

Provisional

**For participants only**

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## **International Law Commission**

**Seventieth session (first part)**

### **Provisional summary record of the 3410th meeting**

Held at Headquarters, New York, on Wednesday, 23 May 2018, at 10 a.m.

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Protection of the atmosphere (*continued*)

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***Present:***

*Chair:* Mr. Valencia-Ospina

*Members:* Mr. Argüello Gómez  
Mr. Aurescu  
Mr. Cissé  
Ms. Escobar Hernández  
Ms. Galvão Teles  
Mr. Gómez-Robledo  
Mr. Grossman Guilloff  
Mr. Hassouna  
Mr. Huang  
Mr. Jalloh  
Ms. Lehto  
Mr. Murase  
Mr. Murphy  
Mr. Nguyen  
Mr. Nolte  
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. Vázquez-Bermúdez  
Mr. Wako  
Sir Michael Wood  
Mr. Zagaynov

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

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

**Protection of the atmosphere** (agenda item 8)  
(continued) (A/CN.4/711)

**The Chair** invited the Commission to resume its consideration of the fifth report on the protection of the atmosphere (A/CN.4/711).

**Mr. Reinisch** said that he wished to thank the Special Rapporteur for his report, which provided a rich background to the issues to be discussed and, in particular, a useful overview of cases in which the International Court of Justice and other judicial and quasi-judicial bodies had had to address scientific evidence relating to the protection of the atmosphere in contentious cases. On a general level, he highly appreciated the report; however, he had difficulty with the suggested wording of some of the draft guidelines, which often was not based on the findings set out in the report. For example, as a number of previous speakers had pointed out, draft guideline 10 (Implementation) contained a number of implementation obligations, with no clear explanation of where they stemmed from.

Before elaborating on that point, however, he wished to raise a terminological issue concerning the word “implementation”. In paragraph 11 of the report, the Special Rapporteur rightly noted that the use of the terms “implementation” and “compliance” was not uniform in the literature. He further suggested that implementation referred to measures that States took to make treaty provisions effective in their national laws. Implementation in that sense indeed usually took the form of legislative, administrative and judicial actions, as stated in the second sentence of paragraph 1 of the proposed draft guideline. However, there appeared to be few actual requirements to implement obligations under international law in general and under the draft guidelines in particular. The wording of the first sentence of paragraph 1 of the draft guideline was therefore overly broad.

International law generally allowed States to freely choose their means of abiding by international obligations in accordance with their preferences and in the way that was most suitable for them. As long as those obligations were executed and the rights of third States were safeguarded, the measures to be taken to meet those obligations were, as the Special Rapporteur rightly stated in his report, left to the broad discretion of States. Thus, it was not really possible to speak of a general requirement to implement the obligations affirmed in the draft guidelines. In fact, the only implementation obligation deriving from the draft guidelines provisionally adopted to date seemed to be

the obligation to undertake an environmental impact assessment, which by its nature would appear to require that domestic law, both substantive and procedural, was available to be complied with. That was recognized in paragraph 15 of the report. However, he was surprised by the much broader assertion, in paragraph 14 of the report, that a treaty itself often imposed upon States an obligation regarding national legislation. The Special Rapporteur unfortunately gave no examples of such a case. While it was true, and had been recognized by the Permanent Court of International Justice in its advisory opinion of 1928 concerning *Jurisdiction of the Courts of Danzig*, that treaties might expressly require implementation and that some treaty provisions were to be directly applied in the domestic legal systems of the contracting parties, that was the exception rather than the rule. The general rule was reflected in article 26 of the 1969 Vienna Convention on the Law of Treaties, which merely required that treaties should be “performed”, or complied with, in good faith. It was left to the parties to decide how to fulfil that requirement, whether by incorporating treaty provisions into domestic law through express legislation, by declaring them directly applicable, or through other measures. He therefore suggested that the Commission should be cautious about requiring States to implement international obligations in their domestic law or prescribing particular measures of implementation. It might be best to delete the first sentence of paragraph 1 or to rephrase it using more cautious wording, such as “in some cases, States may be required to implement [the obligations affirmed by the present draft guidelines...]”. Concerning the second sentence, the current text should be rephrased so as to emphasize that there was a choice of measures open to States for the purpose of implementing their obligations and also to make it clear that sometimes the obligation had already been implemented. The sentence should be couched in more cautious terms, such as: “Domestic implementation may take the form of legislative, administrative and judicial actions.”

There were similar terminological issues in paragraph 2 of the draft guideline. While its formulation to some extent mirrored article 2 of the articles on responsibility of States for internationally wrongful acts with regard to the requirements concerning attribution of actions or omissions and breach of obligations, the draft guideline contained the additional element of damage or risk, which must be proven by clear and convincing evidence. It was stated in the commentary to article 2 of the articles on State responsibility that whether damage was required depended on the content of the primary rule applicable. The report contained no discussion of why there was a requirement to prove

damage or risk in the context of the protection of the atmosphere; it was also unclear how such a requirement might apply to some of the other draft guidelines. Furthermore, the issue of actual damage might be relevant with regard to reparation for a claimed breach of an obligation, but it would be unduly restrictive to introduce the element of damage in the draft guidelines for the purpose of establishing responsibility when it had been excluded in the context of establishing responsibility in general.

Under the articles on State responsibility, attribution and breach were required for the purpose of establishing an internationally wrongful act of a State; the articles contained no reference to the implementation of obligations. There appeared to be confusion in the report, as well as in paragraph 2 of the draft guideline, between the breach of an international obligation to comply with the draft guidelines and the failure to implement the obligations under the draft guidelines, unless the phrase “amounting to breach thereof”, which was rather difficult to understand, could be taken to mean that responsibility would arise only when a clear obligation was imposed under the draft guidelines to actually implement them through the legislative, administrative and judicial actions mentioned in the previous paragraph.

A further problem stemming from the current formulation of the paragraph was that a State might implement an obligation in domestic law and still be in breach of the obligation, or not implement it and yet not breach it. For instance, a State might implement an obligation either through the adoption of a new law or by transposing the obligation into domestic law and yet not discharge its obligation in substance because the implementation was inadequate. Conversely, a State might be in compliance with its obligations to protect the atmosphere without any need to resort to implementation measures because it could already fulfil its obligations on the basis of existing domestic law. Hence, the phrase “failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law” was misleading as it suggested that every failure to implement an obligation automatically amounted to a breach; he proposed that it should be replaced with the phrase “failure to observe obligations under these guidelines entails the responsibility of States under international law”. Thus a clear distinction would be drawn between the obligation to implement and the obligation to observe binding commitments: the first related to the domestic law of States and the second to the obligations of States at the international level, the breach of which might entail State responsibility. The same consideration applied to

paragraph 3 of the draft guideline, which, in his view, should read along the following lines: “States should also observe in good faith the recommendations contained in the present draft guidelines.”

He had read with particular interest the section of the report concerning extraterritoriality, to which could have been added the example of the *United States — Import Prohibition of Certain Shrimp and Shrimp Products* case, in which the World Trade Organization’s dispute settlement panels and Appellate Body had had the opportunity to revise their views on the matter. However, he had difficulties with the formulation of paragraph 4 of the draft guideline. The first sentence stated the rather obvious fact that the extraterritorial application of national law by a State was permissible when there was a well-founded grounding in international law. The real question was when such a well-founded grounding existed. However, that was a highly complex question that fell within the scope of a different topic that might be considered by the Commission in the future; it probably could not be addressed in an incidental fashion in the context of the topic at hand.

He concurred with the second sentence of the paragraph, at least as he understood its meaning. However, he suggested a different formulation: “Even when permissible, domestic law should be applied extraterritorially with care only, taking into account the interests of States concerned.” The concept of comity, which appeared in the formulation proposed by the Special Rapporteur, was more familiar in the national legal order of some countries, such as the United States, than in others or in international law; it should therefore be referred to in the commentary only, where it could be explained that comity might constitute grounds for abstaining from the exercise of extraterritorial jurisdiction where it was harmful to the interests of other States.

Lastly, he doubted whether the categorical statement in the last sentence of the paragraph, for which no reasons were given, was correct as it stood. While he concurred that, in practice, there were likely to be few cases in which valid grounds existed for the extraterritorial enforcement of national law, the possibility could not be ruled out in general. The sentence should therefore be deleted.

The terminological problems to which he had already referred continued to some extent in chapter III of the report and draft guideline 11, both of which concerned compliance. Under paragraph 1 of the draft guideline, States were required to effectively comply with international law relating to the protection of the

atmosphere. If the obligation to comply was understood to refer to the duty to observe international law, then it would merely state the obvious and lead back to the framework of State responsibility. As explained in paragraph 32 *et seq.* of the report, however, non-compliance was distinct from breach: failure to comply with an international obligation was due to a lack of capacity rather than unwillingness. It was also noted in the report that many international environmental agreements provided for special non-compliance mechanisms with a facilitative approach. Thus it appeared more likely that paragraph 1 was intended to provide that States were required to abide by the specific non-compliance mechanisms that they had accepted under such agreements. Such mechanisms seemed to form largely a *lex specialis* regime; it was thus difficult to say anything as general about them as was proposed in paragraph 1 of the draft guideline.

The report contained interesting material on environmental disputes before the International Court of Justice and other dispute settlement institutions. However, draft guideline 12 (Dispute settlement), as currently formulated, did not seem to flow from the content of the report. Paragraph 1 seemed essentially to be a restatement of the obligation set out in Article 33 of the Charter of the United Nations. That was certainly not objectionable, but possibly also not necessary. More problematic, however, were paragraphs 2 and 3, in which evidentiary rules were purportedly laid down. The basic premise seemed to be that disputes relating to the protection of the atmosphere were likely to be very fact-intensive. If that was accepted, he wondered why consideration was to be given to the rules and procedures concerning the use of experts rather than to the use of experts directly. The second and third sentences of paragraph 2, according to which experts could be appointed by each party and cross-examined by the other party, or could be appointed by the court or tribunal to which the dispute was submitted, were particularly problematic in that they were far too specific and covered a point that would have to be regulated in the applicable rules of procedure.

The statement in paragraph 3 that the principle of *jura novit curia* (the court knows the law) applied not only to law but also to facts was difficult to comprehend. The report contained no evidence that that should be the case, apart from the statement in paragraph 89 *et seq.* that law and facts were not separable and that the legal understanding of a case required sufficient understanding of the technical issues. Lastly, the proviso at the end of the paragraph concerning the rule of *non ultra petita* — or, as some would prefer to say, *ne ultra*

*petita* — should be omitted, since it referred to the principle that an adjudicator could not award more than was requested; it did not relate to agreed-upon facts or law.

He concluded by thanking the Special Rapporteur for his valuable report and relentless work on the topic.

**Mr. Aurescu** said that he wished to commend the Special Rapporteur for his report and his comprehensive oral presentation of it, and also for the outreach efforts that he had undertaken in order to explain, in academic and other contexts, the progress of the Commission's work on the topic.

As stated by the Special Rapporteur, the purpose of the report was to consider issues relating to implementation, compliance and dispute settlement with regard to the protection of the atmosphere. Indeed, while it was essential to address the substance and interpretation of international law in a given area, the means used by States to ensure its application, at both the domestic and the international levels, were perhaps at least as important. He agreed with the Special Rapporteur's view that the issues of implementation, compliance and dispute settlement arose logically from the obligations and recommendations that had been provisionally adopted so far. It was therefore appropriate for the Commission to consider them and such consideration did not imply an expansion of the scope of the topic under draft guideline 2 (Scope of the guidelines) as provisionally adopted: under paragraph 2 of that draft guideline, the issues of common but differentiated responsibilities and the liability of States and their nationals, *inter alia*, were not to be considered by the Commission.

He shared the Special Rapporteur's view, expressed in paragraph 11 of the report, that the use of the terms "implementation" and "compliance" was not necessarily uniform in the literature. The title of chapter II (Implementation) should perhaps have been reformulated in order to indicate clearly that implementation concerned the norms relating to the protection of the atmosphere. The same observation was valid regarding the titles of the other chapters.

In paragraph 12, the Special Rapporteur stated that national implementation took place in the form of legislative, administrative and judicial actions; that there might be certain common features that could be pointed out with regard to national legislation; and that administrative action was normally to be taken in accordance with the law of the State and, accordingly, there was not much to be added to what was said about legislation. Those statements were rather vague; he would have preferred to see more clarity in the text.

Paragraph 12 also contained the first mention in the report of the concept of enforcement, which seemed to be treated as complementary to the term “implementation”; both terms related to the fulfilment of an international obligation at the domestic level. It seemed that a distinction could be made between enforcement, which implied the intervention of an external authority that would oblige national authorities to harmonize domestic law with international law, and implementation, which implied that no such external authority would oblige national authorities to fulfil their international obligations, or, in other words, that national authorities would willingly take the necessary measures at the domestic level to ensure the application of the rules relating to the protection of the atmosphere. However, the draft guidelines did not address the issue of enforcement per se, but only questions relating to implementation and compliance; enforcement was referred to only once, in paragraph 4 of draft guideline 10, in the context of the extraterritorial application of domestic law, which in his view was quite controversial. It would have been preferable not to include the issue of enforcement in the report, at least at the current juncture, as it could raise issues relating to the interpretation of the terminology used for the concepts that were most central to the draft guidelines. However, since it had been included, its relationship with the notion of implementation should have been clarified in an appropriate manner.

Concerning paragraph 14, he did not see the relevance, in practical terms, of the distinction between the three types of obligations mentioned: obligations of measures, obligations of methods and obligations of maintenance. For example, it was stated in paragraph 15 that the obligation to ensure that an environmental impact assessment was carried out probably belonged to the second category, obligations of methods. However, that obligation did not necessarily imply that a specific method was to be implemented; it could also be considered to fall within the first category — an obligation of measures, under which the State could determine the specific means of implementing the obligation. The word “probably” was further indicative of uncertainty regarding the inclusion of the obligation in the second category.

He had some doubts about the conclusions reached in paragraph 16. Citing a renowned international law scholar who had referred to an argument made by France in the *Nuclear Tests* cases before the International Court of Justice, as a matter of positive law, the Special Rapporteur stated that the question of responsibility could not arise in the absence of proven damage or risk. However, it was not clear whether the argument in

question concerned responsibility or reparation: France had observed that, regarding environmental protection, positive law remained primarily based on the obligation to compensate for proven damages when there was a violation of an accepted norm. That conclusion seemed to contradict the general meaning attributed to article 1 of the articles on State responsibility, which stated that every internationally wrongful act of a State entailed the international responsibility of that State. In that regard, the Commission was of the view that injury was not a precondition for responsibility to arise. In fact, any breach of international law represented an injury *lato sensu* to international law and international relations; issues relating to environmental harm should not be an exception to that rule, especially given the sensitive nature of international obligations relating to the environment. A better formulation for the last sentence of the paragraph might therefore have been the following: “No question of reparation could arise in the absence of proven damage.” In his view, the reference to risk should have been avoided, since that notion did not activate any secondary rule relating to reparation. In any case, the manner in which risk influenced responsibility could have been explained more accurately.

It was stated in the same paragraph that a State’s failure to implement obligations might entail the responsibility of that State if the failure was tantamount to a breach of obligations. As a practitioner, he found it difficult to accept the idea that failure to implement an obligation under international law might, in certain circumstances, not represent a breach of international law.

In paragraph 17, the expression “developed industrial States” could lead to controversy relating to developed and non-developed States. It might have been preferable to use the expression “industrially developed States”, which made it clear that the States in question were developed from an industrial point of view; in the former expression, both adjectives modified the word “States”, and the expression could thus be interpreted to mean States that were both developed and industrial. For the same reason, it would have been preferable not to use the term “developed States” in the phrase referring to collective international responsibility, since international obligations were to be applied by all States without discrimination.

With regard to paragraph 18, he fully supported the conclusion that cooperation was the best solution for the purposes of implementation and compliance with international law in general and in the context of the current topic in particular. However, the Special Rapporteur’s conclusion that a failure to implement the

obligations might be better dealt with by an alternative mechanism to seeking to penalize a State for a breach of its obligations could give rise to debates relating to State responsibility in general and to reparation in particular. Penalties, in the sense of punitive measures designed to ensure the implementation of an international obligation or to prevent subsequent breaches, were not necessarily supported by the practice of international courts and tribunals, even if they were accepted under common law. Further, as emphasized by James Crawford, the articles on State responsibility generally did not allow for the award of punitive damages. Therefore, it might have been better to avoid the term “penalize”.

Paragraph 19 contained some assertions that he found somewhat controversial. As a practitioner, he considered the statement in the first sentence, that nation States were increasingly asserting jurisdiction and control over activities that occurred extraterritorially, to be contrary to State practice: States were not at all inclined to accept activities that occurred in their territories as a result of decisions taken by other States. With regard to the second sentence, he did not know what might be legitimate legal grounds to justify the extraterritorial application of national law. In his view, the only situation in which it might be permitted was when the territorial State had voiced its prior and express consent to it. The use of the terms “jurisdiction” and “jurisdictional” in the paragraph was also confusing, since it was not clear, at first sight, whether they referred to the extraterritorial application of national law or to the competence of national courts.

Regarding chapter III (Compliance), the Special Rapporteur stated in paragraph 33 that there was a difference between “non-compliance” and “breach”, an assertion similar to that in paragraph 16 concerning the distinction between failure to implement an international obligation and breach of international law. In the Special Rapporteur’s view, a breach of international law by a State entailed its international responsibility, whereas, under the concept of non-compliance, the aim was to find an amicable solution. He could not agree with that distinction or its implications as set out in the report. In practical terms in real life, there was no difference between non-compliance and breach. In both cases an obligation under international law was not fulfilled, and State responsibility was the legal effect of that situation because, under contemporary international law, an objective rather than a subjective view of responsibility was taken, in accordance with which the idea of guilt or fault was no longer relevant. It was irrelevant whether failure by a State to comply with an international obligation was due to a lack of capacity rather than a

lack of willingness. The fact that a number of international agreements provided for measures of encouragement to States to comply with their obligations was a totally different issue; such measures could not be seen as being in opposition to traditional dispute settlement procedures, since they were of a different nature: they were preventive measures rather than methods of settling disputes. It was not possible to conclude, on the basis of the distinction between measures of encouragement and traditional dispute settlement procedures, that there was a difference between non-compliance and breach. A similar lack of clarity could be found in paragraph 35 *et seq.*, where, in line with the claimed difference between non-compliance and breach, a distinction was made between the facilitative/promotional approach and the coercive/enforcement approach. Meanwhile, reference was made in paragraph 44 to the difference and relationship between non-compliance and dispute settlement, which were obviously different in nature: the former was the source of an international dispute, whereas the latter was a means of solving a dispute prompted by non-compliance with obligations or the breach of international law.

In paragraph 45, good offices were not among the peaceful means of dispute settlement listed. In addition, negotiation was referred to as a non-legal means of dispute settlement; that was not, however, confirmed by practice, since negotiation as a means of peaceful settlement often constituted a phase in the conclusion of a treaty. Concerning the last sentence of the paragraph, he could not see how international adjudication or arbitration could lead to the development of substantive norms of international environmental law, since international courts and tribunals could not create international law.

Turning to draft guideline 10, he said that paragraph 1 was acceptable, as it was a precise representation of the manner in which international obligations were implemented. However, he suggested that the words “from atmospheric pollution and atmospheric degradation” should be deleted from the first sentence.

In paragraph 2, it was not appropriate to include damage and risk as elements that were required in order to determine whether responsibility was entailed; that would conflict with the general understanding of the articles on State responsibility, under which injury was not a precondition for responsibility. Similarly, the presence of risk was insufficient for international responsibility to arise. The text of the paragraph could be reformulated to read: “Failure to implement or the breach of the obligations resulting from the rules

relating to the protection of the atmosphere entails the responsibility of States in accordance with the articles on responsibility of States for internationally wrongful acts.”

Paragraph 3 was generally acceptable; however, it was unclear from the proposed wording whether or not it involved the imposition of an international obligation. The paragraph could be interpreted to mean that States had the discretion to choose whether or not to implement the recommendations contained in the draft guidelines, as that was the very nature of a recommendation. On the other hand, the word “also” could imply a link with the obligations mentioned in paragraph 1, meaning that an international obligation of implementation was imposed under paragraph 3. More context should be provided so that the paragraph would be easier to interpret.

With regard to paragraph 4, the first sentence was unacceptable for the reasons that he had explained in relation to paragraph 19 of the report. The second sentence was not needed either, since it was vague, in particular the phrase “should be exercised with care” pertaining to the extraterritorial application of national law, while the reference to comity had no relevance to the matter at hand, since the national law of a State could be applied extraterritorially only with the prior express acceptance or approval of the territorial State. Furthermore, he found it difficult to understand why a provision formulated in such general terms should be included in the draft guidelines, unless it could be connected with the topic at hand. If the paragraph was retained and its text could be changed to establish a connection with the protection of the atmosphere, it should be further modified, for the reasons he had explained, in order to include the idea that the extraterritorial application of national law by a State was not permissible in the absence of the prior express consent of the territorial State, alongside the statement in the existing text that the extraterritorial enforcement of national law by a State should not be exercised in any circumstance.

Concerning draft guideline 11, he considered paragraph 1 to be acceptable, although he wished to suggest a number of changes. First, the word “effectively” should be deleted, since, qualitatively speaking, there could be no degrees of compliance; compliance either took place or it did not. Moreover, it could be argued that ineffective compliance was, *de facto*, non-compliance. The removal of the word “effectively” would clarify the meaning of the paragraph, which in its current form seemed redundant. Secondly, he suggested that the words “and procedures” should be deleted, since procedures would be covered simply by referring to the rules of multilateral

environmental agreements. Thirdly, the reference to multilateral agreements seemed to exclude bilateral agreements, which should be included in the provision. Even if a multilateral framework could be considered to have a greater impact, bilateral agreements should not be ignored. He suggested that the paragraph should be reformulated to read: “States are required to comply with the international norms relating to the protection of the atmosphere in accordance with the rules of the relevant multilateral and bilateral environmental agreements.”

For the reasons that he had already explained, he suggested that paragraph 2 should be reformulated to read: “Facilitative and/or enforcement methods may be used in order to ensure compliance with the international norms relating to the protection of the atmosphere.” Paragraphs 3 and 4 should be removed from the draft guideline and be placed in the commentary instead, as they were descriptive in nature.

On draft guideline 12, he suggested that paragraph 1 should be reformulated so as to include good offices among the peaceful means of dispute settlement listed. Paragraphs 2 and 3 should be removed from the draft guideline and presented in the commentary instead. However, if the majority of Commission members were in favour of retaining them, he suggested that the term “scientific” should be replaced with the term “technical”, since “scientific” was perhaps too restrictive in nature; “technical” would include scientific matters. A wider range of experts would thus be used, bringing to bear a larger quantity of relevant information for the purposes of the final resolution of a dispute. If “scientific” were interpreted restrictively, it could be argued that experts could not be used to determine the quantum of compensation payable in respect of certain breaches of international law, whereas the International Court of Justice had confirmed in its judgments that experts were generally used for that purpose.

With those comments and suggestions, he was in favour of referring the proposed new draft guidelines 10, 11 and 12 to the Drafting Committee.

**Ms. Galvão Teles**, having thanked the Special Rapporteur for his report, said that she agreed with his decision to propose three draft guidelines on implementation, compliance and dispute settlement. Those new draft guidelines complemented the draft guidelines and preamble already provisionally adopted by the Commission. However, the debate so far had shown that some of the content of the proposed draft guidelines gave cause for concern and should be revised. Some members, including Ms. Oral, Mr. Park,



Mr. Reinisch and Mr. Aurescu had made useful suggestions that were worthy of consideration by the Special Rapporteur and the Drafting Committee. Her general view was that the three new draft guidelines could be rather shorter, since, in referring to general State obligations of implementation, compliance and dispute settlement, they dealt with aspects of international law that were applicable in all contexts and not just that of protection of the atmosphere. Also, some of their content did not seem to constitute guidelines as such, but rather examples or details that could be moved to the commentary.

With regard to draft guideline 10, she supported the general thrust of paragraphs 1 and 3 but considered that paragraph 4, which dealt with the extraterritorial application and enforcement of national law, should be moved to the commentary. As the Special Rapporteur mentioned in paragraph 11 of the report, “implementation” referred to measures that States took to make treaty provisions effective in their national laws. That should thus be the focus of draft guideline 10; the extraterritorial application and enforcement of national law was a different and sensitive issue. As to the wording of paragraph 1, mention should be made of the applicable rules of international law as the framework for the implementation of the treaty obligations of States. The various forms of national implementation referred to in the second sentence could be explained in the commentary instead of in the draft guideline itself.

The question of breach of obligations and State responsibility, referred to in paragraph 2, was also a matter separate from implementation, as the Special Rapporteur pointed out in paragraphs 16 to 18 of the report. Paragraph 2 should therefore be formulated as a “without prejudice” clause in relation to questions of State responsibility for internationally wrongful acts, drawing on the wording of the articles on State responsibility. Article 73 of the 1969 Vienna Convention, adapted as necessary, could also be a useful source of inspiration.

Concerning draft guideline 11, she said that the contents of paragraphs 2, 3 and 4 could be addressed in the commentary, which would bring the draft guideline into line with those already provisionally adopted by the Commission. The different types of compliance mechanisms described in the report — those provided for in the Montreal Protocol on Substances that Deplete the Ozone Layer, the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the Paris Agreement — were examples that had advantages and disadvantages and, as such, should be explained in the commentary rather than being used as

the basis of guidelines for new compliance mechanisms that should be adopted by States.

In paragraph 1, which referred to compliance mechanisms under relevant multilateral environmental agreements, it could be specified that the relevant agreements were the ones to which States were parties.

With regard to draft guideline 12, she could support paragraph 1, which set out the general obligation regarding the settlement of international disputes and enumerated the different methods available for that purpose. However, it would be advisable to quote Article 33 (1) of the Charter in full by adding the phrase “or other peaceful means of their own choice” at the end of the paragraph, a possibility to which the Special Rapporteur, when introducing the report, had said he was open.

The first sentence of paragraph 2 contained a recommendation based on the specific nature of the disputes that might arise in the context of the protection of the atmosphere; the additional elements set out in the second and third sentences could be addressed in the commentary. In order to streamline the text, the content of paragraph 3 could also be addressed in the commentary.

She asked the Special Rapporteur to clarify, perhaps in his summing-up of the plenary debate or in the Drafting Committee, how he intended to proceed with regard to the text in the preamble and draft guideline 2 that was still in square brackets, as set out in annex I to the report. She was in favour of referring the three proposed new draft guidelines to the Drafting Committee, which should take account of the debate and the suggestions for revisions made in the plenary. She agreed that the Commission should complete its first reading of the entire set of draft guidelines at the current session.

**Mr. Murphy**, having thanked the Special Rapporteur for his interesting report, said that, like other members, including Mr. Park, Ms. Oral and Mr. Reinisch, he thought that the analysis in the report was selective and lacking in balance, and that it had ultimately resulted in draft guidelines that were dubious in many, if not most, respects. Although the report painted a promising picture of reactions in the Sixth Committee to the Commission’s work on the topic so far, many of the actual statements suggested otherwise. The representative of Slovakia, for example, had said that the consideration of the topic at the Commission’s sixty-ninth session had once again proven that the topic was not developing in the right direction. A good summary of States’ views could be found in the topical summary prepared by the Secretariat of the discussion

held in the Sixth Committee during its seventy-second session (A/CN.4/713), which stated that delegations had expressed doubts with regard to the usefulness of the work of the Commission on a topic that concerned many policy issues regarding a broad range of socioeconomic, development and scientific questions that fell outside the scope of the primary mandate of the Commission; that it had been noted that existing international obligations concerning the protection of the environment generally covered many issues associated with the protection of the atmosphere and provided for sufficient flexibility; and that the work of the Commission on the topic was likely to complicate rather than facilitate ongoing and future negotiations, thus possibly inhibiting State progress in the environmental area. The views expressed reflected the overall problem faced in the discussion of the topic from the outset, which was that the Commission was trying to take a set of sophisticated and diverse treaties and instruments and shoehorn them into a series of vague and bland assertions that at best were platitudes and at worst would interfere with carefully negotiated regimes. His reading of the statements made in the Sixth Committee indicated that about half of the States addressing draft guideline 9 thought that it was poorly crafted. The Czech Republic, for example, had asserted that the draft guideline suggested an unworkable solution, while France had questioned the underlying justification for the provision.

Turning to the new draft guidelines proposed by the Special Rapporteur, he said that the overall thrust of draft guideline 10 seemed to be based on a mistaken premise: that the draft guidelines themselves constituted a binding international instrument. In paragraphs 1 and 2, the Commission was essentially stating that States must implement the draft guidelines in their national law and that failure to implement them was a breach of international law entailing State responsibility. However, the Special Rapporteur did not identify prior Commission texts designated as conclusions or guidelines that contained such mandatory wording. The current formulation of the draft guideline suggested that the Commission wanted to declare itself a legislator of international law. If that were the case, the draft guidelines on the current topic could simply be referred to as a convention created by the Commission that was automatically binding upon States.

Perhaps the draft guideline could be reformulated to the effect that States were admonished to implement their treaty obligations in national law and that violation of those obligations would entail their State responsibility. Irrespective of whether it was the Commission's role to remind States of the need to live up to their treaty obligations, no such approach was

taken in the most important treaties relating to atmospheric protection. The 1979 Convention on Long-range Transboundary Air Pollution, for example, contained no such provisions. Indeed, the opposite approach was taken in much of that Convention: the international obligations set out therein on matters such as the sharing of data and technology were conditional on what was possible under national laws and regulations. In the Paris Agreement, for better or worse, there was no provision requiring the enactment of national laws or even the establishment of the kinds of obligations that might trigger State responsibility; voluntary mitigation contributions, rather than country-specific emissions targets, were relied upon.

Since there was no analysis in the report of national implementation of international obligations relating to the atmosphere, it was difficult to know to what degree even bland assertions by the Commission on that point might complicate the operation of such international regimes. For example, a claim that States were required to implement in their national law the obligations set forth in the Paris Agreement, such as on the communication of nationally determined contributions, on the conservation and enhancement of carbon sinks or on adaptation efforts, was a serious claim that should not be blithely advanced. Certainly no such claim existed in the Paris Agreement itself. The draft guideline almost appeared calculated to discourage States from establishing any targets or timetables in treaties relating to the atmosphere and from becoming parties to treaties on atmospheric protection, since it essentially highlighted the potential perils of doing so. That was unfortunate at a time when States were trying their best to encourage even modest commitments to atmospheric protection.

Others had noted the rather vague, circular and perhaps controversial assertion in paragraph 4 of the draft guideline about the permissibility of the extraterritorial application of national law, which, curiously, was not even expressed in such a way as to have a connection to the atmosphere. In any event, the reason why the Transboundary Haze Pollution Act of Singapore featured so prominently in the Special Rapporteur's report was presumably that the Government of that country had been involved in the writing of that report. With respect to the references to United States law in that part of the report, he noted that the sources were dated and somewhat misleading. For example, the 1945 ruling of the United States Court of Appeals for the Second Circuit in *United States v. Aluminum Co. of America* provided for the extraterritorial application of United States law only if, first, an agreement had been made abroad that was

intended to affect foreign commerce with the United States and, secondly, the foreign agreement did in fact affect such commerce. That standard was even higher under contemporary United States antitrust law, exemplified in Supreme Court cases such as *Hartford Fire Insurance Co. v. California* in 1993 and *F. Hoffman-La Roche Ltd. v. Empagran S.A.* in 2004. In his view, transboundary air pollution, even if it had effects in the United States, would not satisfy such a standard. In any event, the most recent source capturing United States law on the effects doctrine was the *Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction (Tentative Draft, 2017)* published by the American Law Institute.

In draft guideline 11, paragraph 1, States were again admonished to comply with international law. The wording of the paragraph was peculiar in that, as Mr. Aurescu had noted, States were required not just to comply but to “effectively comply” with international law relating to the protection of the atmosphere. As the Commission had discussed in years past, international law was not actually aimed at protecting the atmosphere. Rather, the relevant international treaties were designed to protect humans and sometimes wildlife, and their environment and ecosystems. Indeed, pollution of the atmosphere at various levels deemed consistent with human health was invariably permitted under those treaties.

In any event, it seemed that the Commission’s aim in the draft guideline, beyond admonishing States to comply with obligations, was to claim that there were two, and only two, types of compliance mechanism in international law that could be adopted in unspecified circumstances. It was not clear to him whether that claim was tied only to treaty regimes or also to customary international law, but in either case it struck him as simplistic and potentially confusing: simplistic because it failed to take into account a variety of other compliance and managerial techniques, and confusing because it seemed to suggest that all those approaches or techniques were available for all regimes, which certainly was not the case.

Draft guideline 12, paragraph 1, contained a reference to Article 33 of the Charter, which concerned disputes the continuance of which was likely to endanger the maintenance of international peace and security. It was not clear to him why it was a good idea to imply that disputes concerning atmospheric pollution and degradation endangered peace and security, nor was it clear between whom such disputes arose; the references to States that appeared at a similar point in the other two proposed draft guidelines were absent from draft guideline 12. Furthermore, many treaties

relating to the atmosphere had specific dispute settlement clauses, which mostly did not refer to the various forms of dispute settlement mentioned in the draft guideline; under a typical formulation, if a dispute arose between two or more contracting parties, they must seek a solution by any method acceptable to the parties to the dispute. In other words, unilateral resort to dispute settlement was often not contemplated. There were, of course, exceptions, such as the United Nations Convention on the Law of the Sea, as pointed out by Ms. Oral.

Paragraphs 2 and 3 of the draft guideline contained an odd level of detail with respect to the procedural aspects of disputes. Others had addressed those issues more fully. As best he could tell, in paragraph 2 the Commission was telling arbitral and judicial tribunals to pay attention to their own rules and procedures, which they might not appreciate. In paragraph 3, the Commission seemed to be encouraging arbitral and judicial tribunals to play at being scientists, which also seemed unhelpful; in his view, if anything, courts should pay more attention to what scientists had to say, not less.

He concluded by thanking the Special Rapporteur once again.

**Mr. Tladi** said that he agreed with Mr. Murphy that there had been some difficulties with the current topic. However, they had arisen not only from the Special Rapporteur’s reports but also from the understanding on which the Commission had decided to include the topic in its programme of work in 2013, which had had the effect of removing the very heart of the topic by excluding a number of issues from consideration. He regretted that decision and hoped that a lesson would be learned from it; he certainly would never again agree to the imposition of conditions on the Commission’s consideration of any topic.

**Mr. Petrič** said that he remembered all the difficulties with which the Commission had grappled when it had begun its discussions on the topic. Members had been keen to make a positive contribution in the field of environmental law, and specifically the protection of the atmosphere, but they had also been faced with significant negative reactions from States to the idea of addressing the topic. He agreed with Mr. Tladi that in future the Commission should not make its consideration of a particular topic subject to any conditions. Since the Commission was a body of the General Assembly, it should, of course, take seriously the opinions of States.

**Mr. Nolte** said that the basic requirement for the Commission’s selection of a topic was that the topic should be well defined, whether in the form of an

understanding or otherwise. In his view, the Commission should not make any assumptions about the cause of the dissatisfaction expressed by some States concerning the topic at hand. While some might consider that the 2013 understanding was not restrictive enough, others might consider it too restrictive. It was important to look beyond the formulation of the understanding and consider the substance of the issue and the views of States on the way in which the Commission was dealing with the topic.

**Ms. Oral**, expressing support for the comments made by Mr. Tladi, said that, although she had not been party to the initial decision on the scope of the topic, she, too, regretted the fact that conditions had been imposed on the consideration of what was a very serious and important matter for the environment. Those conditions had had a negative impact on many aspects of the Commission's work. She noted that one of the conditions was that work on the topic should not interfere with negotiations on climate change, which had still been under way at the time of the 2013 understanding. However, those negotiations had now ended; the Paris Agreement had been adopted. She therefore wondered whether that condition still needed to be taken into account in the Commission's work.

**Mr. Gómez-Robledo** said that, since the Commission's consideration of the topic was already well under way, it was necessary to find a means of moving forward on it. It was worth noting that on 10 May 2018 the General Assembly had adopted resolution [72/277](#), entitled "Towards a Global Pact for the Environment", in which it had decided to establish an *ad hoc* open-ended working group for the purpose, inter alia, of discussing options to address possible gaps in international environmental law, one of which might be to draft an international instrument. It was not clear whether such an instrument would be legally binding, although France, at least, which had initiated the resolution, hoped that it would be. It was interesting that the Assembly had acknowledged the possibility of gaps in international environmental law, as doubts had sometimes been expressed as to whether such gaps existed. In considering the possibility of an international instrument, the working group would have to take account of all relevant existing materials, including both treaties and non-binding instruments, and also the Commission's work on the topic to date. He agreed with Mr. Tladi that the Commission needed to find a better way of coming to decisions concerning the selection of topics.

**The Chair** said that he intended to convene a meeting of the enlarged Bureau to discuss a recommendation to be made to the plenary on the

transfer of topics from the long-term programme of work to the programme of work. Speaking as a member of the Commission, he noted that he, along with Ms. Oral and two former members of the Commission, Ms. Jacobsson and Mr. Kamto, had, at the invitation of the Government of France, joined the group of experts tasked with drafting the proposal for a Global Pact for the Environment that had been presented to the General Assembly by the President of France and had subsequently been the subject of the aforementioned resolution. The President of the Constitutional Council of France had emphasized that it hoped the Pact would be a legally binding instrument. At the experts' meeting in Paris, he had informally suggested that the Pact would be an appropriate topic for referral to the Commission; the reaction to that suggestion had been negative. Members should be mindful of such realities when taking decisions about the Commission's work in the future.

**Mr. Cissé**, concurring that there was a problem with the way in which the Commission selected topics for consideration, said that he was surprised that the information on interactions between the land, the oceans and the atmosphere that had been included in the fourth report of the Special Rapporteur had not been reproduced in the fifth report. In his view, it was not possible to consider the atmosphere without taking account of what was happening on the land and in the oceans, as the three formed an indivisible whole. Furthermore, in the fifth report the Special Rapporteur cited a number of cases that had been adjudicated by the International Court of Justice in relation to environmental protection in the broad sense, but for some of them there was no clear link with the protection of the atmosphere specifically.

**Mr. Jalloh** said that the topic was important and consistent with the Commission's criteria for the selection of new topics. The Commission sought not to restrict itself to traditional topics but also to consider those that reflected newer issues of concern to the international community as a whole; of which the environment in general, and the protection of the atmosphere in particular, was a prime example. He therefore appreciated the Chair's intention to discuss the methods that the Commission would adopt in future for selecting and, perhaps, placing limits on topics. The fact that the Commission would soon complete a number of topics at the same time provided an ideal opportunity for the Working Group on Methods of work to hold a rigorous discussion regarding how it selected topics and added them to its active agenda.

He asked whether Mr. Murphy could clarify his point with regard to Article 33 of the Charter. He did not

believe that the Special Rapporteur had proposed anything unusual by suggesting that the methods of dispute settlement set forth in the Charter could be incorporated into the draft at that stage. While he accepted Mr. Murphy's broader point that the issues at hand might already be addressed by specific treaties, he could not see why Article 33 of the Charter would not be relevant, particularly as principle 26 of the 1992 Rio Declaration on Environment and Development provided that States should resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

**Mr. Peter** said that he had always made clear his lack of support for the so-called 2013 understanding. Members were now realizing the mistake that had been made. The Commission had shown a lack of good faith: it had chained the Special Rapporteur and asked him to run. As a result, virtually any new line of enquiry crossed a red line. The time had come for the Commission to set the understanding aside and allow itself to think freely.

**Mr. Šturma** said that the real question was whether the topic was truly suited to the Commission, as the latter was not a political or a technical body. As Mr. Gómez-Robledo had pointed out, negotiations on the environment were being convened in other forums, which were perhaps more appropriate. At the current stage, the Commission should seek to limit the damage and bring the topic to a conclusion by preparing draft guidelines that did not send a confusing or mistaken message. In so doing, the Commission should limit itself to its own area of competence, namely international law. He otherwise agreed with the points made by Mr. Tladi and Mr. Petrič.

**Mr. Murphy**, recalling that he had not addressed the 2013 understanding in his statement, said that Mr. Tladi appeared to be referring to the initial part of that statement, in which he had sought to reflect on the reactions of States in the Sixth Committee. Relatively few States had given their views regarding the understanding. There had been many more comments expressing concern that the Commission had taken up such a topic at a general level, when so many complicated and sophisticated treaty regimes existed, and that its work ran the risk of inhibiting State progress in the environmental area. That issue had to do with the nature of the topic, not the 2013 understanding.

Responding to the question from Mr. Jalloh, he said that Article 33 of the Charter referred to dispute settlement processes in the context of disputes likely to endanger the maintenance of international peace and security. The disputes mentioned in the report were not

likely to endanger peace and security, and it was unfortunate to suggest otherwise. It might be possible to include a reference to Article 33 that was worded in such a manner as to avoid that implication. Alternatively, the draft guideline could refer to various means of dispute settlement without mentioning Article 33.

**Mr. Grossman Guiloff** said that one alternative would be for the draft guideline to refer instead to Article 2 (3) of the Charter, which provided that States should settle their international disputes by peaceful means. Since the formulation of that article was more general and less closely linked to the concept of threats to international peace and security, such a solution would avoid the difficulties raised by the reference to Article 33.

**The Chair** said that questions regarding the future approach of the Commission in general would be better referred to the Working Group on the Long-term Programme of Work and the Working Group on Methods of work. The points made by several members did, nevertheless, get to the heart of the situation. In his five reports, the Special Rapporteur had shown great flexibility and complied with the 2013 understanding agreed upon by the Commission, in the hope of saving a topic that the Commission had deemed important. There was thus no reason to revisit the understanding, which, as Mr. Murphy had noted, had scarcely been mentioned in the Sixth Committee. Members of the Sixth Committee and of the Commission had expressed a wide range of opinions both on matters of substance and of drafting, but that was part of those bodies' normal method of work. He had not heard any member oppose the idea of adopting draft guidelines on first reading, and he hoped that that process could be completed before the end of the first part of the current session.

**Ms. Lehto** said that she was grateful to the Special Rapporteur for successfully guiding the project in difficult circumstances and appreciated the many outreach activities he had conducted in relation to the topic. The issues of implementation, compliance and dispute settlement had raised considerable discussion and given rise to some interesting developments in international environmental law. As stated by the Special Rapporteur in his report, those three issues were the intrinsic and logical consequence of the obligations and recommendations provisionally adopted to date by the Commission on the topic.

Paragraphs 16 to 18 of the report gave a summary account of how and why alternative ways to address a lack of implementation had been developed in international environmental law over the past three decades. Multilateral environmental agreements now

almost always included elaborate non-compliance mechanisms. It was not surprising that, in paragraph 18, the Special Rapporteur had concluded that a failure to implement obligations might be better dealt with by an alternative mechanism to seeking to penalize a State for a breach of its obligations. Similar comments could be found in the literature: one jurist had noted that the regular system of State responsibility was not particularly suitable for environmental protection, while another had described it as an inadequate model for the enforcement of international standards of environmental protection. As Ms. Oral had pointed out, it was particularly difficult to establish responsibility for the harm caused to a global commons such as the atmosphere: both sufficiently precise measurement of the harm and its attribution were problematic because the effects were dispersed generally and there were multiple contributors.

That said, paragraphs 16 to 18 might give an unduly simplified account of alternative mechanisms. In particular, the discussion on State responsibility contained in paragraph 16 could be more substantive, as it underpinned paragraph 2 of draft guideline 10, according to which failure to implement the obligation amounting to breach thereof entailed the responsibility of States under international law, if the actions and omissions were attributable to the States and the damage or risk was proven by clear and convincing evidence. However, while draft guideline 3 (Obligation to protect the atmosphere) provided that States had the obligation to protect the atmosphere by exercising due diligence, paragraph (5) of the commentary to draft guideline 3 stated that significant adverse effects on the atmosphere were caused, in large part, by the activities of individuals and private industries, which were not normally attributable to a State. It was also clear that failure to exercise due diligence did not make such activities attributable to the State, which was responsible only for its own acts and omissions. Moreover, there appeared to be a disconnect between the requirement of “clear and convincing” evidence set forth in paragraph 2 of draft guideline 10 and the discussion of the standard of proof contained in paragraph 99 of the report. The latter referred to the separate opinion of Judge Greenwood in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, according to which environmental disputes called for a lower standard of proof requiring that the facts should be established only on the balance of probabilities, as the application of the higher standard of proof would have the effect of making it all but impossible for a State to discharge the burden of proof.

Such issues as State responsibility and extraterritorial application of national law appeared to be given disparate treatment. The latter issue remained controversial and had prompted a lively discussion. For instance, the existence of discrete national environmental policies had been criticized as a weak basis for the protection of the global environment, and some scholars had urged States with strong environmental standards to apply their law extraterritorially. Some had argued that extraterritorial regulation should apply even to environmental harms contained within the territory of a single State, on the grounds that all environmental harms were interconnected. Others, however, had pointed out that such extraterritorial application could discourage other States from developing their own regulation regimes. As Mr. Reinisch had noted, the question was an important one and should not be addressed just incidentally.

With regard to draft guideline 10, she believed that the three cases described in chapter II, section C, of the report did not quite justify the inclusion of paragraph 4 thereof.

Chapter III (Compliance) referred to the work of Martti Koskenniemi, one of the first scholars to have drawn attention to the development of non-compliance mechanisms and their not entirely unproblematic relationship with traditional approaches to breach of obligations, either in the law of State responsibility or in treaty law. As Ms. Oral and Mr. Park had pointed out, that reference was somewhat misplaced: non-compliance procedures as set out in multilateral environmental agreements did not usually replace more traditional enforcement mechanisms, such as dispute settlement clauses, but rather complemented them. Chapter III, section B, usefully described various forms of non-compliance mechanisms. However, not all of the points made there should necessarily be reflected in draft guideline 11, which could benefit from streamlining.

Chapter IV (Dispute settlement) raised important questions related to the increase in fact-intensive and science-heavy cases brought before the International Court of Justice and other international courts and tribunals. The report referred to a number of cases decided over the past two decades, as well as to the various procedural issues raised with regard to the assessment of scientific evidence. Some of those issues had been discussed in the compensation judgment of the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* of 2018. For the compensation phase involving complex scientific quantification of environmental damage, the International Court of Justice had not employed an

expert to carry out further fact-finding or evaluation of the evidence. Rather, it had relied on its own interpretation of the parties' submissions as to the facts. For the quantification of damages, the Court had devised its own methodology, which drew on but did not adopt either of the methods proposed by the parties. While the Court had not specified its role regarding scientific evidence in precise terms, it had stated generally that, in cases of alleged environmental damage, particular issues with regard to damage and causation must be addressed as and when they arose in the light of the facts of the case at hand and the evidence presented to the Court; it had further indicated that it was ultimately for the Court to decide whether there was a sufficient causal nexus between the wrongful act and the injury suffered. Furthermore, even when the Court would prefer to hire experts to elucidate the facts of a case, financial or time constraints might in practice force it to evaluate factual evidence without such assistance. In that regard, it was worth noting that, in her statement before the Commission in 2006, the then President of the International Court of Justice, Judge Higgins, had pointed out that the Court's docket increasingly included fact-intensive cases in which it must carefully examine and weigh the evidence; no longer could it focus solely or even largely on legal questions. However, the Special Rapporteur seemed to go further, wondering in paragraph 91 of the report whether fact could ever be separated from law, and arguing, in paragraph 92, that in actual cases inside the courtroom, the line between "fact" and "law" was often obscured. Similarly, paragraph 3 of draft guideline 12 contained the bold statement that the principle *jura novit curia* ("the court knows the law") applied not only to law but to facts. The issues were important, and she herself could support the idea of highlighting the specific requirements related to the handling of complex scientific evidence along the lines of draft guideline 12, paragraph 2, the precise wording of which could be discussed in the Drafting Committee, together with paragraph 1. She would, nevertheless, propose deleting paragraph 3 of the draft guideline.

In conclusion, she supported referring the proposed new draft guidelines to the Drafting Committee and anticipated the completion of the first reading at the current session.

**Mr. Huang** said that, in the light of the unprecedentedly critical tone of the debate, it was time for the Commission to consider seriously how to proceed with the topic. He thanked the Special Rapporteur for his report and welcomed the references he had made to China during its oral introduction. He had commended the outcome of the "Defending the blue

skies in Beijing" campaign of the previous few years and had mentioned the course he had given on the protection of the atmosphere as part of a training programme run by China and the Asian-African Legal Consultative Organization (AALCO). The Government and people of China were indeed committed to protecting the environment; the air quality in Beijing had become measurably cleaner and the environment in other regions had also improved markedly. Those realities reflected the country's progress in building an ecological civilization. In March 2018, the National People's Congress had amended the Constitution to include the terms "ecological civilization" and "building a community with a shared future for humanity". China would implement its national strategy to respond to climate change while facilitating and guiding efforts to establish an equitable and reasonable global climate governance system featuring win-win cooperation.

However, one should not conclude that China supported the Commission's deliberations on the topic of protection of the atmosphere; the two were not intrinsically linked. When the topic had first been added to the Commission's programme of work, he had registered strong reservations in his capacity as the representative of China on the Sixth Committee at the sixty-eighth session of the General Assembly in 2013. At subsequent meetings of the Sixth Committee, representatives of China had repeatedly emphasized that the protection of the atmosphere was a multifaceted question that had political, economic, legal and scientific dimensions. They had expressed the hope that the Commission fully realized the complex and sensitive nature of the question and would comply strictly with the 2013 understanding by further clarifying the scope and objectives of the topic while fully respecting the existing mechanisms and efforts. The Government of China had believed all along that the draft guidelines, as they currently stood, were not supported by international practice. It had therefore expressed serious doubts regarding the need for the Commission to continue its deliberations on the topic.

When introducing his report, the Special Rapporteur had cited the invitations he had received to give lectures at universities in China as evidence or an indication of the country's support for the topic. That assumption was hardly tenable. The relevant Government departments in China, including the Ministry of Foreign Affairs, attached importance to the role played by the Commission in developing and codifying international law and respected the academic status and freedom of the Commission's members. Despite its reservations regarding the topic, the Government of China had invited the Special

Rapporteur to visit China and had never interfered with the content of his lectures. That stance was a testament to the country's open-mindedness in academic exchanges. Chinese tradition and culture had always valued such principles as harmony in diversity, listening to different opinions before making decisions and seeking common ground while agreeing to differ. He therefore could not agree with the Special Rapporteur's suggestion that there was great enthusiasm and support in China for the topic. He nevertheless wished to commend the Special Rapporteur for his frequent visits to China, in which he imparted a lifetime of knowledge and disseminated international law. Other members of the Commission were also welcome to visit China and exchange ideas.

The development process could not ignore environmental and ecological questions, as they had economic, social and political ramifications. Those questions were not merely an academic concern. They could not be reduced to principles concerning the use of or obligation to protect the environment, or to legal issues regarding compliance and enforcement. One example, to which the Special Rapporteur had referred, was the haze pollution caused by traditional Indonesian slash-and-burn farming. Although local people were accustomed to the smog and haze, the air pollution caused by such practices had recently worsened, drawing attention and protests from neighbouring countries. Regulations introduced by the Indonesian Government had been weakly enforced. That example showed that environmental protection including protection of the atmosphere, and the response to climate change, were complicated, arduous and long-term tasks that required integrated planning by all countries to advance economic and social development while promoting an ecological civilization. They also required cooperation and joint efforts by the international community. The top priority was now to formulate, through negotiation and cooperation, a holistic solution for the protection of the world's environment and sustainable development. That priority could be addressed only through common development. The international community was developing advanced philosophies to address the problem. One example was the concept of ecological civilization, which was regarded as fundamental for a country's long-term development and which recognized that civilization and a healthy ecology were mutually dependent. There was growing recognition that mountains, forests, rivers, oceans, lakes and grasslands needed to be protected holistically or restored systematically, something that required rigorous legal regimes. Several countries were enacting ecology-first development strategies at an accelerated pace. For instance, China was implementing

major plans of action to prevent and treat atmospheric, water and soil pollution, including its country programme for the implementation of the 2030 Agenda for Sustainable Development, and its National Plan for Tackling Climate Change 2014-2020. All of those initiatives were expressions of the country's will and determination; they did not in any sense reflect an obligation under international law.

At the international level, follow-up negotiations on the Paris Agreement had also moved forward. The rules for the implementation of the Agreement were expected to be adopted by the twenty-fourth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, which would be held in Katowice, Poland, in December 2018. The Bonn Climate Change Conference held in April 2018 had also helped to advance the negotiation process. The parties had demonstrated the political will to defend and implement the Paris Agreement and conclude the negotiations in a timely manner.

Regrettably, however, the Commission's consideration of the topic continued to focus on "draft guidelines" that sought to define such everyday terms as "atmosphere", "pollution of the atmosphere" and "degradation of the atmosphere", and that restated the general obligation to protect the atmosphere and the general principles of promoting international cooperation and equitable, reasonable and sustainable utilization, issues on which States had reached consensus many years before. In contrast, many major legal issues concerning the protection of the atmosphere had been listed as taboo subjects. For instance, the Commission was not to interfere with political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. It must not seek to fill gaps in treaty regimes or impose on current treaty regimes legal rules and principles not already contained therein. Also out of bounds were the "polluter pays" principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights. Moreover, the study of the topic must not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which were the subject of ongoing intergovernmental negotiations. Even with such constraints, the Commission was seriously divided regarding some basic questions. The study of the topic had thus been reduced to a game of words for the members' amusement. The Commission should ask itself how the topic would contribute meaningfully to the ongoing global negotiations on climate change and



what substantive guidance on protecting the atmosphere it could offer to the international community. The debate over the previous two days had merely strengthened his doubts in that regard.

Strong opposition to the topic had also been expressed in the Sixth Committee. Some Member States had been critical of the Commission's approach, arguing that any attempt to extrapolate general legal rules from specific environmental agreements would yield no results and would indeed blur the nuances among different, carefully negotiated regimes. Some had felt that such an approach would complicate rather than facilitate ongoing or future negotiations and prevent countries from making progress in their environmental efforts. Other Member States had believed there was not enough State practice to support further regulation, and that relevant norms were already in force. They had argued that the proposed additional general principles regarding cooperation, information-sharing and the conclusion of other agreements would contribute little to legal certainty.

Some Member States had emphasized that work on the topic should not seek to fill the gaps in the international regime or introduce new rules or principles. On those grounds, they had criticized the current work of the Commission as running counter to the 2013 understanding. They had also expressed concern regarding the direction in which the Special Rapporteur was steering his work. Some had asked what function the final outcome of the project would fulfil at the global level. Others had failed to see how the Commission could study international law on the topic while at the same time ignoring such important rules as the precautionary principle, the principle of prevention and the "polluter pays" principle. Yet others had called into question certain specific draft guidelines.

In the light of those clear differences, which remained after years of time- and energy-consuming deliberations, he believed that the Commission should seriously consider ending its consideration of the topic at the appropriate moment or referring it to a study group for consideration. The Commission's attempt to include the topic in the programme of work subject to certain conditions had proved unsuccessful. The 2013 understanding had been intended either to make the proponent of the topic back off and agree to withdraw the original proposal, having realized the size of the challenge or, as a compromise, hand the topic over to a study group for consideration. To the surprise of most members, the proponent had not only refused to accept the compromise, but had also agreed to all of the conditions attached. However, the four-point understanding was like four chains that prevented the

Special Rapporteur from fulfilling his task, rendering it unfeasible from a practical standpoint. Oriental wisdom celebrated the courage to retreat at the appropriate moment. While the Special Rapporteur and some members might be reluctant to end the study of the topic, the most responsible course of action for the sake of the Commission, the General Assembly and its Member States might well be for the Commission to cut its losses in a timely manner.

There had been precedents for that course of action. One example was the topic "Status, privileges and immunities of international organizations, their officials, experts etc.", which had been included on the Commission's agenda at its twenty-eighth session, in 1976. Two successive Special Rapporteurs had submitted a total of eight reports on that topic, yet neither the Commission nor the Sixth Committee had expressed a wish for it to be more actively pursued. Based on the recommendations of the Planning Group, the Commission had decided not to continue its consideration of the topic. Another example was the topic "Shared natural resources (oil and gas)", concerning which, in 2010, Mr. Murase had drafted a paper entitled "Shared natural resources: feasibility of future work on oil and gas" (A/CN.4/621). In his paper, Mr. Murase had recommended that the topic of oil and gas should not be pursued any further, on the grounds that topics should reflect the needs of States in respect of the progressive development and codification of international law; should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and should be concrete and feasible for progressive development and codification. Mr. Murase had suggested three feasibility tests: the practical consideration of whether there was any relevant pressing need in the international community as a whole; the technical feasibility of the topic — whether it was sufficiently "ripe" in the light of relevant State practice and literature; and the political feasibility of the topic — whether addressing it might or might not meet with strong political resistance on the part of States. In his capacity as Special Rapporteur of the topic under consideration, Mr. Murase might now wish to revisit those criteria.

An analysis of the three new draft guidelines proposed in the Special Rapporteur's report merely strengthened the case for bringing the discussion of the topic to a timely end. In negotiating multilateral environmental treaties, he had found that implementation, compliance and dispute settlement clauses were the most critical and controversial core clauses in treaties on the environment; such elements might hold back negotiations or even cause them to end

prematurely. However, the three draft guidelines not only included such terms as “implementation of obligations” and “enforcement”, but also introduced the element of State responsibility, something that clearly went against the 2013 understanding. That situation showed once again that any meaningful study of the topic would inevitably conflict with the 2013 understanding.

Turning to draft guideline 10, he recalled that, in paragraph 11 of the report, “implementation” was defined as measures that States took to make treaty provisions effective in their national laws. Since implementation was purely a matter of domestic law, its relevance to the topic was open to question. Paragraph 1 of draft guideline 10 provided that States were required to implement in their national law the obligations affirmed by the draft guidelines relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. It further stated that national implementation took the forms of legislative, administrative and judicial actions. In the light of previous draft guidelines, those obligations mainly referred to protection of the atmosphere (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization of the atmosphere (draft guideline 5), equitable and reasonable utilization of the atmosphere (draft guideline 6) and international cooperation (draft guideline 8). However, under the 1969 Vienna Convention and customary international law, parties were obliged to transpose into domestic law only international treaties that were already in force. It therefore appeared that the requirement set forth in draft guideline 10 went too far, too fast.

Paragraph 2 stated that failure to implement the obligations amounting to breach thereof entailed the responsibility of States under international law. However, the nature of the obligations was unclear: were they *erga omnes* obligations, treaty-based obligations or, perhaps, obligations based on the draft guidelines? The first two categories clearly did not apply. They must therefore be obligations under the draft guidelines; yet the 2013 understanding had expressly stated that the draft guidelines should impose no new obligations on States.

Paragraph 3 required that States should also implement in good faith the recommendations contained in the draft guidelines. However, in the absence of a specific international convention for the protection of the atmosphere, the recommendations under the draft guidelines either were too broad and inactionable, or went beyond the scope of *lex ferenda* and were not binding. It was therefore unclear how they could be implemented.

Paragraph 4 dealt with the controversial issue of the extraterritorial application of domestic law. It was unclear what was meant by a “well-founded grounding in international law”; what type of grounding was referred to; which party or entity it should be judged by; and whether, in the case of a conflict arising from the extraterritorial application of domestic law, that conflict was general or related to the protection of the atmosphere. In international practice, extraterritorial application often led to international disputes. For example, while dealing with the 2015 haze incident in Indonesia that had affected neighbouring countries such as Singapore and Malaysia, the Indonesian Government had lodged a strong protest against the extraterritorial application of the Transboundary Haze Pollution Act of Singapore, leading to diplomatic fallout. There had also been friction between Malaysia and Indonesia as a result of pollution from slash-and-burn agriculture. Paragraph 4 provided no viable solution to that issue and could indeed give rise to new problems.

With regard to draft guideline 11, he said that the Special Rapporteur’s study of non-compliance mechanisms drew mainly on the models of the Montreal Protocol, the Kyoto Protocol and the Paris Agreement. However, the compliance mechanisms under those international treaties were distinct from one another and had not been designed specifically for the protection of the atmosphere. Piecing together parts of compliance provisions contained in different treaties and applying the end product to the protection of the atmosphere went well beyond existing international practice and was very difficult for States to accept. The practical relevance of such an approach to international law was questionable.

Paragraph 1 stated that States were required to effectively comply with international law relating to the protection of the atmosphere. However, that requirement in fact applied to all obligations enshrined in international law. Paragraphs 2 and 4, which referred to enforcement approaches, highlighted the Achilles’ heel of international law, namely its implementation. In order to adopt the enforcement approaches set out under paragraph 4, a dedicated international commission would need to be envisaged. However, one might ask how likely it was that such a commission would be established and that its recommendations would be implemented by States. It was not helpful to cling to fantasies.

Turning to draft guideline 12, he said that, in paragraph 102 and footnotes 267 and 268 of the report, the Special Rapporteur, in discussing the judicial settlement of disputes, cited as an example the Arbitral Tribunal in the *South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of*

*China*) case. However, the reference showed a lack of understanding of the basic nature of that tribunal. The International Court of Justice, the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration had all publicly dissociated themselves from the ad hoc arbitral tribunal that had been convened for that case. The Permanent Court of Arbitration had stated that it had merely provided secretariat services for the tribunal.

Draft guideline 12 appeared to be completely unnecessary; all disputes should, as a matter of course, be settled through peaceful means in accordance with the Charter of the United Nations. In paragraphs 2 and 3, the Special Rapporteur proposed specific requirements for the judicial settlement of disputes relating to the protection of the atmosphere, such as rules and procedures concerning the use of experts in order to ensure proper assessment of scientific evidence. Those provisions were inconsistent with the current practice of courts. Independence of the judiciary, procedure established by law, and discretion of judges in the course of proceedings were all basic principles for the judicial settlement of disputes that left no room for external interference. Moreover, the draft guideline overemphasized the judicial settlement of disputes, thereby giving the mistaken impression that arbitration or judicial proceedings were a panacea for settling international disputes related to the protection of the atmosphere.

In light of the plethora of problems with the three new draft guidelines and the concerns raised by a substantial number of members, he believed that it would be irresponsible and lacking in seriousness to refer the draft guidelines to the Drafting Committee for consideration and then to repackage them into hollow truisms. That course of action might help to break the deadlock and act as a shortcut to escape from a controversial topic; but it would be a departure from the overarching objectives of the Commission and injurious to its reputation. The Commission enjoyed authoritative status in the field of international law because its work and output in specific areas, including diplomatic relations, consular relations and the law of treaties, had catered to the needs of the international community and provided clear guidance for States. The question was whether the draft guidelines would, if adopted at the Commission's seventieth session, enhance its reputation or achieve the opposite result. In conclusion, while he agreed with Mr. Tladi that the difficulties that had emerged were intrinsic to the topic rather than reflecting on Mr. Murase personally, he urged the Commission to think seriously about whether it ought to continue with its consideration of the topic.

**Mr. Hassouna** said that, although Mr. Huang had suggested that the Commission should end its consideration of the topic, his detailed comments on the substance of the three proposed new draft guidelines showed that he retained some interest in it. The difficulties mentioned by Mr. Huang were all attributable to the 2013 understanding. Although that solution had proved unfortunate and should be avoided in future, he believed that the Commission ought to continue to work in accordance with the decision that it had taken. The Special Rapporteur had skilfully complied with the restrictions in place.

The scepticism of Member States was hardly recent, and it reflected States' perception of their own interests and the fear that the topic might interfere with political negotiations. The Commission, for its part, had been faithful to the 2013 understanding by avoiding political issues. Given that the topic had reached an advanced stage, he urged Mr. Huang not to insist on bringing it to a close. It might be possible to address the outstanding concerns in the Drafting Committee or a working group.

**Mr. Huang** said that the idea of suspending the discussion was not his own; it had been raised by Member States in the Sixth Committee. He had expressed his own strong objection to the topic clearly and consistently from the outset, and he did indeed hope that the Commission would consider the possibility of suspending the debate in a timely manner or referring it to a study group. At the same time, however, he had no intention of standing in the way of consensus.

**The Chair** said that he had not understood Mr. Huang as making a formal request to bring the consideration of the item to a close. He was, nevertheless, grateful to Mr. Huang for making it clear that he would not object to the process whereby the Commission in plenary, with the participation of all its members and if possible without a vote, would arrive at the completion of its first reading of the topic at the current session. The Commission's immediate aim was solely to produce a full draft for Member States, whose comments would then be taken into account when preparing the text on second reading. The Commission's normal procedure would make it possible to discuss any suggestion that any Member State might make.

*The meeting rose at 12.55 p.m.*