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Provisional summary record of the 3529th meeting

Held at the Palais des Nations, Geneva, on Thursday, 27 May 2021, at 3 p.m.

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Present:

<i>Chair:</i>	Mr. Hmoud
<i>Members:</i>	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 3.05 p.m.

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/735 and A/CN.4/736)

Report of the Drafting Committee (A/CN.4/L.951)

The Chair invited the Chair of the Drafting Committee to present the report of the Drafting Committee on the topic “Protection of the atmosphere”, as contained in document A/CN.4/L.951.

Ms. Galvão Teles (Chair of the Drafting Committee) said that it had been a session of many firsts for the Drafting Committee. It had not only held hybrid meetings, in which some members, including the Special Rapporteur, had participated via video link, but also undertaken the final “clean-up” of the text by circulating proposed amendments in electronic form.

At its 3515th meeting, on 4 May 2021, the Commission had referred the set of 12 draft guidelines and the draft preamble contained in the Special Rapporteur’s sixth report (A/CN.4/736) to the Drafting Committee. Accordingly, the Committee had had before it the entire set of draft guidelines and the draft preamble as adopted by the Commission on first reading in 2018, together with the recommendations put forward by the Special Rapporteur in his sixth report and the changes that he had proposed after taking into account the Commission’s debate in plenary and the comments and observations received from Governments and international organizations, which were set out in document A/CN.4/735.

The Committee had devoted six meetings to the topic between 5 and 12 May 2021, and had successfully completed its second reading of the draft guidelines and the draft preamble. The text that it had provisionally adopted had the same structure as the first-reading text, with the draft preamble followed by the introductory guidelines (draft guidelines 1 and 2), substantive guidelines (draft guidelines 3 to 8) and then guidelines of a procedural nature (draft guidelines 9 to 12).

The draft preamble, which sought to provide a contextual framework for the draft guidelines, comprised eight paragraphs in relation to which the Special Rapporteur had made a number of proposals. In that connection, she wished to recall the Drafting Committee’s understanding, on adopting the text on first reading, that the language of the preamble should, during the second-reading stage, be carefully considered and amended where appropriate. On the basis of proposals by the Special Rapporteur, some preambular paragraphs had been repositioned or modified.

The Drafting Committee had provisionally adopted the first preambular paragraph with one change to the first-reading text, namely the incorporation of the phrase “a natural resource, with a limited assimilation capacity” between the words “is” and “essential”. The Special Rapporteur had proposed to introduce the words “a limited natural resource”, but the phrase “a natural resource, with a limited assimilation capacity” had been deemed both consistent with the wording used in draft guideline 5 and a more accurate characterization of the atmosphere. The Drafting Committee had also found that it alleviated the doubt raised by some members as to whether the atmosphere was “a limited natural resource” as such. Concerns had been expressed over whether the addition proposed by the Special Rapporteur was to be understood from a quantitative or qualitative perspective, with it being underlined that doctrine and practice in that regard were insufficient. The Drafting Committee had concluded that it was important to include a formulation in the preamble without reopening the substantive debate on the concept. The first preambular paragraph as adopted thus read: “Acknowledging that the atmosphere is a natural resource, with a limited assimilation capacity, essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems.”

The second preambular paragraph, which addressed the functional aspect of the atmosphere as a medium through which the transport and dispersion of polluting and degrading substances occurred, had been adopted without changes to the first-reading text.

The third preambular paragraph, which corresponded to the fourth preambular paragraph of the text adopted on first reading, underlined the importance of addressing problems related to the atmosphere. The paragraph had been the subject of considerable

debate, particularly over whether it should be changed despite already having been discussed at length during the first reading. Ultimately, the Committee had decided to replace the phrase “pressing concern of the international community as a whole” with “common concern of humankind”. The Special Rapporteur had proposed the change in order to bring the draft guidelines somewhat into line with related instruments, including the 1992 Convention on Biological Diversity, the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement. Moreover, in its resolution 43/53 of 6 December 1988, the General Assembly had recognized that climate change was a “common concern of mankind”. The Special Rapporteur’s proposal had also been a response to comments received from States and international organizations on the draft guidelines adopted on first reading. It had been recalled, in the Drafting Committee, that the expression “common concern of humankind” was commonly used in the field of environmental law, even though doctrine was divided on its precise scope, content and consequences. It had also been recalled that the expression used in the first-reading text, “pressing concern of the international community as a whole”, was internal to the work of the Commission and had been employed on first reading as a compromise on account of its factual, rather than normative, content.

In making the change, the Drafting Committee’s understanding had been that the commentary would be used to elaborate on the origin of the expression “common concern of humankind”, on how it had been introduced in multilateral instruments and on its factual evolution over time. In that regard, it had been suggested that, since the expression might be understood as entailing legal consequences for States, including *erga omnes* obligations, the Special Rapporteur should make clear in the commentary that atmospheric pollution and atmospheric degradation were a concern of the entire international community because all were affected by them; that the inclusion of the expression did not create rights or obligations, particularly *erga omnes* obligations, that were not spelled out in the draft guidelines; and that it should be understood as a call to action and as a means to enhance international cooperation.

The Drafting Committee had also introduced three interrelated changes in the third preambular paragraph. First, at the beginning of the paragraph, the words “*Recognizing* therefore” had been replaced with “*Considering*”, so as not to suggest that the wording retained was the result of the Commission’s own assessment of the situation. Secondly, the words “the protection of the atmosphere from” had been deleted to make clear that it was atmospheric pollution and atmospheric degradation that were the common concern of humankind, and to bring the wording closer to that of the 2015 Paris Agreement. Lastly, the word “is” after “atmospheric pollution and atmospheric degradation” had been replaced with “are”.

The fourth preambular paragraph, which corresponded to the fifth preambular paragraph of the text adopted on first reading and had regard to considerations of equity, had been adopted with no change to the first-reading text.

The fifth preambular paragraph corresponded to the third preambular paragraph of the text adopted on first reading; the Special Rapporteur had recommended the change in position at the suggestion of a State. The paragraph itself had been adopted by the Drafting Committee without any changes, on the understanding that the impact on the atmosphere of factors other than the oceans would be noted in the commentary.

In the sixth and seventh preambular paragraphs, which addressed one of the most profound impacts of atmospheric degradation for all States – sea-level rise caused by global warming – and the interests of future generations, respectively, two stylistic amendments proposed by the Special Rapporteur as a result of the reordering of the preambular paragraphs had been endorsed by the Drafting Committee. The first words of the sixth preambular paragraph had been changed from “*Aware also*, in particular, of” to “*Noting* in particular”, while in the seventh preambular paragraph, the word “*Noting*” had been replaced with “*Recognizing*”.

The eighth and final preambular paragraph had been considered in conjunction with draft guideline 2 (2), given that both provisions reflected the limitations imposed on the scope of the topic by the 2013 understanding. The provisions and the way in which they interacted had been the subject of an extensive discussion in the Drafting Committee. Consistent with

comments made during the Commission's debate in plenary, the Committee had considered, first, whether the 2013 understanding should be reflected in the draft guidelines at all. Some members had asserted that all reference to it should be deleted, as suggested by some States and the Special Rapporteur in his sixth report. An argument given in favour of that approach was that the Paris Agreement negotiations had been completed and the understanding complied with, thus rendering it irrelevant at the current, second-reading stage. Other members, however, had stated that it was important to reflect the understanding, given that it imposed a significant limitation on both the scope of the topic and the outcome of the work of the Special Rapporteur and the Commission.

Secondly, the debate had centred on determining, in the event that a reference to the understanding was kept, how best to reflect the matter, with some members in favour of including the text in the preamble and others advocating either keeping it in draft guideline 2 (2) or having it in both places. Still other members had spoken in support of including the relevant wording in the general commentary, where contextual information was usually provided, or in a footnote.

Against that backdrop, concerns over transparency had led the Special Rapporteur to submit a revised proposal to amend the text of the preambular paragraph to read: "*Recalling* that the present draft guidelines are not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained in them."

The original wording of the preambular paragraph referring to relevant political negotiations as "including those on climate change, ozone depletion, and long-range transboundary air pollution" had been deleted, as had the words "they also neither seek to 'fill' gaps in treaty regimes", since that language might be understood as being aimed at curtailing or undermining the relevance of the draft guidelines, as had been noted by some States and international organizations. In any case, the phrase "fill gaps" had been considered as subsumed by the reference to the draft guidelines not seeking "to impose on current treaty regimes rules or principles not already contained in them".

It had also been recalled that the 2013 understanding had been applied primarily to guide the Commission's development of the topic. For some members, it was difficult to see how the outcome of the Commission's work could interfere with future negotiations, considering that the Commission could not dictate how States used the guidelines. Thus, the Drafting Committee had finally chosen to include a historical emphasis by stating factually that the draft guidelines "were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein". The text adopted on first reading referred to "legal" rules and principles, but that adjective had been deleted as the focus was on the content and applicability of rules and principles rather than their "legal" character. It had been agreed that the elements of the 2013 understanding not reflected in the eighth preambular paragraph should be reflected in the commentary.

Turning to the draft guidelines themselves, she said that the Drafting Committee had retained the titles of all the draft guidelines with the exception of draft guideline 2, the title of which had been changed from "Scope of the guidelines" to, simply, "Scope", taking into account that the latter title was commonly used by the Commission in its work.

The Drafting Committee had provisionally adopted paragraphs (a) and (c) of draft guideline 1 without any changes to the first-reading text. However, it had introduced two amendments to paragraph (b) in response to proposals by some States, the Special Rapporteur and other members of the Commission.

First, the Special Rapporteur had recommended adding the words "or energy" after "substances", as suggested by a number of States. It should be recalled that, while the 1979 Convention on Long-range Transboundary Air Pollution and the 1982 United Nations Convention on the Law of the Sea referred to "energy" and other substances as causes of pollution, the Commission had decided on first reading not to include the term "energy" in its definition of atmospheric pollution on the understanding that, for the purposes of the draft guidelines, the word "substances" covered "energy". That understanding was reflected in paragraph (9) of the commentary to the draft guideline adopted on first reading. "Energy"

had been understood to include heat, light, noise and radioactivity introduced and released into the atmosphere through human activities.

Consistent with the views expressed by States on the text adopted on first reading and with those conveyed by members of the Commission during the debate in plenary, it had been argued in the Drafting Committee that the term “energy” also included nuclear energy and coal- and oil-based energy sources and that it was thus not to be excluded from the scope of the draft guidelines. The inclusion of the term had also been deemed warranted in order to reflect the nature of contemporary air pollution and in order not to depart from the already codified definition of “pollution” in various multilateral instruments, including the 1979 Convention on Long-range Transboundary Air Pollution, in article 1 (a), the 1982 United Nations Convention on the Law of the Sea, in article 1 (1) (4), and the 1999 Protocol concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, in article 1 (c). With that in mind, the Drafting Committee had decided to make the change, on the understanding that the definition contained in the commentary adopted on first reading would be retained.

Secondly, the Drafting Committee had found it appropriate to add the word “significant” before “deleterious effects”, further to a suggestion to align the wording with that of paragraph (c). The change had been agreed upon following a debate as to whether it would be appropriate for the purposes of paragraph (b). The Committee, departing from the differentiation made on first reading, had concluded that the change was warranted in the interests of consistency with paragraph (c). It had also been stressed that the term had been used in the substantive provisions of some relevant instruments and in the jurisprudence of the International Court of Justice, including in its 2015 judgment in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*.

As noted in paragraph (12) of the commentary to draft guideline 1, the Commission had frequently used the term “significant” in its previous work, stating that: “... ‘significant’ is something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’. The harm must lead to real detrimental effects [and]... such detrimental effects must be able to be measured by factual and objective standards.”

Finally, the Drafting Committee had decided to retain the phrase “extending beyond the State of origin”. As noted in paragraph (10) of the commentary, the expression “effects extending beyond the State of origin” in paragraph (b) clarified that the draft guidelines addressed the transboundary effects in the sense provided in article 1 (b) of the 1979 Convention on Long-range Transboundary Air Pollution, according to which: “‘Long-range transboundary air pollution’ means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.”

The Drafting Committee had adopted draft guideline 2, on the scope of the draft guidelines, with several changes to the text adopted on first reading.

Paragraph 1 had been adopted without any changes.

Paragraph 2, which related to the 2013 understanding, had been considered in conjunction with the eighth preambular paragraph, against the background of an extensive debate. The Drafting Committee had made several changes to paragraph 2 to facilitate agreement on the eighth preambular paragraph. For greater clarity, it had been decided that the formulation “do not deal with, but are without prejudice to”, which several States had found confusing, should be replaced with “do not deal with and are without prejudice to”. Some members had proposed replacing the reference to “the polluter-pays principle, the precautionary principle, common but differentiated responsibilities” with a more general reference to the principles of international environmental law. However, the Drafting Committee had concluded that the reference in question should be retained as an explicit statement of the fact that those three principles were excluded from the scope of the draft

guidelines. It had been noted that, in the commentary, further information should be provided about other principles that might be relevant in that context, and it should also be stated that, while the draft guidelines did not deal with the three principles in question, the Commission was in no way implying that they were irrelevant. The Drafting Committee had also decided to delete the reference to “the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights”. Some members had considered that some of those aspects were already covered under the principle of common but differentiated responsibilities. Others had considered that those aspects were not of equal importance to the preceding ones. It had been noted that the aspects in question could be addressed in the commentary. Accordingly, paragraph 2 now read: “The present draft guidelines do not deal with and are without prejudice to questions concerning the polluter-pays principle, the precautionary principle and the common but differentiated responsibilities principle.”

In accordance with a proposal by the Special Rapporteur, the Drafting Committee had deleted paragraph 3 of the text of the draft guideline as adopted on first reading, which had stated that: “The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.” The Drafting Committee had concluded that mentioning only some of the substances that were the subject of negotiations among States would have been overly selective. However, it had been noted that the content of the former paragraph should nevertheless be reflected in the commentary.

Paragraph 4 of the text of the draft guideline as adopted on first reading, which had now become paragraph 3, had been adopted without changes.

The Drafting Committee had adopted draft guideline 3, on the obligation to protect the atmosphere, without any changes to the text adopted on first reading. However, the adoption of the draft guideline had been preceded by a debate on the Special Rapporteur’s proposal to replace the phrase “prevent, reduce or control” with “prevent, reduce and control”, as had been suggested by several States. That proposal had led to an alternative suggestion to move the words “in accordance with applicable rules of international law” to the end of the sentence, with a view to leaving room for interpretation as to the applicable rules and the meaning of the phrase in context, and to provide further explanation in the commentary. However, the Drafting Committee had concluded that neither of those proposals justified a change to the text adopted on first reading, since the obligation to exercise due diligence in taking appropriate measures would not necessarily be altered by the use of the word “and” instead of “or”. As noted in the commentary to the draft guideline as adopted on first reading, the reference to “prevent, reduce or control” denoted a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules as might be relevant to atmospheric pollution on the one hand and atmospheric degradation on the other.

The Drafting Committee had adopted draft guideline 4, on environmental impact assessment, with no changes to the text adopted on first reading, on the understanding that the potential impact of adding the word “significant” to the definition of the term “atmospheric pollution” in draft guideline 1 (b) would be addressed in the commentary. There was an understanding that the comments made by States regarding the draft guideline would be taken into account in the commentary.

The Drafting Committee had adopted draft guideline 5, on the sustainable utilization of the atmosphere, with one small change to the text of paragraph 2 as adopted on first reading: the word “the” had been inserted before “protection of the atmosphere” for the sake of consistency.

The text of draft guideline 6, on the equitable and reasonable utilization of the atmosphere, had also been adopted with only one change to the text adopted on first reading, namely the insertion of the word “fully” between “taking” and “into account”. In that connection, the Drafting Committee had first considered an alternative proposal, namely to replace the words “taking into account” with “having due regard to”, in line with the United Nations Convention on the Law of the Sea and various international instruments relating to natural resources. While support had been expressed for that wording, in part because it could

be seen as a response to some of the concerns expressed by States, the Drafting Committee had concluded that consistency with the language used in the seventh preambular paragraph needed to be maintained. There was an understanding that an explanation of what was meant by the word “fully” in the context of the draft guideline would be included in the commentary.

The Drafting Committee had adopted draft guideline 7, on intentional large-scale modification of the atmosphere, with some changes to the text adopted on first reading. Those changes were aimed at implementing two proposals made by the Special Rapporteur and a third made by another member of the Commission during the debate. First, the word “only” had been inserted between “should” and “be”, thereby further strengthening the obligation to conduct intentional large-scale modification with prudence and caution. Second, the word “and” had been inserted before “subject to” to clarify that the conduct of activities aimed at intentional large-scale modification was subject to any applicable rules of international law. The insertion of that word had also represented a compromise, since some members had been concerned about the implications of the insertion of the word “only”. Third, the words “including those relating to environmental impact assessment” had been inserted after “international law” to emphasize the importance of such assessment, as reflected in draft guideline 4. The Drafting Committee had accepted those proposals on the understanding that the Special Rapporteur would provide further clarification, in the commentary, of the reasons for inserting the reference to environmental impact assessment.

Draft guideline 8, on international cooperation, was central to the draft guidelines. The Drafting Committee had adopted it with one change to paragraph 2, namely the insertion of the words “and technical” after “scientific”, in accordance with a proposal by the Special Rapporteur. The first sentence of the paragraph now read: “States should cooperate in further enhancing scientific and technical knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation.”

The Drafting Committee had adopted draft guideline 9, on the interrelationship among relevant rules, without any changes to the text adopted on first reading. However, there had been some debate regarding the meaning of the last sentence of paragraph 1, which stated that the identification, interpretation and application of relevant rules “should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties” and “the principles and rules of customary international law”. The Drafting Committee had considered various alternative formulations, including “the principles and customary rules of international law”, but had concluded that such wording would lead to a substantive debate on the applicable sources of international law, for which there was no time. Therefore, the Drafting Committee had adopted the paragraph without any changes. Nevertheless, there was an understanding that it could be noted, in the commentary, that the paragraph was without prejudice to the relevance that “general principles of law” might have in relation to the draft guidelines.

Paragraphs 2 and 3 of the draft guideline, which addressed the harmonious development of new rules of international law relating to the protection of the atmosphere and special consideration for persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation, respectively, had also been adopted without changes.

Draft guideline 10, on implementation, had been adopted by the Drafting Committee without any changes to the text adopted on first reading.

With regard to draft guideline 11, which concerned compliance with obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, the Drafting Committee had adopted paragraph 1 without changes to the text adopted on first reading. Paragraph 2 had been adopted with one technical change, namely the deletion of the comma before the words “as appropriate” in the introductory phrase. In the text adopted on first reading, it had been ambiguous whether those words related to the use of “facilitative or enforcement procedures” or to the phrase “in accordance with the relevant agreements”. The Drafting Committee had been of the view that the latter interpretation should be excluded; the removal of the comma would make it clear that procedures must always be in accordance with the relevant agreements. It had been reiterated that the terms “facilitative procedures” and “enforcement procedures” had been carefully

chosen after a review of compliance mechanisms in multilateral environmental agreements, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

With regard to draft guideline 12, on dispute settlement, the Drafting Committee had adopted paragraph 1 without changes to the text adopted on first reading, but had decided to make two technical changes to paragraph 2. First, the words “Given that” had been replaced with “Since”, which had been considered more appropriate in the context of a set of draft provisions. Second, the words “technical and scientific” had been replaced with “scientific and technical” for consistency with the wording of draft guideline 8 (2).

The Drafting Committee recommended that the Commission should adopt, on second reading, the texts and titles of the draft guidelines and preamble.

The Chair invited the members of the Commission to proceed with the adoption of the texts and titles of the draft guidelines and preamble provisionally adopted by the Drafting Committee on second reading, as set out in document [A/CN.4/L.951](#).

Draft preamble

The draft preamble was adopted.

Draft guidelines 1 to 12

Draft guidelines 1 to 12 were adopted.

The Chair said he took it that the Commission wished to adopt, on second reading, the texts and titles of the draft guidelines and preamble on the protection of the atmosphere, as a whole, as contained in document [A/CN.4/L.951](#).

It was so decided.

Mr. Murase (Special Rapporteur), speaking via video link, said that he wished to thank all the members of the Drafting Committee for the topic “Protection of the atmosphere” for their dedicated work, which had enabled the Commission to adopt the draft preamble and guidelines on second reading.

Organization of the work of the session (agenda item 1) (*continued*)

Ms. Oral (Co-Chair of the Study Group on sea-level rise in relation to international law) said that, in addition to Mr. Aurescu, Mr. Cissé, Ms. Galvão Teles and Mr. Ruda Santolaria, who were the other Co-Chairs, the Study Group on sea-level rise in relation to international law was composed of: Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov.

The meeting rose at 4.05 p.m.