines”.

Subparagraph (d), as amended, was adopted.

Subparagraph (e)

Subparagraph (e) was adopted.

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

The Chair said he took it that the Commission wished to adopt the draft report on the work of its seventy-second session.

The draft report of the International Law Commission as a whole, as amended, was adopted.

Chair’s concluding remarks

The Chair said that, despite the challenging circumstances linked to the coronavirus disease (COVID-19) pandemic, the seventy-second session had been a productive one. During the session, the Commission had adopted on second reading the draft guidelines on protection of the atmosphere and the Guide to Provisional Application of Treaties. The Commission had also made substantial progress on the draft articles on immunity of State officials from foreign criminal jurisdiction, which, he hoped, it would be able to adopt on first reading the following year. Good progress had also been made on the topics “Succession of States in respect of State responsibility”, “General principles of law” and “Sea-level rise in relation to international law”. The Commission had also decided to place a new topic on its long-term programme of work, namely, “Subsidiary means for the determination of rules of international law”.

The Commission could be proud of its productivity, its creativity and the continued collegial spirit in which it worked and overcame differences of view. He was grateful to his colleagues on the Bureau for their advice and guidance in managing the affairs of the

Commission. He wished to thank the members of the Secretariat from the Codification Division for their competent assistance and continuous support and to the Legal Liaison Office in Geneva for their efficient assistance. He also wished to thank the précis-writers, interpreters, editors, conference officers, Zoom moderators, translators and other members of the conference services who had extended their assistance to the Commission on a daily basis.

Closure of the session

After the customary exchange of courtesies, **the Chair** declared the seventy-second session closed.

The meeting rose at 12.30 p.m.