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## PROTECTION OF THE ATMOSPHERE

**Statement of the Chairman of the Drafting Committee,**

**Mr. Mathias Forteau**

**2 June 2015**

Mr. Chairman,

I am pleased today to present the first report of the Drafting Committee for the sixty-seventh session of the Commission, on the topic "Protection of the atmosphere". I wish to indicate that the present Statement of the Chairman of the Drafting Committee, as well as any other statement of the Chairman during this first part of the session, will be posted on the website of the Commission both in French and English. In addition, I wish to stress that the Drafting Committee worked, during the first part of the session, both in English and French.

The report of the Drafting Committee on the topic "Protection of the atmosphere" is contained in document, A/CN.4/L851. It contains a preamble and three draft guidelines.

At the current session, the Drafting Committee devoted five meetings – the 3rd to seventh, on 13, 18, 19, 20 and 21 May 2015, to the consideration of the draft guidelines referred to it by the Commission on 12 May 2015.

Before I address the details of the draft guidelines provisionally adopted, I should like to pay tribute to the Special Rapporteur, Mr. Shinya Murase, whose mastery of the subject, constructive spirit and cooperation greatly facilitated the work of the Drafting Committee and made my task, as chair, easier. I am also most grateful to the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. I would also wish to thank the Secretariat for its invaluable assistance. And, as always, the interpreters have continued to perform, behind the scenes, a challenging task for the Drafting Committee.

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Mr. Chairman,

At its 3249th meeting, on 12 May 2015, upon the completion of its debate on the topic, the Commission decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report (A/CN.4/681) to the Drafting Committee, with the understanding that draft guideline 3 be considered as part of a preamble. Moreover, the Special Rapporteur proposed to defer the referral by the Commission of draft guideline 4 to the Drafting Committee pending further analysis next year. It will also be recalled that the Special Rapporteur, in his summing up of the debate, suggested some adjustments to the proposed draft guidelines and proposed some preambular paragraphs, based on the various comments made by members. Accordingly, the Drafting Committee had before it a working paper containing the adjusted proposals made by the Special Rapporteur.

I shall now introduce the report of the Drafting Committee. Mr. Chairman, before turning to the draft guidelines as provisionally adopted, I would like to point out an error in the title of the report, which refers to draft "Conclusions". This will be corrected to read draft "Guidelines".

I will begin with draft guideline 1, "**Use of terms**", and return to the preambular paragraphs at the end of this statement.

**Draft guideline 1: "Use of terms"**

It is understood that the "Use of terms" set out is for the purposes of the draft guidelines. Paragraph (a) defines the term "atmosphere". As proposed by the Special Rapporteur, the definition of "atmosphere" had two components. The physical aspect sought to reflect the characteristics of the atmosphere as identified in the scientific literature. It corresponds to the definition offered by the Intergovernmental Panel on Climate Change (IPCC) in its 5th assessment report, in 2014. The functional aspect highlighted the fact that the atmosphere is a dynamic medium within which the transportation and dispersion of polluting substances occurs. This second aspect gave rise to discussions in the Drafting Committee. The reference to "degrading substances" raised the problem of what these substances were, as well as what was meant by "dispersion". Further, even though it was recognized that trans-continental movement of polluting substances is one of the major concerns regarding the present-day atmospheric environment, concerns were raised that this reference in the definition of "atmosphere" would unnecessarily limit it, and carry a negative connotation, perhaps even implying that the transport and dispersion of degrading substances in the atmosphere is somehow desirable or acceptable. It was agreed to delete this second element of the proposed definition, leaving a short simple first element.

The other aspect of the discussions, which had also been the subject of debate in Plenary, was whether it is necessary to define "atmosphere" at all, given that in other comparable situations, like the law of the sea, the sea had not been defined. It was recalled that the informal dialogue with Scientists that members of the Commission had held on 7 May 2015 revealed that there were a variety of ways in which the atmosphere could be defined. It was noted that the brief definition remaining after deletion of the functional element seemed too basic, and some members questioned whether it would be

useful. It was countered by others that there were other instances in which the Commission itself had deemed it appropriate to define certain terms in similar situations. This was the case, for example, with respect to its consideration of the Law of Transboundary aquifers in which “aquifers” are defined. Accordingly, it was agreed that the definition be brief, focusing on the substance of what the “atmosphere” is, leaving aside the functional aspects for subsequent elaboration, presumably in a preamble, bearing in mind that this definition is only for the purpose of the present guidelines.

Paragraph (a) of draft guideline 1 therefore now reads: **“Atmosphere” means the envelope of gases surrounding the Earth.**

Paragraph (b) of draft guideline 1 addresses the meaning of “atmospheric pollution”. The decision was taken to define “atmospheric” pollution instead of “Air” pollution, as initially suggested by the Special Rapporteur, to remain within the ambit of the present project which deals with the protection of the atmosphere. The general point was made, both in relation to this draft definition and the others proposed by the Special Rapporteur, that it was not straightforward for the Drafting Committee to formulate definitions at this stage, before deciding what the substantive provisions of the draft guidelines would consist of. This meant that it was difficult to know, for example, whether the definition of atmospheric pollution should address both natural and man-made forms of pollution. It was ultimately agreed, however, that a definition was both possible and needed at this stage and that the focus of the draft guidelines should be on sources of pollution “by humans”. These words were therefore included in draft guideline 1 (b).

A major part of the discussion concerned whether the definition of atmospheric pollution should be limited to transboundary pollution, as in the 1979 Convention on Long-range Transboundary Air Pollution, or whether pollution of the atmosphere within one State should be within the scope of the draft Guidelines. Although it was agreed that atmospheric pollution within the territory of one State could certainly be a matter of concern, it was underlined by some members that international law had not to date addressed such pollution. Existing international instruments were either concerned with

transboundary pollution, or other matters affecting the global atmosphere, such as emissions of greenhouse gases, which are addressed in the UN Framework Convention on Climate Change. A possible threshold for the seriousness of atmospheric pollution within a single State was proposed as an alternative approach. Some members proposed using the expression “significant” effects or damages, but the Committee was unable to arrive at an appropriate formulation. It was ultimately agreed that the definition should be limited to pollution whose effects both extend beyond the State of origin, and which are of sufficient gravity to endanger human life and health, and the Earth’s natural environment.

A further aspect of the discussion concerned the reference in the Special Rapporteur’s original draft to “energy” as well as “substances” as a source of atmospheric pollution. There were concerns that it was unclear what this might refer to. Some members were concerned that it might be understood, for example, as addressing nuclear energy, whereas this form of energy could be considered among the least polluting compared to coal and oil powered sources of energy. Other members considered that energy, including nuclear energy, should not fall outside the remit of the draft guidelines. It was feared that, since Article 1 (a) of the 1979 LRTAP Convention and Article 1, paragraph 1 (4) of the 1982 UNCLOS provide for “energy” in addition to “substances,” it would create a significant gap if the draft guideline did not refer to “energy.” Consideration was given to replacing “energy” with “emissions and releases”, which were words that had been used in other international instruments, such as the Minamata Convention on Mercury. Ultimately, however, the Committee decided not to use these words since, unlike the Minamata Convention, it would remain unclear in the current draft guidelines exactly which “emissions and releases” would constitute atmospheric pollution. The definition therefore refers only to “substances”, with the agreement that the commentaries will define the term “substances” and explain whether energy or anything else is thereby included, taking into account that some members strongly opposed the inclusion of nuclear energy in this definition.

Finally, the phrase “contributing to” was substituted for the phrase “resulting in” to put more emphasis on the fact that atmospheric pollution is due to the global, accumulative effect of the introduction or release of substances into the atmosphere.

Paragraph (b) of draft guideline 1 therefore reads: **“Atmospheric pollution” means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth’s natural environment.**

Having dealt with a number of the issues of principle in relation to the definition of "atmospheric pollution", the Drafting Committee was able to move relatively quickly to agreement on the definition of "atmospheric degradation" in draft guideline 1 (c). It was again agreed that, although atmospheric degradation can be caused by natural phenomena such as volcanic eruptions, the draft guidelines should only apply to alterations of the atmosphere caused by humans, bearing in mind that the definition covers both direct and indirect alteration of atmospheric conditions by humans. Further, it was agreed that the structure and formulations used in this definition should, as far as possible, follow those provisionally adopted for the definition of "atmospheric pollution". However, since "atmospheric degradation" referred to a global phenomenon, not a transboundary one, it was not necessary to restrict the definition to deleterious effects extending beyond the State of origin. Given that the definition could therefore apply to actions occurring within a single State, the members considered that it was necessary to include a suitable threshold for its application. The word “significant” was included before “deleterious effects”, which follows the precedent of Article 1.1 of the UN Framework Convention on Climate Change.

Paragraph (c) of draft guideline 1 reads: **"Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.**

## Draft Guideline 2: Scope of the guidelines

Having thus completed consideration of draft guideline 1, the Drafting Committee turned its attention to draft guideline 2, which deals with the scope of the guidelines in four paragraphs, and which includes some of the substance of the decision adopted by the Commission in 2013 regarding the scope of the project. For the sake of time, I will not read out the content of the remaining paragraphs, but will refer to the texts as provisionally adopted set out in the L document that you have before you.

Paragraph 1 gave rise to a discussion concerning whether the draft guidelines should indeed set out "basic principles", as proposed by the Special Rapporteur, and whether the use of this phrase implied that the guidelines would include legal obligations for States. There was agreement that the word "basic" was unnecessary in any event, and possibly confusing. The phrase "guiding principles" was considered by some members to be more reflective of the purpose of the guidelines. Moreover, they felt it necessary to include a reference to these principles since paragraph 2 of the present guideline excludes some specific principles from the scope of the project. In addition, it was decided to refer to "guiding principles" rather than to "the" guiding principles to highlight that the present draft guidelines are not intended to be exhaustive. Other members retained a concern that the use of the word "principles" could be read as having some form of legal connotation, and should therefore be avoided, and that it could be misleading to give the impression that the draft guidelines would only contain "principles". Ultimately, it was not possible to resolve this difference of views in the drafting Committee, and draft guideline 2.1 therefore contains two sets of brackets, reflecting the two main points of view. The draft guidelines either "**..contain guiding principles relating to**" the protection of the atmosphere, or "**...deal with**" the protection of the atmosphere from atmospheric pollution and atmospheric degradation. A footnote has been added in the L document to state that these alternative formulations will be subject to further consideration, depending on the final content of other guidelines to be adopted in the years to come.

The remaining paragraphs of draft guideline 2 were adopted with little discussion, and only minor amendments to the Special Rapporteur's proposal, as they set out a part of the substance of the decision adopted in 2013 by the Commission on the scope of the current project. Mr. Chairman, I must point out one in error in the L document before the Commission in paragraph 2 of draft guideline 2. In the fifth line of that paragraph, after the words "...transfer of funds", should be added the words "...and technology". Apart from this correction, Mr. Chairman, paragraphs 2, 3 and 4 of draft guideline 2 were provisionally adopted as set out in the L document before you.

### **Draft guideline 5: International cooperation**

Mr. Chairman, in turning to draft guideline 5, I should make clear first that the numbering of the draft guidelines will be corrected at a later stage. The numbers as they appear in the L document at this stage – draft guidelines 1, 2 and 5 - simply reflect their numbering as referred to the Drafting Committee by the Plenary on 12 May 2015.

During the Drafting Committee's consideration of paragraph (a) of draft guideline 5 concerning international cooperation, discussion focused on whether the guideline should be drafted such as to refer to legal obligations upon States to cooperate, or whether less binding language should be used, perhaps encouraging States to cooperate, or stating that they "should" do so. The view was taken by some members that, in the environmental field, more general undefined responsibilities such as some of the principles set out in the 1972 Stockholm Declaration on the Human Environment, and the 1992 and 1997 Rio Declarations, and also Article 3.5 of the UN Framework Convention on Climate Change, tended to be expressed in non-obligatory terms, such as "should". More specific and narrowly defined responsibilities for States, on the other hand, such as those in Article 2 of the 1998 Kyoto Protocol, were expressed in terms of obligations, or other mandatory language.



For these members wishing to avoid obligatory language, the discussion was linked to the earlier discussion of draft guideline 2.1, and the choice of bracketed text to which I have already referred. If the choice were made in draft guideline 2.1 that the guidelines contain "principles", then these members would wish to take a more restrictive approach in draft guideline 5 (a) to ensure that no new legal obligations for States was implied. If the alternative bracketed text in draft guideline 2.1 were chosen, a more flexible approach in draft guideline 5 (a) may be possible. Other members took the view that there was a general duty for States to cooperate under international law, deriving from the 1970 UN Declaration on Friendly Relations among States, and that this could be expressed first in this paragraph, followed by a more specific statement that States "should" cooperate for the protection of the atmosphere. This interpretation of the Declaration on Friendly Relations among States was not accepted by some other members of the Drafting Committee.

Ultimately, paragraph (a) of draft guideline 5 was provisionally adopted as a result of the Special Rapporteur's reformulation of the paragraph as an obligation for States to cooperate with each other and with international organisations "**as appropriate**" for the protection of the atmosphere from atmospheric pollution and atmospheric degradation. Moreover, the mention of good faith was considered as implicit for any international obligation and was therefore deleted. Draft guideline 5 (a) as provisionally adopted is set out in the L document before you.

Paragraph (b) of draft guideline 5 was adjusted by the Special Rapporteur in light of the above discussion to a statement that States "**should**" cooperate in enhancing scientific knowledge, and that cooperation could include exchanges of information and joint monitoring. Draft guideline 5 (b) as provisionally adopted is set out in the L document.

Finally, Mr. Chairman, I will turn to the preambular paragraphs. As requested by the Plenary, the Drafting Committee considered the Special Rapporteur's revised version of his original proposal for draft guideline 3. During the course of the discussions, he submitted a further revised proposal, the first paragraph of which

concerned the essential nature of the atmosphere for sustaining human life and health, and terrestrial and aquatic ecosystems, and determined its protection to be a common concern of humankind. Some members were concerned that the phrase "common concern of humankind" could trigger legal consequences for States, which would not be appropriate in an instrument containing guidelines. Other members considered the phrase to be a factual statement - an expression of concern regarding a global phenomenon - the atmosphere - which need not necessarily carry any legal consequences. Still other members were comfortable with the possibility that the phrase might suggest that the guidelines include legal principles for the protection of the atmosphere, and did not consider this to be contrary to the Commission's 2013 decision regarding the scope of the current project.

A further aspect of the discussion on the preamble concerned the second part of the Special Rapporteur's original definition of the atmosphere, relating to the "functional" element - the transport and dispersion of polluting and degrading substances. The Special Rapporteur had responded to comments in the Plenary debate by redrafting this element to remove any unintended implication that the transport and dispersion of pollutants was in any way a desirable or positive aspect of the atmosphere, or that it formed part of the definition of the atmosphere. This revised approach met with the approval of the Drafting Committee.

The result of the discussions was an agreement to restructure these first two paragraphs of the Special Rapporteur's revised proposal into three paragraphs - a first paragraph acknowledging the essential nature of the atmosphere to life on earth; a second paragraph referring to the transport and dispersion of polluting and degrading substances; and a third paragraph recognising that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is "a pressing concern of the international community as a whole." This latter phrase was proposed by the Special Rapporteur to allay the concerns of those members who preferred to avoid the phrase "common concern of humankind", and to choose instead an expression that the Commission itself had used as a criterion for determining which topics should be brought onto its programme of work, as cited in the ILC Yearbooks of 1997 and 1998, and from which it was agreed

among the members of the Committee that no legal consequences arise on their own. This approach met with the agreement of the Drafting Committee, and you will see it reflected in the first three paragraphs of the preamble as set out in the L document before you.

The fourth paragraph of the preamble contains a further part of the substance of the Commission's 2013 decision regarding the limits of the present topic before the Commission. Discussion focused on the possible re-wording of the paragraph, and whether this would be appropriate since in its formulation as proposed by the Special Rapporteur, the paragraph accurately reflected the understanding reached by the Commission.

For some members, rewording was essential because the formulation in the paragraph reflected a compromise among Commission members, and was inappropriate for an international instrument potentially to be adopted by States. For other members, re-opening the wording in this paragraph would amount to re-opening the 2013 decision of the Commission, which should be avoided. These members also raised the possibility that the paragraph should form part of draft guideline 2 concerning the scope of the guidelines. Ultimately, it was agreed among the members of the Drafting Committee to retain the wording of the 2013 decision in this preambular paragraph, but to add a footnote recognising that the terminology and the location of the paragraph will be revisited at a later stage of the Commission's work on the topic when the whole set of draft guidelines will be adopted. You will see this outcome reflected in the L document in the fourth paragraph of the preamble, and in its footnote at the bottom of the page.

It should be noted that some other paragraphs may be added to the preamble at later stages and that the preamble will be finalized at the end of the first reading.

Mr. Chairman, this concludes my introduction of the first report of the Drafting Committee for the sixty-seventh session. It is my sincere hope that the Commission will be in a position to provisionally adopt the draft guidelines as presented.

I thank you for your kind attention.