

The Work of the UN International Law Commission on the Protection of the Atmosphere

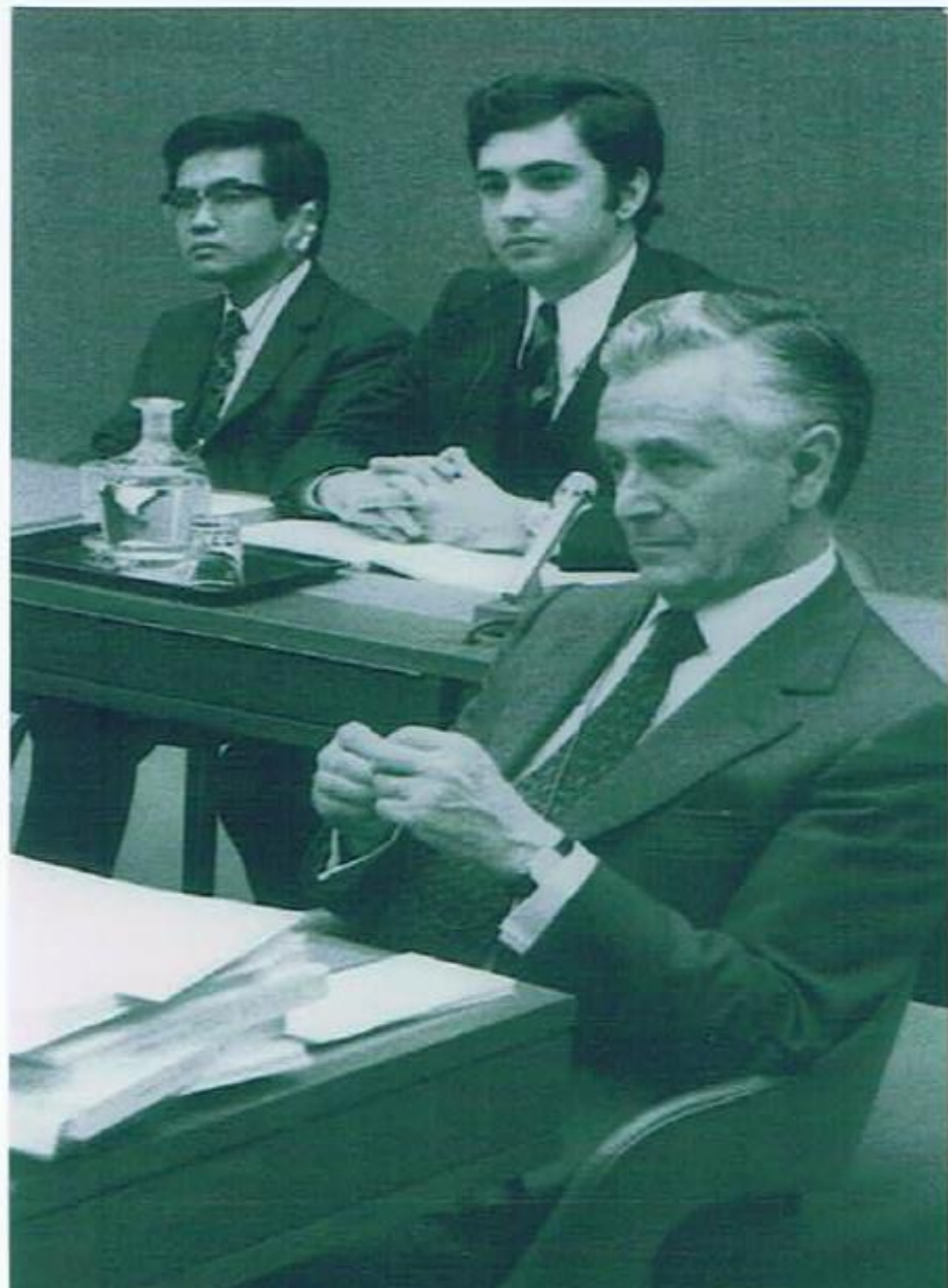
University of Oslo 28 April 2017

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My Early Encounters with ILC and Subsequent Life

- **International Law Seminar 1975**
- **Codification Division, UN OLA**
Servicing the ILC and the Sixth Committee
- **Rikkyo Univ. and Sophia Univ. (1972-2014)**
- **Law School, China Youth University of Political Studies (2014-present)**
- **Elected to ILC** by filling the vacancy of Mr. Chusei Yamada in 2009; Re-elected in the GA election in 2011; Re-elected in 2016





Sixth Committee, 1981



Sixth Committee, 2014



Historical Sketch of ILC

**1950s-60s: Splendid Records for
Codification**

**1970s-80s: Difficulty in Progressive
Development**

1990s: A Revival

2000s: A Slow-Down

2010s: No good topics!

ILC at a Crossroads

- **Members: 15→21→25→34 Individual Capacity**
- **Membership Quality:**
(A former ILC member)
20%: absent; 20%: don't know what's going on
20%: silent; 20%: out of tune; 20%: contributing
- **Reform of the ILC:**
balance between academics and practitioners
generation quotas?
gender balance?
- **No Good Topics**

Criteria for Topic Selection

Three Feasibility Tests

Practical: Pressing Need?

Technical: Ripe in light of State Practice?

Political: No Strong Resistance?

“It should not restrict itself to *traditional topics* but could also consider those that reflect *new developments and pressing concerns* of the int. community as a whole.” (ILC 1997/98)

Availability of a Special Rapporteur

Special Regimes and General International Law

- Shift of topics from “Codification” to “Progressive development”
- From Traditional topics to New topics: Special Regimes (international economic law, environmental law, criminal law, human rights law, etc.) → fragmentation
- ILC: a body of experts of general international law: ILC’s mission is to review special regimes from this perspective

Protection of the Atmosphere

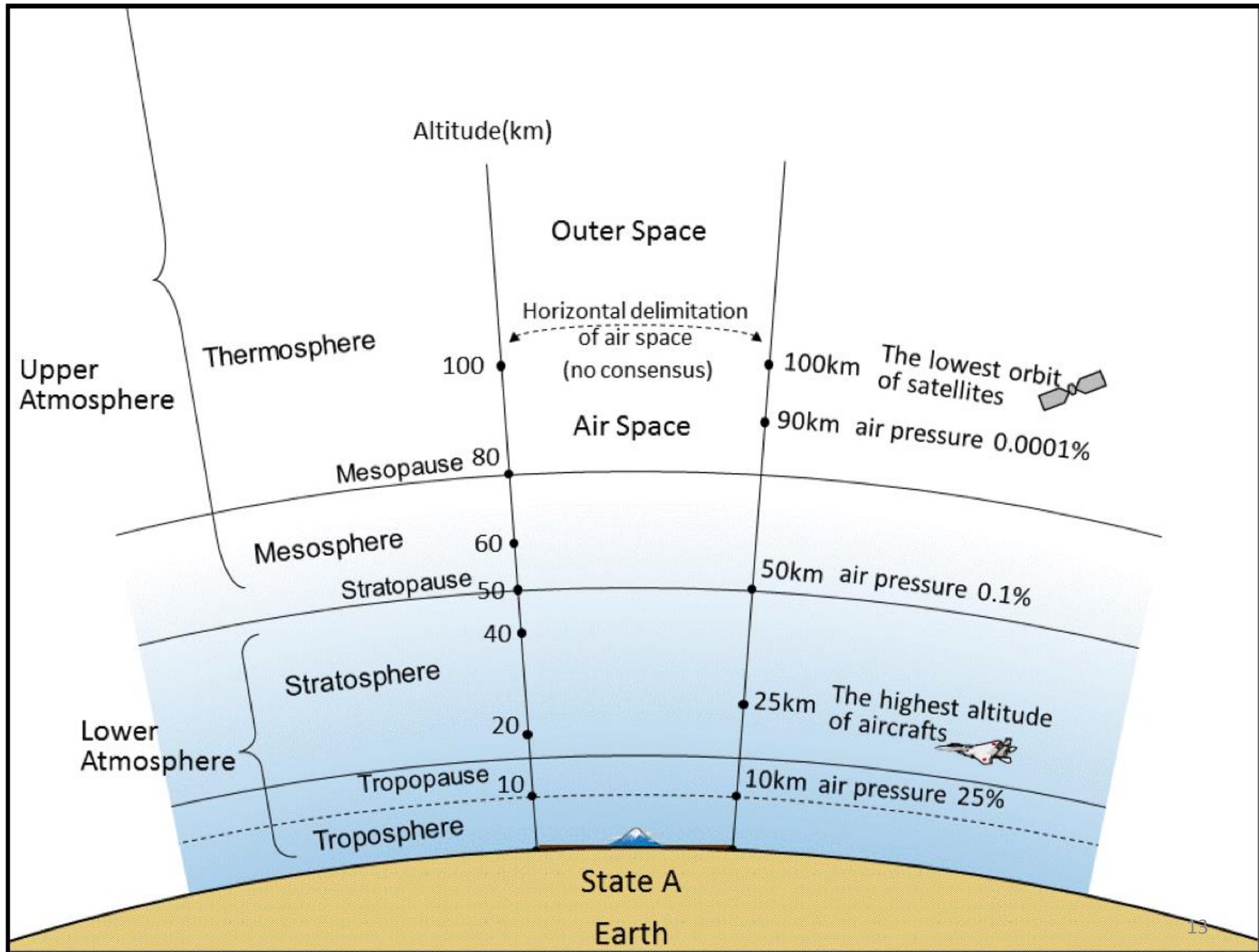
Feasibility

- **Environmental Degradation: Pressing concern**
- **A number of Conventions and the relevant judicial decisions of int. courts and tribunals**
- **Need for de-politicization**

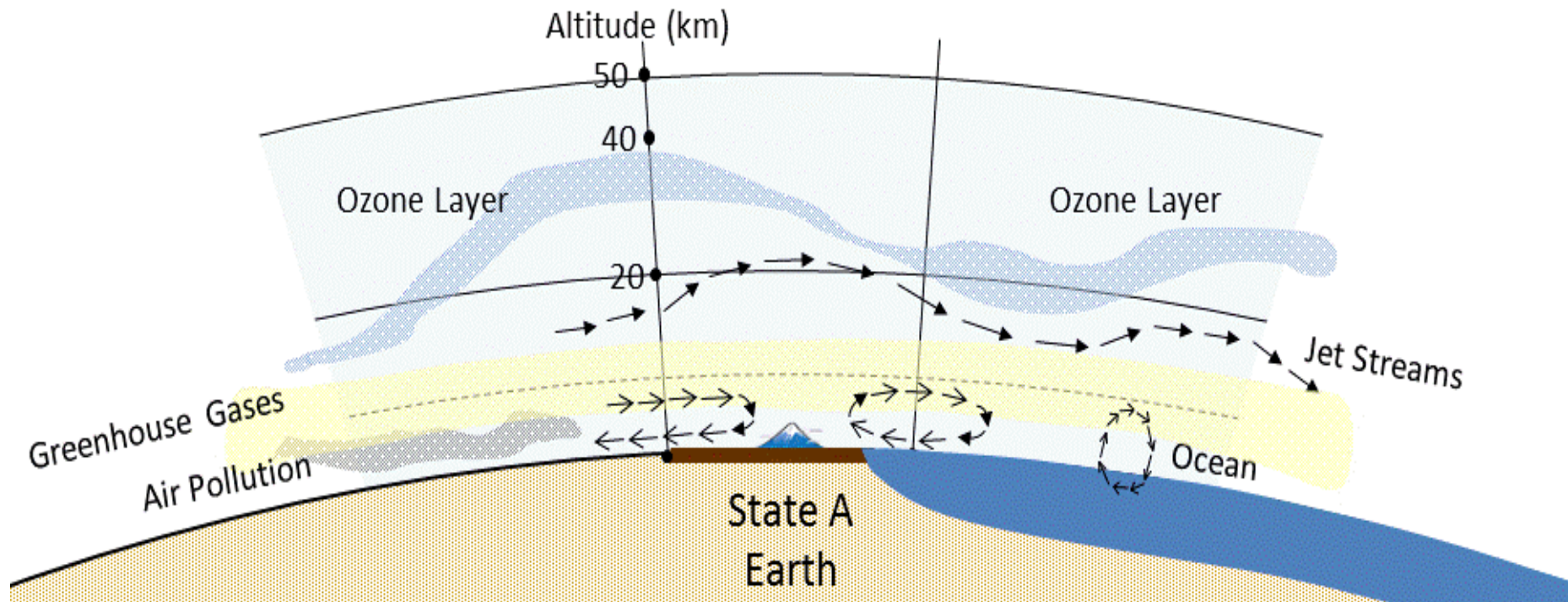
Rationale

- **Patchwork of Conventions: Need for a comprehensive framework convention (like UNCLOS Part XII)**
- **Holistic Approach is needed for the Atmosphere: “One Atmosphere”**





Atmospheric Circulation



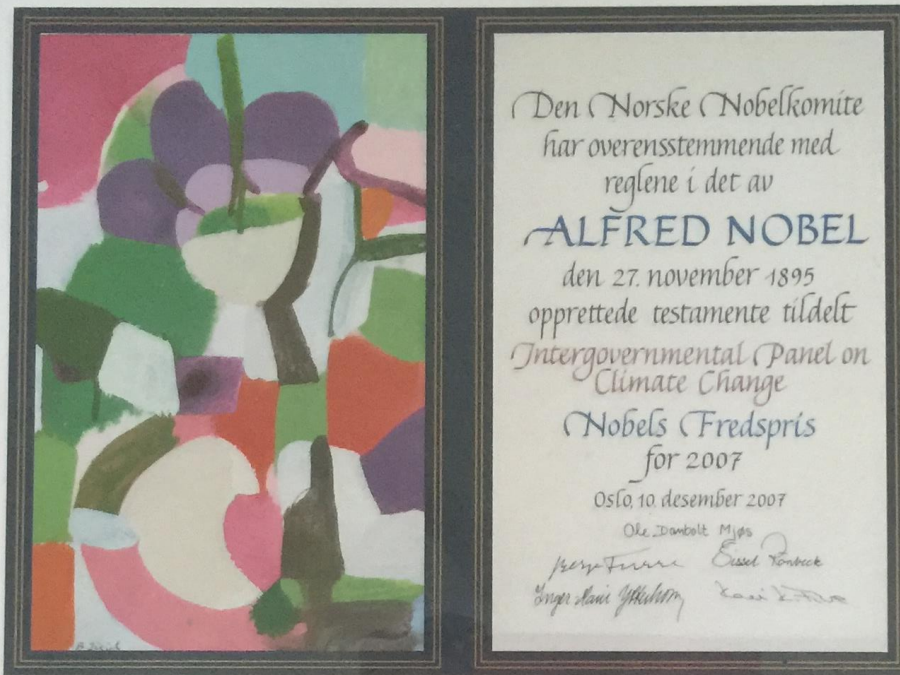
Science and International Law on the Protection of the Atmosphere

- **IPCC** (Intergovernmental Panel on Climate Change) since 2004 (Nobel Peace Prize in 2007!)
- **Contacts** with UNEP, WMO, UNECE and Environmental Treaty Secretariats since 2011
- **ILC Informal Dialogue with Atmospheric Scientists**

First sess. 2015: General overview

Second sess. 2016: EIA and Geo-engineering

Third sess. 2017: Oceans and the Atmosphere



INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE



PRESENTED TO

SHINYA MURASE

FOR CONTRIBUTING TO THE AWARD OF THE

NOBEL PEACE PRIZE

FOR 2007 TO THE IPCC

R. K. Pachauri
IPCC Chairman

R. Christ
IPCC Secretary

Objective of the topic on the Protection of the Atmosphere

- Atmosphere to be treated as *a single unit* for the purpose of environmental protection: It moves around across national boundaries all the time.
- Linkage bet. transboundary air pollution and global atmospheric degradation (black carbon and tropospheric ozone) **“One Atmosphere”**
- Existing conventions: remain a patchwork of instruments with substantial gaps and loopholes in terms of geographical coverage, regulated activities and substances, and, most importantly, applicable principles and rules.

A Historical Sketch (1)

Atmosphere in International Law

6th century Justinian Institute

8th-9th century Sharia Law

1273 London Ordinance on coal burning

**1783 French authorization of a hot air
balloon by Montgolfier brothers**

1870-71 Franco-Prussian war

1899 Hague Peace Conference

1944 Chicago Conv. “airspace” (Art. 1)

A Historical Sketch (2)

Atmosphere in International Law

- **1907 U.S. Supreme Court *Georgia***
- **1938, 41 *Trail Smelter***
- **1972 Principle 21 of the Stockholm Decl.**
- **1979 ECE LRTAP Convention**
- **1985 Ozone Conv., 1987 Montreal Prot.**
- **1992 UNFCCC, 1997 Kyoto Protocol**
- **1988, 89 Conferences on Atmosphere**
- **2010 WCCA “One Atmosphere”**

Relevant Judicial Decisions

- **1973 *Nuclear Tests* (ICJ)**
- **1996 *Nuclear Weapons* (ICJ)**
- **1997 *Gabčíkovo Project* (ICJ)**
- **2010 *Pulp Mills* (ICJ)**
- **2014 *Aerial Herbicide Spraying* (ICJ)**
- **1996 *Gasoline* (WTO)**
- **2011 *Air Transport As.* (ECJ)**

Debates at the ILC and the Sixth Committee 2011-13

- 2011 WGLTPW, ILC, Sixth Committee
- 2012 Informal consultations
- 2013 Adoption of the topic with the following “Understanding”:
 - (a) not to interfere in political process
 - (b) not to deal with specific substances
 - (c) outer space is not part of the topic
 - (d) guidelines (not draft articles)
- 2014 First Report (A/CN.4/667)
- 2015 Second Report (A/CN.4/681)
- 2016 Third Report (A/CN.4/692)
- 2017 Fourth Report (A/CN.4/705)

Draft Guidelines So Far Adopted (2015-16)

Preamble: Protection of the Atmosphere is a “pressing concern of the international community as a whole.”

“special consideration for developing countries”

2013 Understanding

Guideline 1: Use of terms

(a) Atmosphere

[“transport and dispersion” in the preamble]

(b) Atmospheric Pollution [substance & *energy*]

(c) Atmospheric Degradation

Draft Guidelines (cont.)

- **Guideline 2: Scope**
 - anthropogenic causes,
 - “significant” deleterious effects
 - differentiation between the atmosphere and airspace
 - 2013 Understanding

Draft Guidelines (cont.)

- **Guideline 3:** Obligation to protect the atmosphere
- **Guideline 4:** Environmental Impact Assessment
- **Guideline 5:** Sustainable utilization of the atmosphere
- **Guideline 6:** Equitable and reasonable utilization of the atmosphere
- **Guideline 7:** Intentional large-scale modification of the atmosphere (geo-engineering)
- **Guideline 8 :** International Cooperation

Draft Guidelines (2017)

- **Guideline 9:** General Principle on Interrelationship
- **Guideline 10:** Interrelationship with international trade and investment law
- **Guideline 11:** Interrelationship with the law of the sea
- **Guideline 12:** Interrelationship with human rights law

Draft Guidelines (2018)

- **Guideline 13:** Implementation
 - **Guideline 14:** Compliance
 - **Guideline 15:** Dispute Settlement
- End of the First Reading (2018)
- Comments by States (2019)
- Second Reading (2020)

Hope for the Future

- The biggest achievement in international lawmaking in the 20th century: UN Convention on the Law of the Sea.
- The biggest lawmaking exercise in the 21st century will be the Law of the Atmosphere!
- Speech by Amb. Pardo of Malta at GA in 1967, which paved the way to the 1982 UNCLOS.
- Initiative of Small Island Countries?

Amb. Arvid Pardo of Malta

Speaking at the UN General Assembly



Hope for the Future

- Conclusion of a future Framework Convention on the Law of the Atmosphere? Initiative by Norway?
- A New Branch of International Law: The Law of the Atmosphere?