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Held at the Palais des Nations, Geneva, on Tuesday, 12 May 2015, at 10 a.m.

Contents

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Present:

Chairman:	Mr. Singh
Members:	Mr. Al-Marri
	Mr. Caflisch
	Mr. Candioti
	Mr. Comissário Afonso
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Korontzis	Secretary to the Commission

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

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/681)

The Chairman invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of protection of the atmosphere (A/CN.4/681).

Mr. Huang said that the protection of the atmosphere was a far more complex topic than the Commission had initially imagined. He was therefore surprised that it had not adopted a more cautious approach: it was attempting to establish legal definitions for scientific concepts that even scientists found difficult to define, something which did not seem to be in keeping with its usual rigorous working methods.

During the debate, a range of views had been well argued and well expressed. Regrettably, however, the discussions had taken a political and emotional turn, with some members conflating opposition to the Special Rapporteur's views with not caring about the planet, while others had approached the topic strictly in terms of the divide between the developed and developing world. Such an approach was counterproductive. There was no need for the Commission to become an environmental protection forum or an NGO. Its members needed to do less propaganda and more legal analysis, to work in harmony in the interests of protecting the environment, a goal that would not be achieved by empty rhetoric or unrealistic legal "guidelines".

Various concerns had been raised in the Sixth Committee about the Commission's choice of topic. The views had been voiced that: an overarching legal framework on protection of the atmosphere was unnecessary, since long-standing instruments already provided sufficient guidance to States; the attempt to extract legal rules from existing treaties and to assert that they were applicable in areas beyond their original scope was potentially harmful; the Commission's pursuit of the topic would severely complicate sensitive ongoing negotiations; and the Commission might not have the expertise to handle the highly technical nature of the topic. The difficult situation the Commission now faced would seem to bear out those concerns.

The Commission faced a dilemma. On the one hand, the understanding reached in 2013 as a result of arduous negotiations was no longer open to debate; on the other hand, the understanding had itself become controversial. The Special Rapporteur had attempted to bypass it by applying a "relatively liberal interpretation". His wish for some leeway was understandable, but his "liberal interpretation" was in fact a total disregard for the 2013 understanding. He admired the Special Rapporteur's ambitious work for the International Law Association, culminating in the adoption in 2014 of a set of legal principles on climate change, but like other members, he wondered whether the Special Rapporteur had similar ambitions for the Commission's final output. The 2013 understanding was the precondition for the study of the topic, and the Special Rapporteur must revert to it.

Turning to the draft guidelines, he said that the three definitions proposed under draft guideline 1 were controversial and not supported by scientific research and international practice. The definition of the atmosphere in subparagraph (a) was still not acceptable to most members. He had doubts about the Commission's capability to draw up a legal definition of the atmosphere, owing to the absence of a clear physical boundary between airspace and outer space. From the legal standpoint, there had to be different legal regimes for different parts of airspace and outer space. If there were not, and the legal regimes were interrelated, there might be lack of clarity in the exercise of State jurisdiction and the attribution of responsibilities, for example in the event of pollution.

After 50 years of deliberations, the Committee on the Peaceful Uses of Outer Space (COPUOS) and its Legal Subcommittee had still not reached agreement on the utility of defining outer space. Some maintained that, with scientific and technological advances and

the commercialization of outer space, a definition would help to establish a single legal system for regulating airspace and outer space and to clarify the limits of the sovereignty and responsibilities of States. Others considered that the existing legal framework worked well and that defining outer space or determining its boundary might hinder future space activities and developments in technology. It seemed unwise for the Commission to go down that same path, especially since any definition of the atmosphere by the Commission would prejudice the work of COPUOS and its Legal Subcommittee.

Air pollution was likewise difficult to define. An increased concentration of carbon dioxide was one of major causes of climate change, yet no clear conclusion could be drawn from current case law and State practice as to whether carbon dioxide itself constituted a pollutant. The United Nations Framework Convention on Climate Change had not identified greenhouse gases as pollutants in general, but had called for the stabilization of the concentration of greenhouse gases in the atmosphere. Furthermore, scientific experiments had showed that the emission of a specific substance constituted an environmental problem only when it was concentrated to a certain degree and under particular meteorological conditions. There were therefore no uniform criteria for establishing what constituted serious air pollution. The Special Rapporteur had cited the Fukushima nuclear accident as proof that nuclear emissions were a source of air pollution; however, such emissions did not come under the scope of the topic.

Members of the Commission had also expressed doubts about the definition of atmospheric degradation. The arbitrary identification of alterations of certain physical elements in the atmosphere as atmospheric degradation was not sufficiently substantiated by scientific experiments and data.

In connection with draft guideline 2, he expressed doubts that the Special Rapporteur would be able to honour the assurance given in paragraph 18 of the report that the draft guidelines would be limited to “transboundary” atmospheric damage.

He shared the doubts expressed regarding the appropriateness of the term “common concern of humankind” in draft guideline 3, for three reasons: first, despite the fact that it was used in several treaties, its exact legal connotations were not clear. It could apply to many issues of global concern ranging from terrorism to climate change. He was certain that 90 per cent of the world’s population had never heard of “the degradation of atmospheric conditions” before the Special Rapporteur had come up with the phrase, and he therefore wondered how could that be called a “common concern of humankind”.

Secondly, a “common concern of humankind” could not effectively embody the legal status of the atmosphere or the legal obligations of States to protect the atmosphere. Much of the atmosphere was in the territorial airspace of States, but a large part lay over international waters or polar areas that were outside State jurisdiction. How, then, could the legal obligations of States to protect the atmosphere be defined without any differentiation between those areas? How, moreover, could the common concern of humankind create two general obligations of States — to protect the atmosphere and to cooperate — while not creating specific substantive obligations? Yet that was the thesis posited by the Special Rapporteur in paragraph 37 of his report.

Thirdly, the *Trail Smelter* case cast doubt on the key question of whether transboundary air pollution could constitute a common concern of humankind.

The general obligation of States to “protect the atmosphere” set out in draft guideline 4 was quite likely a false proposition. Humans needed to adapt to and mitigate the adverse effects of changes in the natural environment, but that was not protection, it was “adaptation and mitigation”, the phrase used in international treaties on climate change. Even if an obligation of States to protect the atmosphere were to be recognized, the merits of defining it as a general obligation still needed to be demonstrated. More study was

needed to identify the specific requirements entailed for States and to find a way to determine when a State failed to meet them. Thus, a sweeping definition of atmospheric protection as a "general obligation" would seem to lack legal rigour.

With regard to draft guideline 5, there was already a consensus that international cooperation was the only effective means of resolving global problems. Some fundamental principles relating to protection of the atmosphere, such as the general obligation of States to cooperate, the peaceful settlement of disputes and common but differentiated responsibilities, were already addressed in binding legal instruments such as the Charter of the United Nations, so there was no need to replicate them. Similarly, ozone depletion and climate change were well regulated under existing legal frameworks. Thus, what protection of the atmosphere lacked was not regulations, but concrete commitments and substantive action, which depended to a considerable degree on the political will of States.

In conclusion, in view of the current inconclusive state of atmospheric studies, the Commission's discussions should be evolving in pace with scientific research and State practice. Additionally, given that members of the Commission had cast such doubt upon the Special Rapporteur's second report and its five draft guidelines, he objected to the referral of any of the draft guidelines to the Drafting Committee.

Mr. Kamto, referring to the continuing debate on the advisability of the Commission's addressing the topic, said that although the Sixth Committee had plainly approved of the project, some members of the Commission still appeared to have lingering doubts. An understanding like the one reached in 2013, which should be termed an "*entente*" and not an "*accord*" in French, should be the first step towards determining the most appropriate way of addressing a topic. If the Commission subsequently wished to provide the Special Rapporteur with precise guidance on how it wished him to proceed, it could and should do so unambiguously, as it had in the past with regard to other topics such as the expulsion of aliens.

The Commission could best make a modest, but vital, contribution to the protection of the atmosphere by formulating general guidelines drawn from the legal standards obtaining in various fields of international activity, rather than by drafting guidelines on the relationship between the protection of the atmosphere and other branches of international law. Section V of the future programme of work, contained in paragraph 79 of the report, should therefore be abandoned. The relevance of section VI was also questionable. Otherwise, the approach adopted by the Special Rapporteur was appropriate, since the guidelines were not supposed to become binding rules.

As it was crucial to have a scientifically approved definition of the atmosphere, fit for the purposes of the guidelines, the Special Rapporteur should consult experts in order to produce in draft guideline 1 a definition that was in keeping with current scientific knowledge. The Commission had no need to go into matters of sovereignty: its aim should be to identify areas where the atmosphere might suffer degradation that harmed the global environment. In draft guideline 2 (b), the whole of the phrase after "as well as their interrelationship …" should be deleted. The contents of draft guideline 3 should be placed in a preamble, because the first part of the sentence did not offer guidance but was a statement of fact, while the second part, which was normative, lacked a foundation in positive international law and might have sizeable and complex legal implications. Any legal rule on the subject could take the form only of a primary norm falling within the legislative competence of States. Even in the absence of a rule of customary law, however, States were under a general obligation to protect the atmosphere "as an element of the global environment", according to the case law of the International Court of Justice and other international judicial bodies. For that reason, the phrase "as an element of the global environment" [*en tant que composant de l'environnement global*] should be added at the end of the sentence in draft guideline 4.

He was in favour of referring draft guidelines 1 (with a revised scientific definition of the term "atmosphere"), 2, 3 (which should become a preamble), 4 and 5 to the Drafting Committee.

Mr. Forteau commended the Special Rapporteur on the constructive spirit he had demonstrated in mapping out a path that would permit headway to be made and a satisfactory conclusion reached on the topic of the protection of the atmosphere. He was personally convinced of the need to address threats to the earth's atmosphere. However, the Commission would not promote the progressive development of international law on that subject by approaching the topic in terms of rights and obligations, or by creating new concepts or principles.

The protection of the atmosphere introduced a new global legal dimension which escaped the individualistic logic underpinning the classic law of international responsibility. Since it was unclear what economic and social challenges lay ahead and whether the international community would have to adapt to climate change, or if it could avert it, the first fundamental question that the Commission must ask was what it wished to achieve through its text and how it could encourage or accompany the courageous political commitments that would be needed, rather than attempting to revolutionize law in order to force the hand of States.

It was questionable whether even a "relatively liberal" interpretation of the 2013 understanding would allow the Commission to determine emergent principles or trends like those mentioned in paragraphs 25 and 73 of the report. Concerning draft guideline 2 (b), he said that he did not consider that the Commission could define the relationship of the present topic with "other relevant fields of international law" and that the term "basic principles relating to" was a less relevant expression than "international rules applicable to" the protection of the atmosphere, such rules being, by definition, limited in number because they were rules of general international law. It had to be remembered that the purpose of the exercise was to define rules of customary international law, not to develop an international code on the environment.

Draft guidelines 1 (b) and (c) were formulated too broadly, since the definition of "air pollution" would cover any direct or indirect source of such pollution, including smoke from a factory and the energy required for air conditioning. Although some States' domestic legislation, like that of France, contained a definition very similar to that in subparagraph (b), the obligation not to cause air pollution could not cover the same activities in domestic and international law. In the past, the Commission's practice had been to adopt international law provisions concerning significant harm. He wondered if the Special Rapporteur intended, by a combined reading of draft guidelines 1 (b) and 4, to give States an obligation at the international level to combat all air pollution at the domestic level. But did that constitute the codification of customary international law? The same comments could be applied to draft guideline 1 (c) in respect of atmospheric degradation.

Draft guideline 2 (a) appeared to limit the scope of the draft guidelines by referring to human activities that had or were likely to have significant adverse effects on human life and health. True, there was a need to introduce a threshold of harm, but the notion of "significant adverse effects" was rather vague. Why not speak of significant "damage", as some earlier conventions had done? It would be simpler to incorporate the contents of draft guideline 2 (a) into draft guideline 1 (b) and to state that, for the purposes of the text, "air pollution" meant solely significant transboundary damage.

Turning to draft guideline 3, he said that if it was decided to retain the expression "common concern of humankind", which referred at best to the threats to the atmosphere and not to its protection, it might be more appropriate to place the reference to "the degradation of the atmospheric conditions" in a preamble, rather than in a guideline. On the

other hand, that term was not included in any treaty concerning the atmosphere, and its content and exact scope were hard to grasp. Indeed it was too broad, since it could cover isolated instances of local pollution, whereas the subject matter of the draft guidelines was global degradation caused by the sum of local pollution. It might therefore be advisable to use the language of the Minimata Convention on Mercury and to say that the draft guidelines concerned air pollution having a "global" effect.

A crucial question with regard to draft guideline 4 was whether the atmosphere was supposed to be protected against the air pollution and atmospheric degradation mentioned in draft guideline 1, or against the human activities defined in draft guideline 2, since the criterion of a threshold of pollution was to be found only in draft guideline 2. At first sight, the idea that "States have an obligation to protect the environment" seemed sensible, provided that the draft guidelines applied only to significant transboundary (or global) damage. In support of that obligation, the Special Rapporteur mentioned a number of ostensibly converging provisions drawn from the Rio Declaration on Environment and Development, the United Nations Convention on the Law of the Sea and the draft articles on the Law of Transboundary Aquifers. However, economic activities on land were obviously quite a different matter to those carried out on the high seas or in watercourses or aquifers. For that reason, the framework for protecting the environment from economic activities jeopardizing the atmosphere had to be different. A blanket ban on air pollution would have consequences that were something else again, as virtually all human activities on land, especially those of the privileged human beings who had access to modern comforts, polluted the atmosphere. Reasoning in terms of States' rights and obligations would therefore be unsuitable. That consideration had led the authors of the Convention on Long-range Transboundary Air Pollution, the Vienna Convention for the Protection of the Ozone Layer and the United Nations Framework Convention on Climate Change to adopt much less draconian wording than that proposed by the Special Rapporteur, and to introduce an undertaking to stabilize or improve the situation, not an obligation of protection. Draft guideline 4 should perhaps specify that "States have a duty to take the appropriate measures to safeguard the atmosphere from any degradation endangering life on earth" [*les Etats ont le devoir de prendre les mesures appropriées en vue de préserver l'atmosphère de toute degradation dangereuse pour la vie sur Terre*]. Or perhaps it could be deleted and only draft guideline 5 retained, as it was more consistent with the current position with regard to States' international legal commitments. In that case, draft guideline 5 (a) should be slightly amended to read "States must cooperate with each other and with relevant international organizations in good faith in order to safeguard the atmosphere from any degradation endangering life on earth" [*les États doivent coopérer de bonne foi entre eux et avec les organisations internationales compétentes en vue de préserver l'atmosphère de toute degradation dangereuse pour la vie sur Terre*].

Since the Commission did not seem to have a clear idea of the general direction that its work on the protection of the atmosphere should take, it might be useful to set up a working group in which that question, as well as whether general conclusions rather than guidelines should be drawn up, could be considered. In the meantime, he would recommend referral of draft guidelines 1 (a) and 5 to the Drafting Committee.

Mr. Kamto said that he had listened with interest to Mr. Forteau's comments on a number of technical legal points. The most important point raised was the question of what the Commission wished to achieve through the topic. He agreed that the Commission should clearly define its objectives. If progressive development of the law were to be given precedence over codification, then the Commission should have the courage to play its part by indicating what attitude States should adopt to counter the threats posed to the atmosphere. As to the so-called 2013 "understanding", a term that was unprecedented in the context of the Commission's work, he wished to reiterate that it referred to a decision that the Commission had taken in order to guide the Special Rapporteur in his work.

Mr. Nolte said that he was grateful to Mr. Forteau for drawing attention to the new legal dimension that had emerged in relation to the protection of the atmosphere. However, he had not quite understood his conclusion, which was that, because of the complex nature of the problem, it would be inappropriate to conceptualize it in terms of rights and obligations. He would have expected him to suggest that a duty to protect the atmosphere should be supplemented with a duty to reduce adverse effects on the atmosphere.

Mr. Forteau said that it was difficult to see what an obligation to protect the atmosphere might entail in State practice, given that States could not avoid polluting the atmosphere. It was for that reason that existing instruments referred to the stabilization and gradual reduction of damage to the atmosphere rather than to an obligation to protect the atmosphere.

Mr. Wako thanked the Special Rapporteur for his second report, which reflected a high standard of scholarship and showed a willingness to take account of the comments of both Commission members and States. He commended the wisdom of the Special Rapporteur's decision to reformulate the three draft guidelines contained in the first report and to include them in his second report. Of course, there was still room for improvement.

As the definition of "air pollution" set out in draft guideline 1 included the introduction of pollutants into the atmosphere, he wondered why the term "atmospheric pollution" had not been used, in the interests of consistency.

There had been differences of opinion regarding what was referred to in draft guideline 3 as the "common concern of humankind". The phrase had apparently been taken from the preambular paragraphs of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity. However, as Mr. Murphy had demonstrated, there was nothing in treaty law, customary international law or case law to suggest that the concept could be considered a legal principle in the context of the atmosphere. Nonetheless, he had been persuaded by Mr. McRae and Mr. Nolte that it could not be inferred from that silence that States had rejected the concept. Without further analysis, it was not possible to affirm that the issue had been specifically addressed — and rejected — in negotiations leading to relevant treaties. In his view, the word "concern" must be given a literal interpretation. A concern was a matter of interest to a person or entity because of the potential positive or, in most cases, negative consequences that it might have for the person or entity in question. He agreed with Ms. Jacobsson's assertion that the only concept that included the words "common" and "humankind" and that appeared to have a legal implication was the "common heritage of mankind". As she had demonstrated, the mere mention of the words "mankind", "humankind", "concern" or "interest" in a sentence did not entail legal implications.

Some delegates to the Sixth Committee had acknowledged that the protection of the atmosphere was one of the most pressing issues confronting humankind, inasmuch as the atmosphere was indispensable to life on earth. Yet the activities of mankind were such that the boundaries between the different regimes for the protection of the environment, whether local, regional or international, were becoming increasingly blurred. In fact, over time, all such regimes would take on an international dimension.

As the Special Rapporteur had noted in his report, the "common concern of humankind" could be considered to be part of developing international law. Although the stage had not yet been reached where legal consequences could be derived from the failure to protect the atmosphere, it was, in his view, only a matter of time before it would. It was therefore important that the Commission should not confine itself to the current situation but should look to the future.

As to the 2013 understanding, he agreed with Mr. Kamto that it was not so much an understanding as a precondition for the Commission's addressing a topic. Accordingly, the

Commission must proceed with due regard for that understanding. While some members of the Commission, himself included, were of the view that, in future, such constraints should not be imposed on any Special Rapporteur, the conditions attached to the understanding must nonetheless be met. As far as the second report was concerned, he saw nothing that violated the terms of the 2013 understanding.

With regard to draft guideline 3, he agreed with those members who felt that it would be more appropriate to place it in the preamble or an introduction to the draft guidelines. As to draft guidelines 4 and 5, it should be possible to identify the rights and obligations of States that could be derived from existing legal principles and rules applicable to the protection of the atmosphere. Furthermore, common principles could also be identified in relevant existing treaties and practice. However, he agreed with Mr. Kittichaisaree that further clarification was required as to the nature of the obligation to protect the atmosphere and of the obligation of States to cooperate with each other. He also thought that the draft guidelines should be human-centric.

He was of the view that all the draft guidelines should be referred to the Drafting Committee for consideration and that the Drafting Committee should give full consideration to all the suggestions that had been made as to how they could be redrafted.

Mr. Al-Marri commended the Special Rapporteur on the high quality of his second report, which built on the foundations laid by his first report and provided a good analysis of the topic. He had moved to reassure those members who were concerned that the 2013 understanding might not have been complied with and had given due consideration to comments made by Commission members at the previous session.

Protection of the atmosphere from all methods of harmful exploitation required a determined effort to develop a legal framework for that purpose. The Special Rapporteur had convincingly set out such a framework, emphasizing the fact that protection of the atmosphere was a common concern of humankind and drawing on legal frameworks and principles developed in relation to the protection of the environment. With respect to the common concern of humankind, he noted that precedents existed in legal instruments dating back to the 1970s relating, for example, to mechanisms to improve the management of submarine resources in the interests of humankind, while taking into account the development interests of States.

The legal framework set out in the second report included the obligation of States to protect the atmosphere and to cooperate with each other in good faith to that end. The Special Rapporteur had indicated that he expected work on the topic to be completed by 2020. It was his own opinion, however, that that time frame should be compressed in view of the pressing need for the prevention of any further harm to the atmosphere. He therefore encouraged the Special Rapporteur to expedite his work on the topic.

Mr. Murase (Special Rapporteur), summing up the debate, said that the insightful and constructive comments made by 22 speakers attested to the importance of the topic. A consensus had been reached that the topic was closely linked to scientific research on the atmosphere, that the scientific perspective was helpful and that the Commission should remain aware of relevant scientific developments, so as not to stray from scientific facts.

During the debate, members had expressed a wide range of opinions concerning the four-point understanding reached by the Commission during its sixty-fifth session. Five members had raised concerns about whether he (the Special Rapporteur) had been successful in adhering to that understanding in his second report, despite his contention that he had indeed done so. His use of the phrases “relatively liberal interpretation” and “middle-ground approach” had not meant to imply that he was seeking to find a compromise between complying with the understanding and abandoning it, but rather to acknowledge that his interpretation of international law and its role in relation to the project

might not correspond exactly to that of some Commission members. He agreed with the proposal made by three members that the language of the 2013 understanding should be reflected in the draft guidelines.

Turning to the future workplan, he explained that he had not intended for future draft guideline 12, to be entitled "Precaution", to refer to the precautionary principle, whose inclusion several members had questioned. The precautionary principle had not been established as a principle of customary international law, and if it was applied as a legal principle, it would have the effect of shifting the burden of proof – an effect that had never been acknowledged by any international court or tribunal. Instead, he planned to refer in draft guideline 12 to "the precautionary approach" or to "precautionary measures".

A few members had expressed concern about references to the interrelationship of the topic with other relevant fields of international law. There was no question but that the topic was linked to the United Nations Convention on the Law of the Sea. Moreover, the links between the topic and international trade law had been a pressing issue for nearly three decades, as demonstrated by article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer and by the World Trade Organization dispute settlement cases. Additionally, it would certainly be necessary to refer to international health law and some of the human rights treaties, if the topic was to be a human-centric project, as had been suggested. Nonetheless, references to that relationship would be made only to the extent necessary and appropriate.

On the issue of dispute settlement, he explained that he had not intended and would not be seeking to establish any new dispute settlement procedures. Rather, he would review those that already existed in international law, pointing out some unique features of environmental disputes relating to the atmosphere that were fact-intensive and science-heavy, such as several of those described in paragraphs 42 to 50 of his first report (A/CN.4/667).

Regarding the relationship between the current topic and the Declaration of Legal Principles relating to Climate Change produced by the International Law Association, he recalled that the International Law Association was an academic, non-governmental institution whose mandate was to study, clarify and develop international law. His inclination would be to refer to those principles as legal writings, to the extent that that was necessary or appropriate.

Turning to the five draft guidelines, he said that he had revised his original proposals in order to take into account the suggestions made by Commission members during the debate on the topic. He had also drafted a few paragraphs of a preamble, to which others could be added at a later stage. The proposed preamble read:

"Preamble

The International Law Commission,

Acknowledging that the atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a common concern of humankind.

Noting that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

[…]

Adopts the following guidelines on the protection of the atmosphere."

For the title of Part I, "General guidelines" — in contradistinction to the title "General provisions" used for draft articles — he was open to suggestions for a better expression.

With regard to draft guideline 1 (a), three members had questioned whether it was ultimately desirable to provide a definition of the atmosphere, while seven had declared such a definition to be necessary and appropriate for the purposes of the draft guidelines. His proposal was a working definition that had been formulated as a matter of practical necessity, and exclusively for the purposes of the draft guidelines. A few members had proposed that the term "particles" might be added. He would defer to the opinion of the Drafting Committee on that question. Even though two members had questioned the need to refer to the functional aspects of "transport and dispersion of substances", he believed that it was crucially important to include them, but he would defer to the opinion of the Drafting Committee on that question as well.

With regard to subparagraph (b), he was not opposed to replacing the words "air pollution" with "atmospheric pollution", as had been proposed by several members, and he had reflected that change in the revised set of draft guidelines. Although he had based subparagraph (b) on article 1 (a) of the 1979 Convention on Long-range Transboundary Air Pollution, the Drafting Committee might consider reformulating it if its members considered that the language of that Convention should be adhered to strictly, as had been proposed by two members. Four members had expressed concern at the insertion of the term "energy" in the definition, whereas four others had supported its inclusion, in principle, while acknowledging that further refinement by the Drafting Committee might be necessary. His own view was that the definition should include the term "energy" in order to avoid a major lacuna.

With regard to subparagraph (c), he had considered it logical to include broader issues in the definition of "atmospheric degradation", given that the previous term, "atmospheric pollution", had been defined narrowly, excluding such global issues as climate change and ozone depletion. Nonetheless, he would not mind deleting the references to air pollution, stratospheric ozone depletion and climate change and referring merely to alterations of the atmospheric conditions, so long as the words "other than atmospheric pollution, caused by human activities" were inserted thereafter, in order to clear up the doubts that had been expressed by two members.

Turning to draft guideline 2, he said that, as had been reiterated by several members, it was important to make clear in subparagraph (a) that the topic dealt only with anthropogenic causes, thereby excluding damages caused by natural phenomena such as volcanic eruptions or desert sands. He trusted that the Drafting Committee would find appropriate language to address the concerns expressed in that regard. There was admittedly some overlap between subparagraphs (a), (b) and (c), owing to their status as components of a draft guideline on scope, not definitions. However, if the draft guideline was to be simplified, it was important to retain the phrases "human activities", "that have or are likely to have" and "significant adverse effects", which he considered to be the most relevant factors in delimiting the scope of the project.

With regard to subparagraph (b), several members had questioned the suitability of the word "interrelationship", and he accordingly proposed to replace it with "relationship". He also proposed to replace the word "fields" with "principles".

As to subparagraph (c), he proposed to delete the word "intended", pursuant to the request of one member, and to add to the end of the subparagraph the phrase "nor are questions related to outer space, including its delimitation, part of the draft guidelines".

Given that subparagraph (c) was a saving clause concerning airspace, it seemed to be the natural place to include that component of the Commission's 2013 understanding.

Three members had proposed that the 2013 understanding should be inserted in the text on the scope of the draft guidelines. He had accepted that proposal, in part, and had included aspects of the understanding that concerned the scope of the draft guidelines in a new subparagraph (d), which read:

> "(d) These draft guidelines will not deal with, but are also without prejudice to, questions such as the liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds to developing countries, including intellectual property rights. These guidelines also will 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 remaining part of the 2013 understanding had been inserted into the second clause of the preamble, which was a more suitable place for the aspect concerning the basic approach of not interfering with relevant political negotiations.

Turning to Part II of the project, he stressed that the title was "Basic principles", not "General principles", as had inadvertently been inserted into the annex to his second report. The title was meant to refer to the basic principles of international law and not to the general principles of law recognized by civilized nations. He had asked the Secretariat to issue a corrigendum.

Draft guideline 3, entitled "Common concern of humankind", had been the most controversial in the debate. Several members had highlighted the continuing importance of the concept of "common heritage of humankind" in relation to the United Nations Convention on the Law of the Sea and in other contexts. In his first report, he had indicated that a reference to the protection of the atmosphere as a common concern of humankind did not impose specific substantive obligations on States. In his second report, he had focused on the general obligations that such a reference did impose on States. Both reports described substantive, not procedural, obligations. Nonetheless, many members had expressed the view that the term "common concern of humankind" was not a legal principle but merely a concept or a statement of fact, devoid of any normative content. Based on the concerns and reservations expressed in the debate, he had accepted the recommendation of the majority of the members to move the reference to the common concern of humankind to the preamble.

Draft guideline 4 had also given rise to much controversy. Yet, in his view, it reflected one of the most important principles in the project. The Commission had been divided as to whether it should be retained or not. He consequently wished to withdraw his request to send it to the Drafting Committee at the current session, which would allow him time for further reflection on the valuable comments made by members during the debate. In his third report, he would address the principle of *sic utere tuo ut alienum non laedas* and other principles, and he hoped to be able to present a clearer picture on the obligation of States to protect the atmosphere by identifying specific obligations under existing international law.

Commission members had generally welcomed draft guideline 5, and several members had provided useful suggestions for its improvement. His revised proposal was, at the end of the first sentence, to add the phrase "which should be made publicly available in a transparent manner".

In sum, 12 members had expressed support for sending all five draft guidelines to the Drafting Committee, while 10 had been in favour of sending only some. Seven

members had opposed referring draft guidelines 3 and 4 to the Drafting Committee, while two had opposed referring draft guideline 4. Three members had not been in favour of referring draft guideline 1 (a), and one member had not been in favour of referring draft guideline 2.

He therefore requested that draft guidelines 1, 2, 3 and 5 should be referred to the Drafting Committee, on the understanding that guideline 3 was to be moved to the preamble. In light of the need for further review and given the concerns of Commission members, he was not requesting the referral of draft guideline 4 at the current session. He hoped that the concerns expressed by some members with regard to the wording of draft guidelines 1, 2, and 5 could successfully be addressed in the Drafting Committee. He also requested that the parts of the preamble that he had read out earlier should be considered by the Drafting Committee at the current session. Lastly, he did not consider it necessary at the current stage to set up a working group on the topic, as had been proposed by Mr. Forteau.

The Chairman thanked the Special Rapporteur for his flexibility in incorporating the views expressed by members in a revised set of draft guidelines.

Sir Michael Wood requested reassurance that, in moving draft guideline 3 to the preamble, the Commission was not necessarily endorsing the exact words "common concern of humankind". In his second report, the Special Rapporteur had referred to a number of alternative ways in which the notion could be described, which he trusted that the Drafting Committee could consider. If that was agreed, he could accept the proposal that was before the Commission.

Mr. Petrič said that he supported the proposal for the Drafting Committee to clarify all of the questions raised in the proposed guidelines. However, if it reached an impasse on a particular issue, the Commission might wish to revisit Mr. Forteau's proposal to set up a working group.

Mr. Hmoud said that he supported draft guideline 4 and considered there to be a basis for its reformulation by the Drafting Committee; however, he would go along with the Special Rapporteur's proposal to postpone its finalization until the sixty-eighth session. With regard to draft guideline 3, he was concerned at the Special Rapporteur's comment that a common concern of humankind imposed a general obligation on States, given that such an obligation produced a wide variety of legal effects. He had not heard any Commission member endorse that notion, and in his own view, it did not *per se* impose a general obligation on States. He could accept Sir Michael Wood's idea that the text of draft guideline 3 should be reformulated so as to portray it as an understanding by the international community on certain issues, but it should not carry legal obligations.

Mr. Murphy requested confirmation of his understanding that it was the Drafting Committee that would determine the proper format for the introductory text to the draft guidelines, whether that turned out to be a preamble, an introduction or some other format.

The Chairman confirmed that it was indeed the Drafting Committee that was entrusted with deciding that matter. If he saw no objection, he would take it that the Commission wished to refer draft guidelines 1, 2, 3 and 5 to the Drafting Committee, on the understanding that guideline 3 would be placed in the introductory text.

It was so decided.

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

Mr. McRae (Chairman of the Study Group on the Most-Favoured-Nation clause) said that the members of the Study Group were Mr. Caflisch, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Tladi, Sir Michael Wood and Mr. Vázquez-Bermúdez, *ex officio*.

The meeting rose at 1 p.m.