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Summary record of the 3355th meeting

Topic:
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Programme, procedures and working methods of the Commission and its documentation (*continued*)* (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

47. The CHAIRPERSON proposed, in the light of the consensus that had emerged from consultations, that the topic “Succession of States in respect of State responsibility” should be included in the Commission’s programme of work and that Mr. Šturma should be appointed as Special Rapporteur.

It was so decided.

The meeting rose at 11.30 a.m.

3355th MEETING

Wednesday, 10 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aureescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Protection of the atmosphere¹⁰⁵ (A/CN.4/703, Part II, sect. B,¹⁰⁶ A/CN.4/705,¹⁰⁷ A/CN.4/L.894¹⁰⁸)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the protection of the atmosphere (A/CN.4/705).

2. Mr. MURASE (Special Rapporteur) said that he would first like to express his appreciation to the members of the Commission for their active participation in the informal dialogue session with atmospheric scientists on 4 May 2017, a summary of which would shortly

* Resumed from the 3350th meeting.

¹⁰⁵ At its sixty-seventh and sixty-eighth sessions (2015 and 2016), the Commission provisionally adopted five preambular paragraphs and draft guidelines 1 to 8, and the commentaries thereto (*Yearbook ... 2015*, vol. II (Part Two), pp. 19–26; and *Yearbook ... 2016*, vol. II (Part Two), pp. 172–179).

¹⁰⁶ Available from the Commission’s website, documents of the sixty-ninth session.

¹⁰⁷ Reproduced in *Yearbook ... 2017*, vol. II (Part One).

¹⁰⁸ Available from the Commission’s website, documents of the sixty-ninth session.

be uploaded on to the website of the International Law Commission. Unfortunately, in order to meet the 30,000-word limit imposed on reports, he had had to delete, among other things, the two annexes, a number of footnotes and references and two subparagraphs from draft guideline 9. As a result, there were some discrepancies in the cross-referencing between paragraphs. In addition, paragraph 65 had been included by mistake and should be ignored.

3. The report addressed the interrelationship between the law relating to the protection of the atmosphere and other branches of international law, notably the law of international trade and investment, the law of the sea, and human rights law. Those areas had been highlighted because of their intrinsic links with the law relating to the protection of the atmosphere.

4. In chapter I of the report, he discussed the general guiding principles of interrelationship. The real strength of international law, as an integral system of law, lay in interrelationships. The law relating to the protection of the atmosphere was not a sealed or autonomous law: it existed and functioned in relation to other fields of international law, as had been stressed by the Study Group on fragmentation of international law in its 2006 report.¹⁰⁹ Guided by the conclusions of the Study Group,¹¹⁰ the Special Rapporteur discussed in his fourth report the question of interrelationship as a matter of ensuring coordination when there were overlaps or conflicts between two multilateral treaty regimes. In cases of conflict between two multilateral treaties, the interpretation of those treaties should be guided by the rules set out in article 30 of the 1969 Vienna Convention. He had also considered the question of a “systemic interpretation” of multilateral treaties under article 31, paragraph 3 (c), of the 1969 Vienna Convention. The concept of “mutual supportiveness” had been considered the most basic guiding principle for coordination, as confirmed by the relevant international instruments and judicial decisions. Those considerations were reflected in draft guideline 9 concerning the guiding principles on interrelationship. It should be noted that all the draft guidelines proposed in the report employed the hortatory “should”, rather than binding expressions.

5. Chapter II of the report dealt with the interrelationship between the law relating to the protection of the atmosphere and international trade and investment law. In the area of international trade law, there had been heated debates and abundant jurisprudence since the early 1990s on “trade and the environment” in the context of article XX of GATT, which provided that environmental measures by States should not be applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”.

6. The most important decision in relation to the atmosphere in that context was that of the Appellate Body of the World Trade Organization (WTO) in the 1996 *United States–Standards for Reformulated and Conventional Gasoline* case, in which it declared that “clean air was a

¹⁰⁹ *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

¹¹⁰ *Ibid.*, vol. II (Part Two), pp. 177–184, para. 251.

‘natural resource’ that could be ‘depleted’”, noting that, in accordance with article 31, paragraph 3 (c), of the 1969 Vienna Convention, GATT was “not to be read in clinical isolation from public international law” (pp. 14 and 17 of the decision). Thus, the Appellate Body had emphasized the importance of adopting a systemic interpretation in a spirit of mutual supportiveness and sustainable development. The concept of mutual supportiveness had been confirmed in the *United States–Import Prohibition of Certain Shrimp and Shrimp Products* case as the guiding principle in the broad context of trade and the environment. By contrast, the decision of the European Court of Justice in the *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* case had had to be suspended because of the lack of sufficient mutual supportiveness between the relevant aviation agreements and the European Union Greenhouse Gas Emissions Trading Scheme.

7. The concept of mutual supportiveness had first appeared in Agenda 21¹¹¹ and had been incorporated in various environmental agreements, including the United Nations Framework Convention on Climate Change. It had also been stressed by the WTO Committee on Trade and Environment and in several declarations agreed at WTO ministerial conferences. The concept was also taken as a guiding principle in some free trade agreements.

8. Although the relationship between international investment law and the environment had not been examined as closely as that between trade law and the environment, the relevant treaty practice and arbitral cases confirmed that the guiding principle was the same in both trade and investment law. Thus, draft guideline 10 covered both.

9. Chapter III of the report addressed the interrelationship with the law of the sea. The close interaction between the oceans and the atmosphere had been the main issue discussed by the scientific experts at the dialogue the previous week. Polluting substances from land-based sources were transported to the oceans through the atmosphere. Temperature rises in the oceans as a result of global warming were the cause of ocean acidification and extreme weather. Emissions from ships were also a problem. Some of those problems were addressed in the provisions of the United Nations Convention on the Law of the Sea, while others were addressed in the relevant International Maritime Organization (IMO) regulations and conventions regulating land-based pollution of the oceans through the atmosphere. The rules of the United Nations Convention on the Law of the Sea and related instruments generally supplemented those on the protection of the atmosphere, but the *Nuclear Tests* case heard by the International Court of Justice and *The MOX Plant Case* heard by the International Tribunal for the Law of the Sea raised the question of the mutual supportiveness of those two branches of law.

10. One issue that could not be ignored in the context of the law of the sea was the sea-level rise caused by global warming and the resulting baseline issue. Sixth

Committee delegates from small island States had spoken up strongly on that matter in recent years. The International Law Association Committee on Baselines under the International Law of the Sea had been considering the options for adjusting the baseline for the countries affected. He believed that the issue should be referred to in the draft, and it was thus included in the second paragraph of draft guideline 11, on the interrelationship of law on the protection of the atmosphere with the law of the sea.

11. Chapter IV of the report considered the interrelationship with international human rights law. International human rights norms were relevant to the protection of the atmosphere to the extent that they provided for rights and obligations that could protect humans from atmospheric pollution and atmospheric degradation. In the decisions and jurisprudence of human rights bodies and tribunals, the right to life was often evoked as a general right and the right to health and the right to environment as specific rights when considering remedies for damage resulting from atmospheric pollution and atmospheric degradation. Of course, it was not easy to claim remedies for such damage because of the need to prove a direct link of causality, among other things. The limitations of the extra-judicial application of human rights treaties could be another barrier.

12. Certain groups of people deserved special attention under international law because of their vulnerability to the impact of atmospheric pollution and degradation. They included indigenous people and people living in small island States and low-lying States, who were in danger of being forced to migrate as sea levels rose. Women, children and the elderly, as well as persons with disabilities, also needed to be protected. Future generations, which were already referred to in draft guideline 6 on the equitable and reasonable utilization of the atmosphere,¹¹² should be specifically mentioned in the context of human rights protection. Draft guideline 12, on the interrelationship with human rights law, took those considerations into account.

13. He wished to stress that each of the four draft guidelines he had referred to had distinct content and standing, and therefore should not be merged.

14. In his next report, he intended to deal with domestic implementation, compliance at the international level and certain specific features of dispute settlement. As he had previously mentioned, it was not his intention to draft a set of dispute settlement clauses. Rather, he would point out some of the features that might be considered unique to disputes over the protection of the atmosphere, which tended to be fact-intensive and science-heavy. The assessment of scientific evidence was therefore an important part of the dispute settlement process. He hoped that the first reading on the topic would be concluded in the following year.

15. Lastly, he would like to mention some of the outreach activities he had undertaken in recent years in relation to the topic of protection of the atmosphere. He had given lectures on the topic at various universities and

¹¹¹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex II.

¹¹² *Yearbook ... 2016*, vol. II (Part Two), p. 177 (draft guideline 6).

institutions in China and Europe; he had spoken at various forums in Japan, including the annual meeting of the Japanese Society of International Law; and he had made presentations on the topic at the annual conferences of the Asian–African Legal Consultative Organization. It was gratifying to see that there was strong enthusiasm and support outside the Commission for work on the topic.

16. Mr. TLADI said that, while he thought the Commission had made good progress on the topic in the previous year,¹¹³ he found it difficult to comment on the fourth report, because he was not really sure where its contents fitted into the broader scheme of the topic. In fact, he was really not sure whether the issues covered ought to have been covered, at least not as topics in and of themselves. The issues of interrelationships and mutual supportiveness could provide guidance to the Special Rapporteur and the Commission on how to approach the topic of protection of the atmosphere, but they should not serve as self-standing topics.

17. On first reading the report, he had been happy to note that, for once, the infamous 2013 understanding,¹¹⁴ on the basis of which the topic had been included on the Commission's agenda, would not be part of the debate. However, he suspected that the subjects considered in the report were considered precisely because the real issues that the Special Rapporteur had intended to cover were excluded from the scope of the topic, leaving him no choice but to scrape the bottom of the barrel with generic issues that could apply just as well to other topics such as crimes against humanity, the protection of the environment in relation to armed conflicts or the immunity of State officials from foreign criminal jurisdiction. Indeed, the issues of mutual supportiveness and interrelationships would be just as relevant for any topic seeking to address normative or primary rules. They might well serve as the basis for the Commission's approach to all its topics, but he very much doubted that it was appropriate to consider them as individual topics.

18. Moreover, the Special Rapporteur referred to mutual supportiveness and interrelationships as “principles”, but they were not legal principles in the way that, say, the precautionary principle was a legal principle. Rather, they were common-sense objectives. Certain legal principles, such as the principle of interpretation found in article 31, paragraph 3 (c), of the 1969 Vienna Convention, had been developed to facilitate those objectives.

19. In paragraph 8, the Special Rapporteur referred to “self-contained” or “sealed” regimes, while noting that international law related to the protection of the atmosphere was not one of them. Although the Study Group on fragmentation of international law had referred to self-contained regimes in its conclusions, he preferred to steer clear of the phrase “self-contained”; *lex specialis*, special rules, or even areas, branches or fields of international law were more appropriate terms.

20. The apparent justification for the detailed assessment of mutual supportiveness and interrelationships that “[t]here is a strong tendency nowadays in international

law towards ‘compartmentalization’ ... which often leads to its fragmentation”, in paragraph 12, was wholly unsupported subsequently in the report. The only authority for that statement was the Special Rapporteur's own book. It would have been better for the Special Rapporteur to provide some examples of that so-called “tendency” towards compartmentalization. In his own experience, the trend was actually in the opposite direction, away from compartmentalization.

21. Assuming that the Special Rapporteur was correct about the need to isolate specific areas of international law to buttress his principles of mutual supportiveness and interrelationships, he would be interested to know why human rights, the law of the sea, trade and investment had been selected. Why not, for example, biodiversity or even hazardous wastes? International law rules regulating biodiversity were more likely to relate to the protection of the atmosphere, and in a more direct way, than either human rights or investment law. Over and above the arbitrariness of the choices made, he was concerned about the Special Rapporteur's characterization of the concepts of mutual supportiveness and interrelationships and how they were reflected in legal doctrine. In paragraph 10, the Special Rapporteur cited the conclusions of the work of the Study Group on fragmentation of international law. Yet, conclusion (2), which apparently provided the main justification for his report, did not call for mutual supportiveness or interrelationships between areas of international law, but rather between rules, norms or principles—including rules, norms and principles from within the same field or area.

22. Thus, the idea of mutual supportiveness or interrelationships between areas was problematic. The flaw in the Special Rapporteur's approach could be illustrated by the discussion of the free trade–environment tension. That tension was not, as might be suggested by the Special Rapporteur, between areas of international law, but between different rules of international law. Some rules that fell within the area of the environment might be more pro-trade than pro-environment. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, for example, very much promoted free trade and investment through its various mechanisms, namely joint implementation, international emissions trading, and even the clean development mechanism. Similarly, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, while constituting international environmental agreements, served, on the whole, to promote and protect free trade. It was not the areas of international law that were at stake in the environment–trade tension, but the rules within those areas. For example, in the *EC Measures Concerning Meat and Meat Products (Hormones)* case before the WTO Appellate Body, Canada and the United States had relied on the provisions of an environmental agreement, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, to trump environmental concerns.

23. In some cases, the Special Rapporteur's characterization of the rules in the various areas of international law was, at best, inaccurate. It was suggested in paragraph 52,

¹¹³ *Ibid.*, chap. VIII.

¹¹⁴ See *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

for example, that the United Nations Convention on the Law of the Sea covered atmospheric pollution. It did not. The fact that article 194, paragraph 3 (a), referred to “pollution” and “atmosphere” did not mean that it covered atmospheric pollution. In fact, the article covered marine pollution, including pollution from or through the atmosphere, not atmospheric pollution. Similarly, it was stated in paragraph 55 of the report that parties to the Convention were obligated to comply with rules in other conventions as rules of reference. That was, at best, a highly questionable statement, the only authority for which was what appeared to be an unpublished manuscript cited in the first footnote to paragraph 55. The provisions referred to in that paragraph did not have the effect the Special Rapporteur claimed they did. Article 211 of the United Nations Convention on the Law of the Sea, for example, simply required States to adopt measures. Those measures would be binding only on the States that adopted them. Article 211 further stated that those measures ought to meet certain standards. That did not magically obligate States parties to the Convention to comply with other treaties to which they were not a party. It simply obligated them to ensure that if they did adopt other measures, those measures met certain standards.

24. Thus, even if the Commission was to consider the draft guidelines proposed by the Special Rapporteur, the Drafting Committee should redraft them to focus on specific rules, norms or principles of international law, rather than on broad areas such as the law of the sea, investment law and so on.

25. As stated by the Special Rapporteur, it was true that, in its work, the Commission should apply the principles and rules of general international law to various aspects of the problem of atmospheric protection. That should, however, be the basic approach taken at all times, and, at that late stage of the work on the topic, did not need to be addressed in a dedicated report and certainly not in a draft guideline. He would like to think that draft guideline 3, on the obligation to protect the atmosphere,¹¹⁵ had been adopted following that approach.

26. It was clear from the report that the concepts of mutual supportiveness and interrelationship could be applied, and reflected a number of legal principles that did apply, to the protection of the atmosphere, including the principle of sustainable development. In paragraph 12, for example, the Special Rapporteur noted that the concept of interrelationship reflected the interdependence of environmental protection and social and economic development. It was a question of mutual supportiveness not between areas of international law but between substantive rules or objectives, as acknowledged in the report itself. In paragraph 14, the Special Rapporteur referred to mutual supportiveness as having first appeared in Agenda 21, paragraph 2.3 of which stipulated that “[t]he international economy should provide a supportive international climate for achieving environment and development goals by ... [m]aking trade and environment mutually supportive”.¹¹⁶ The quote conveyed a substantive point and related to sustainable development. It also

indicated that mutual supportiveness and interrelationship concerned policy goals or even rules and principles, but not branches of international law.

27. In paragraph 15 of the report, the Special Rapporteur recognized that, from a substantive perspective, mutual supportiveness was reflected in sustainable development, which was a cornerstone of international law, linking long-term economic growth to the prevention of irreparable harm to the environment. Although he personally would have conceptualized sustainable development differently, the idea that it promoted mutual supportiveness was one that he espoused. The fact was, however, that the notions of mutual supportiveness and interrelationship, though useful in analysing the substantive concepts and principles related to the protection of the atmosphere that had been considered in the Special Rapporteur’s third report,¹¹⁷ did not and should not have an existence or significance that was divorced from other principles of international law.

28. Given that the two notions were of general relevance, he worried that, by attempting to address them in the report under consideration, the Special Rapporteur risked straying into other topics and, for example, hastily re-examining the report of the Study Group on fragmentation of international law, or exploring the meaning of article 31, paragraph 3 (c), of the 1969 Vienna Convention, again without adequate forethought. The Commission might well wish to consider those subjects in the future, but it should do so knowingly, rather than by accident.

29. The hasty consideration of important subjects very often resulted in broad statements that ignored nuances. The discussion of WTO jurisprudence was a case in point. Beginning in paragraphs 18 and 23, that jurisprudence was presented as an example of mutual supportiveness, ignoring the fact that WTO bodies had consistently been criticized for prioritizing trade objectives over environmental concerns. It should be recalled that, in the *EC Measures Concerning Meat and Meat Products (Hormones)* case, the WTO Appellate Body, when considering the role of precaution in sanitary and phytosanitary measures, had emphasized that the precautionary principle could not relieve a panel from applying the terms of the relevant agreement “without a clear textual directive to that effect” (para. 124 of the decision). That statement was consistent with WTO instruments, in particular article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Considering such complicated issues hastily led to real tensions being overlooked and to the provision of solutions that were too good to be true, precisely because they were.

30. In short, he thought that the decision to consider mutual supportiveness and interrelationship as self-standing issues was ill conceived. Similarly, it was incorrect to speak of the mutual supportiveness of areas of international law, rather than rules of law. Since he had issues with the report as a whole, it was difficult to comment on the proposed draft guidelines, but he would do so anyway, in case the Commission chose to refer them to the Drafting Committee.

¹¹⁵ *Yearbook ... 2016*, vol. II (Part Two), p. 173 (draft guideline 3).

¹¹⁶ See *Report of the United Nations Conference on Environment and Development ...* (footnote 111 above), p. 14.

¹¹⁷ *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/692 (third report).

31. Regarding draft guideline 9, first, interrelationship was not a principle of international law; the initial phrase of the provision should therefore be deleted. Second, when expressing the desirability of developing, interpreting and applying rules of international law in a mutually supportive and harmonious manner, international rules relating to the protection of the atmosphere should not be subordinated to other rules of international law. Third, if the text was retained, it should be drafted in a more general way, since the aforementioned desirability applied to all areas of international law.

32. He saw no need for a guideline on international trade and investment law. After all, the notions of mutual supportiveness and interrelationship should apply to rules of international law, not to areas or branches of law. Moreover, the Commission should avoid using language from trade regimes, such as “not constitute a means of arbitrary or unjustifiable discrimination” or “a disguised restriction on international trade or foreign investment”, in a way that legitimated the domination of trade interests over environmental concerns and incorporated, wholesale, the jurisprudence of WTO. In sum, he considered draft guideline 10 to be unacceptable.

33. He had similar concerns about draft guideline 11. The gist of the first paragraph was that States should take appropriate measures to protect the atmosphere from atmospheric pollution and atmospheric degradation, yet draft guideline 3 already set out an obligation to protect the atmosphere by exercising due diligence in taking appropriate measures. The only real contribution of draft guideline 11 was to specify that those measures should be “in the field of the law of the sea, taking into account the relevant provisions of the United Nations Convention on the Law of the Sea”. There was, however, nothing in draft guideline 3 that excluded measures relating to the oceans, investments or trade. Indeed, it established that the measures should be “in accordance with applicable rules of international law”.¹¹⁸

34. Draft guideline 11 also addressed the issue of pollution of the marine environment from or through the atmosphere. Aside from the fact that, by calling on States to “deal with” such pollution rather than “prevent” it, the Special Rapporteur diluted the unambiguous obligation imposed in article 194 of the United Nations Convention on the Law of the Sea, it was not clear whether marine pollution fell within the scope of the topic at hand. It was very worrying that such an important matter, which was currently the subject of discussions in the General Assembly, should be treated as incidental.

35. Draft guideline 11, paragraph 2, which addressed an important issue that the Commission might one day wish to explore, had absolutely nothing to do with the topic, while draft guideline 12, the substance of which he supported, was also irrelevant and should not be retained.

36. If there was a consensus among members of the Commission to refer the proposed draft guidelines to the Drafting Committee, he would not object. If there were enough members who opposed that referral, however, he would join them.

¹¹⁸ *Ibid.*, vol. II (Part Two), p. 173 (draft guideline 3).

37. In terms of how to proceed with the topic, the 2013 understanding, which was, in his view, the reason why the Special Rapporteur had delved into strange subjects in his fourth report, had been adopted during the previous quinquennium, in part owing to the fear that the Commission’s work might influence the climate change negotiations that had been taking place at the time. The Special Rapporteur might wish to engage informally with other members about revisiting the understanding with a view to undertaking the topic in a proper manner. In any event, the fourth report and the draft guidelines proposed therein were leading the Commission in completely the wrong direction. He nevertheless wished to thank the Special Rapporteur for his hard work under the difficult circumstances occasioned by the restrictions imposed as a consequence of the 2013 understanding.

38. Sir Michael WOOD said that he wished to thank the Special Rapporteur for his fourth report and introduction thereof. He greatly appreciated the Special Rapporteur’s extensive outreach efforts and found it regrettable that the report had had to be shortened in order to render it compliant with the recommended page limit. The Commission simply could not work on that basis, and he hoped that ways could be found to prevent any repeat of the situation in which the Special Rapporteur had found himself.

39. The fourth report was not an easy read. It required careful attention in order to identify the nature, and legal or other basis, of the proposed draft guidelines, which the Special Rapporteur had described as hortatory. He agreed with virtually everything that Mr. Tladi had said, with the notable exception of his comments regarding the 2013 understanding. Nevertheless, he wished to raise five general points about the report, before turning to the proposed draft guidelines.

40. First, it was important to recall the history of the topic in the Commission and in the Sixth Committee. The syllabus, which was contained in annex II to the Commission’s report on the work of its sixty-third session,¹¹⁹ was very ambitious and merited re-reading. It was also interesting to compare the report under consideration with the International Law Association draft articles on legal principles relating to climate change, adopted at its 2014 conference in Washington, D.C.,¹²⁰ which had been developed within a committee chaired by the Special Rapporteur.

41. The topic “Protection of the atmosphere” had been included in the Commission’s programme of work after extensive discussions in 2012 and 2013, which had led to a carefully crafted and formal understanding that had underpinned all subsequent work on the topic. The understanding had been an essential part of the compromise that had enabled the Commission to agree to take up the topic, and was reflected in one of the draft preambular paragraphs¹²¹ and in paragraphs 2, 3 and 4 of draft guideline 2,¹²² as provisionally adopted by the Commission.

¹¹⁹ *Yearbook ... 2011*, vol. II (Part Two), annex II.

¹²⁰ International Law Association, *Report of the Seventy-Sixth Conference held in Washington D.C., August 2014*, London, 2014, resolution 2/2014, annex, pp. 22–26.

¹²¹ *Yearbook ... 2016*, vol. II (Part Two), p. 173 (draft preamble).

¹²² *Yearbook ... 2015*, vol. II (Part Two), p. 23 (draft guideline 2).

42. Notwithstanding the caution with which the Commission as a whole had approached the topic, representatives of States in the Sixth Committee had, over the years, continued to express strong reservations about the Commission's work. In his reports,¹²³ the Special Rapporteur's description of the debates in the Sixth Committee had perhaps been somewhat optimistic, and the fourth report was no exception. In paragraph 16 of its topical summary of the debate held in 2016 (A/CN.4/703), the Secretariat, noting the differing views among States, had painted a rather different picture than had the Special Rapporteur.

43. Members of the Commission had themselves expressed serious doubts about the utility of the work on the topic. No one questioned the importance of the protection of the atmosphere; the issue was whether the Commission could make a useful contribution by drawing up anydyne guidelines as part of a "one-size-fits-all" approach. Would such guidelines help or hinder negotiators, or indeed simply be ignored?

44. The recent negotiations that had culminated in the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted in Kigali, illustrated the potential for existing agreements to deal with emerging challenges concerning the atmosphere, without the need for new overarching guidelines or principles.

45. It was perhaps the case that the draft guidelines were not really aimed at States at all, but were being prepared with potential domestic or international litigation in mind, in the hope that they would inspire judge-made law where States had yet to conclude treaties. It would be interesting to hear the Special Rapporteur's take on the matter. In any case, it was not the Commission's role to provide fodder for litigation against States.

46. As he had made clear in previous years, he had strong reservations about continuing with the topic. There were already a great many multilateral agreements addressing the main threats to the environment. Moreover, it was a particularly crucial and delicate time for progress in environmental matters, and the Commission's work might have an adverse effect with regard to sensitive ongoing issues among States.

47. In any event, the 2013 understanding must continue to be applied faithfully. In 2016, delegates in the Sixth Committee had reaffirmed the importance that they attached to it, yet, in his fourth report, the Special Rapporteur did not even acknowledge its existence and, by discussing common but differentiated responsibilities, again tried to evade it.

48. His second general point was that lawyers must always distinguish law from policy. That was certainly true for the Commission, and was perhaps especially true for the topic at hand, which was not to say, of course, that the Commission should not be aware of the policy aspects of its work, and indeed take them into account. In

the syllabus of the topic, the Special Rapporteur had correctly noted that "the Commission, composed as it is of legal experts, will deal only with the *legal* principles and rules pertaining to the protection of the atmosphere rather than the development of policy proposals".¹²⁴

49. His third general point concerned whether the Special Rapporteur was trying to conjure up an entirely new field of international law, which had indeed seemed to be the intention behind the proposals that he had originally put forward in the Working Group on the long-term programme of work. Those proposals had not been approved by the Commission, yet the expression "law on the protection of the atmosphere" appeared in the titles of three of the draft guidelines proposed in the fourth report, while references to "rules of international law relating to the protection of the atmosphere" appeared in all four. Moreover, in paragraph 8, the Special Rapporteur spoke of "[i]nternational law related to the protection of the atmosphere (sometimes referred to as 'the law of the atmosphere' in the present report)".

50. There were several problems with that approach. Were all the terms the same? Did they refer to the whole of international law insofar as it applied to the protection of the atmosphere, or only to what was covered in draft guidelines 3 to 8?¹²⁵ Did they cover matters excluded by the 2013 understanding, the draft preamble and draft guideline 2? What was the relationship between the so-called "law on the protection of the atmosphere" and "international environmental law", which some already saw as a distinct branch of international law? Lastly, and most importantly, was the use of those terms intended to suggest that "the law of the atmosphere" was a "special regime of international law"? If so, what was meant by the expressions "law of the atmosphere", "special regime of international law" and "autonomous regime", which was used in paragraph 8 of the report?

51. Whatever the answers to those questions, the concept of "the law of the atmosphere" seemed to have returned to centre stage in the fourth report, which had not been the Commission's intention when the topic had been included in the programme of work and which constituted, in his view, a fundamental problem with the report and, perhaps, with the project as a whole.

52. His fourth general point concerned the uncertainty over the nature of the draft guidelines. Draft guideline 2, as currently worded, did not specify whether the draft guidelines would be, or would "contain", "guiding principles". The purpose of some of the draft guidelines already adopted seemed to be to restate legal rules, and they were formulated as obligations. Others contained the word "should" and thus appeared to be intended to set forth policy guidelines. The title of a chapter of the fourth report, like that of proposed draft guideline 9, contained the words "guiding principles", which seemed to beg the question left open in draft guideline 2 as to what was the legal intention behind the various formulations. The commentaries that had so far been adopted did not clarify the matter.

¹²³ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667 (first report); *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/681 (second report); and *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/692 (third report).

¹²⁴ *Yearbook ... 2011*, vol. II (Part Two), p. 194, para. 26.

¹²⁵ For draft guidelines 3 to 8, see *Yearbook ... 2016*, vol. II (Part Two), pp. 172 *et seq.*, paras. 95–96.

53. His fifth general point, which he mentioned in connection with possible future topics as well as the topic at hand, was that the Commission did perhaps need to review how it gathered information about the scientific or technical aspects of its work.

54. Turning to the proposed draft guidelines, he said that the structure of draft guideline 9 was difficult to grasp, and the rules referred to therein were unspecified. Explanations for the provision were given in paragraphs 8 to 20 of the report, under the mysterious heading “Guiding principles of interrelationship”.

55. The 2006 report of the Commission’s Study Group on fragmentation of international law, parts of which were described in chapter I, section A, of the report under consideration, was no doubt relevant to the protection of the atmosphere, as it was relevant to all matters to which international law applied, but he did not find it helpful to pick out parts of it and deduce from them a “principle of interrelationship”. While he shared the Special Rapporteur’s desire to show that, in the words of the Study Group, “[i]nternational law is a legal system”, it was ironic that, having conjured up an “autonomous regime” that he called “the law of the atmosphere”, the Special Rapporteur then had to go to great lengths to conjure up new “guiding principles of interrelationship” to ensure that there was no fragmentation. Quite frankly, the whole edifice had no basis in the real world. For example, it was not helpful to superimpose on existing provisions, in particular the relevant provisions of the 1969 Vienna Convention and the corresponding customary international law, new and wholly vague notions such as a “principle of interrelationship”, which might be of interest to some theorists, but did not help States or practitioners and were liable to sow confusion in the important field of the law of treaties.

56. He had read chapter I, section B, of the report, on what the Special Rapporteur called the “concept of mutual supportiveness”, several times, but could not find any evidence for a legal principle of that name. At most, the chapter might suggest a policy position, though he was not entirely sure what.

57. In short, he found the explanations given in support of draft guideline 9 unconvincing, and the provision itself largely unintelligible and devoid of meaning. The Special Rapporteur mentioned the need to reconcile conflicts between international commitments by reference to the rules on treaty interpretation found in the 1969 Vienna Convention. Those long-standing rules already applied to States parties to the Convention, and to other States as customary international law, and it was difficult to see what the draft guideline could add to them.

58. Draft guideline 9 went beyond interpretation and purported to impose on States some kind of obligation to “develop” the law, though it did not specify how. Perhaps the guideline merely expressed a wish in that regard, but, in any event, it would be strange to seek to impose such an obligation, moral or otherwise, on States.

59. Lastly, there was a clear bias in draft guideline 9. It was stated that rules of international law must be interpreted and applied in a mutually supportive and harmonious

manner, but also with a view to effectively protecting the atmosphere, which suggested that preference must be given to those rules that seemed more favourable to the protection of the atmosphere. There was, however, no basis whatsoever for establishing such an interpretative presumption, other than personal or policy preferences.

60. With regard to draft guideline 10, on the interrelationship between the law on the protection of the atmosphere and international trade and investment law, the overview in chapter II of the report of the environmental and dispute resolution provisions of free trade agreements showed that such agreements already commonly provided for taking into account environmental protection measures in certain circumstances. The nature and scope of such measures varied, but it was the parties to the agreements who should decide how best to reflect their existing domestic and international commitments, and how to balance their aspirations on environmental protection with the trade commitments being made. It was questionable whether draft guideline 10 could usefully add anything as regards trade law.

61. The same considerations applied to investment law. As currently formulated, the draft guideline raised a number of questions. As the Special Rapporteur stated in paragraph 37, most of the free trade agreements and bilateral investment treaties in force contained provisions that, in one way or another, protected the environment. The examples he cited showed that negotiating States decided, on a case-by-case basis, just what treaty provisions they wished to include on the matter. Moreover, were arbitrary or unjustifiable discrimination, and disguised restrictions of trade, the only possible violations of investment and trade law respectively when States adopted environmental measures? The draft guideline seemed somewhat reductive of the body of rules of those areas of international law.

62. There were a number of problems with chapter III of the report and draft guideline 11, which attempted to describe the relationship between the law of the atmosphere and the law of the sea. Draft guideline 11, paragraph 1, said that “States should take appropriate measures in the field of the law of the sea” to protect the atmosphere from pollution. The report mentioned a number of existing instruments relating to regulation of pollution from ships, but it could also have mentioned the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the 1996 Protocol thereto, which had provisions regulating incineration at sea.

63. Air pollution from maritime transport was dealt with by IMO under its key convention in that area, the International Convention for the Prevention of Pollution from Ships, 1973 (“MARPOL Convention”). Efforts should be concentrated in that Organization, which in recent years had focused on measures to combat vessel-source air pollution. In addition to the amendments to the Convention that tackled emissions of sulphur oxide and nitrogen oxides,¹²⁶ IMO had, *inter alia*, agreed to a cap of 0.5 per

¹²⁶ For the amendments, see resolution MEPC.177(58) of 10 October 2008, and resolution MEPC.273(69) of 22 April 2016, available from: www.imo.org/en/OurWork/Environment/Pages/Index-of-MEPC-Resolutions-and-Guidelines-related-to-MARPOL-Annex-VI.aspx.

cent on the sulphur content of maritime fuel applicable internationally from 2020. It had also recently approved a road map for the development of a comprehensive strategy on the reduction of greenhouse gas emissions from ships. Why the Commission should seek to superimpose on those efforts general guidelines regarding formation, interpretation or application of the law escaped him.

64. It was proposed in draft guideline 11, paragraph 1, that States take appropriate measures in the field of the law of the sea to deal with questions of maritime pollution from or through the atmosphere, something which was already happening. As noted in paragraph 58 of the report, there were already a number of regional seas conventions regulating such matters, as well as the regulatory initiatives mentioned in paragraph 52, including the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities,¹²⁷ which came under the broad umbrella of the United Nations Environment Programme. IMO was also developing binding rules to tackle air pollution in the maritime sector. He therefore questioned what the Commission would be adding by advancing draft guideline 11, paragraph 1.

65. Draft guideline 11, paragraph 2, dealt with the baselines for measuring the territorial sea and other maritime zones under the law of the sea, which clearly fell outside the scope of the topic and had no place in the draft. In any event, as drafted, the provision raised a host of questions, such as why the matter should be limited to small island States and low-lying States. The Special Rapporteur referred to common but differentiated responsibilities in paragraph 59, even though that was excluded by the 2013 understanding. His claim that there were conflicting approaches to such responsibilities by the United Nations Convention on the Law of the Sea, IMO and the United Nations Framework Convention on Climate Change was precisely the kind of unhelpful characterization that the understanding had sought to avoid. Indeed, the Special Rapporteur did not identify any recent developments in support of that claim. In fact, contemporary State practice had evolved into a more balanced approach, as was demonstrated in the Paris Agreement under the United Nations Framework Convention on Climate Change, which referred to “common but differentiated responsibilities” but also to “different national circumstances”. In any event, it was difficult to see a place for common but differentiated responsibilities in the United Nations Convention on the Law of the Sea and its related agreements, and he would not want the Special Rapporteur’s claims in that respect to be reflected in either the guidelines or the commentary.

66. Draft guideline 12 concerned human rights law and the protection of the environment, an area on which much had been said and written, and he did not see that there was anything that the Commission could usefully add to the debate. Further, the text proposed was problematic in a number of important respects, and the objections he had expressed in relation to draft guideline 10 applied

equally to draft guideline 12. First, again, States were urged to develop, interpret and apply human rights law in a certain way. Second, chapter IV of the report discussed the interrelationship with international human rights law, drawing upon the 1972 Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”)¹²⁸ and the 1992 Rio Declaration on Environment and Development.¹²⁹ That was familiar territory, and it was not clear why it needed to be taken up in the particular context of the atmosphere. The analysis also appeared to be a stepping stone for the Commission to take a position on a human right to a healthy environment, which was not appropriate under a topic on protection of the atmosphere. A clean and healthy environment did not require an individual human right to back it up, given that the purpose of environmental regulation was precisely to achieve that outcome. It was therefore questionable why the focus of the report went so far beyond what had been developed to date—an examination of guidelines for substantive principles on the protection of the atmosphere—into questions about the development of specific human rights.

67. In draft guideline 12, paragraph 2, it was not clear why States needed to be reminded to comply with their obligations under international human rights instruments, and why only to “make best efforts” to do so. Reference was made in particular to “the human rights of vulnerable groups of people” although, in principle, human rights were vested in individuals. It was hard to see what impact draft guideline 12, paragraph 3, which urged States to consider the impact of sea-level rise on certain States, would have, beyond the existing consideration of such matters. The reference in draft guideline 12, paragraph 4, to “the interests of future generations of humankind” was surely a policy statement, not one of law, and as such had no place in the Commission’s work. There could be no basis, as suggested in the report, for any right of action on behalf of future generations.

68. Noting the issues to be addressed in the next report, he said that it was not clear what the Special Rapporteur had in mind by way of implementation at the domestic level and how that was a matter for the Commission. As for compliance and dispute settlement, he had consistently questioned whether those issues should form part of the Commission’s work on the topic, especially if there was a subtext of promoting litigation. Such issues were hardly appropriate as part of general guidelines, particularly as existing multilateral environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, already had their own specific compliance and implementation regimes.

69. For those reasons, he had doubts about referring the draft guidelines to the Drafting Committee, in particular

¹²⁸ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

¹²⁹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

¹²⁷ Information on the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities is available from: www.unenvironment.org/explore-topics/oceans-seas/what-we-do/addressing-land-based-pollution/governing-global-programme.

draft guideline 9, but also draft guidelines 10 to 12. If, nevertheless, there was a general wish to do so within the Commission, he considered that the Drafting Committee would have to rethink the formulations if it was to ensure consistency with basic tenets of international law, including the freedom to negotiate or not to negotiate treaties, and the law of treaties in general. Perhaps the draft guidelines proposed at the current session could become a single guideline stressing the need to consider protection of the atmosphere in the context of other rules of international law. In previous years, the Special Rapporteur had helpfully proposed new texts to the Drafting Committee in the light of the debate in plenary session. Depending on how the debate went, he would encourage him to do the same at the current session.

70. Mr. PARK said that, like other members, he agreed that the rights and obligations concerning protection of the atmosphere should be identified in the framework of general international law, although he was not sure whether reference could be made to a “law of the atmosphere” as such. He endorsed the Special Rapporteur’s statements, in paragraph 9 of the report, that international law relating to the protection of the atmosphere was also part of general international law, and that the legal principles and rules applicable to the atmosphere should be considered in relation to the doctrine and jurisprudence of general international law. However, he wondered whether the three fields of international law highlighted by the Special Rapporteur—international trade and investment law, the law of the sea, and international human rights law—were the only fields relevant to the protection of the atmosphere. The Special Rapporteur mentioned several times in the report that those fields were intrinsically linked to the protection of the atmosphere but did not explain why. The fact that only those fields were listed would seem to imply that other areas should not be included.

71. In his view, other relevant fields of international law, such as air and space law, also had intrinsic links with the law on the protection of the atmosphere, something which the Special Rapporteur himself had recognized in his first report. He recalled that, during the discussion of draft guideline 7,¹³⁰ on intentional large-scale modification of the atmosphere, at the previous session, he had contended that the scope of temporal application should be limited only to peacetime, and not be extended to situations of armed conflict. Without such a limitation, the law on armed conflict would inevitably also have intrinsic links with the protection of the atmosphere.

72. Brief mention was made of aviation activities in the portion of the report dealing with international trade law. Air and space law was an independent and separate area from trade law, and he was not convinced that the fact that frequency of use of aviation and space objects might disturb the composition of the atmosphere should be connected only with trade law. The protection of the atmosphere might also be relevant to the issue of international liability for injurious consequences arising out of acts not prohibited by international law. Questions then arose concerning its relation to the articles on prevention of

transboundary harm from hazardous activities,¹³¹ in particular draft article 3, on prevention, and draft article 10, on factors involved in an equitable balance of interests.

73. As the Special Rapporteur noted in paragraph 7 of the report, his analysis of the interrelationship between the rules on the protection of the atmosphere and the rules in other fields of international law was not intended to expand the scope of the topic beyond draft guideline 2 and preambular paragraph 5, provisionally adopted by the Commission in accordance with the 2013 understanding. Nevertheless, expansion of the scope of the topic seemed inevitable in the process of considering other fields of international law.

74. Mutual supportiveness seemed to be one of the main concepts in the report, guiding the interrelationship between the topic under consideration and other branches of international law. The Special Rapporteur mentioned in paragraph 14 that mutual supportiveness could “be regarded as an indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition among regimes”. The concept was referred to as the “principle of mutual supportiveness” in draft guidelines 10 and 11 and as “mutually supportive manner” in draft guideline 12. However, he wondered whether the Special Rapporteur illustrated sufficiently that the concept of mutual supportiveness had become a well-established principle of international law, especially in the context of interpretation of treaties. Was a simple reference to the principle of mutual supportiveness sufficient?

75. To answer that question, it was necessary to consider the exact current legal status of mutual supportiveness. As far as he understood, mutual supportiveness enhanced positive interaction or built constructive and interactive relationships between trade and environmental measures. Consequently, it seemed that its scope was limited to specific areas and it could not be applied in all areas of international law. The report of the Study Group on fragmentation of international law briefly mentioned mutual supportiveness in the context of conflict of norms only in two instances, yet in paragraph 412 of that report, reference was made to “the technique of ‘mutual supportiveness’”¹³² rather than the “principle of mutual supportiveness”. It was undeniable that mutual supportiveness had emerged and developed in a specific context—that of the relationship between trade agreements and multilateral environmental agreements. In order for a treaty to be interpreted in the light of mutual supportiveness, all concerned States must be parties to the treaty. For the time being, mutual supportiveness was not yet explicitly recognized by international courts and tribunals, except the WTO Dispute Settlement Body and the WTO Appellate Body. For those reasons, he considered that the denomination of mutual supportiveness as a principle of international law in the context of interpretation of treaties or legal norms went too far. Furthermore, as

¹³¹ The articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

¹³² See *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, p. 84, para. 412.

¹³⁰ *Yearbook ... 2016*, vol. II (Part Two), p. 177 (draft guideline 7).

noted in paragraphs 16 and 17 of the fourth report, mutual supportiveness required States to consider and prevent possible conflicts in advance, from the negotiating stage. However, that *ex ante* aspect of mutual supportiveness would appear to be in conflict with the 2013 understanding, as well as the principles set out in preambular paragraph 5 and draft guideline 2, according to which work on the topic would proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range trans-boundary air pollution.

76. With regard to chapters II, III and IV, overall it seemed that the focus on the three selected fields of international law was somewhat inconsistent. Most aspects of the explanation of State practice and jurisprudence, which constituted the legal basis for the draft guidelines, did not relate to the atmosphere but rather to the environment in general. However, the Commission was not discussing the protection of the environment in general, and should therefore focus on the protection of the atmosphere in particular. The discussion in chapter II on international trade and investment law in relation to the protection of the atmosphere emphasized the avoidance of normative conflicts in interpretation and application, while discussion of the law of the sea in chapter III seemed to create certain obligations to protect the atmosphere in terms of that law. In the case of human rights law addressed in chapter IV, it seemed that the discussion was directed towards providing guidance in the development of human rights norms. At that stage, he considered it necessary to clarify the purpose of the discussions in those three chapters, namely, whether they aimed to provide draft guidelines in the case of conflict between relevant norms, or to put the protection of the atmosphere as a priority above all other norms. If the Special Rapporteur intended the latter, it was necessary to fundamentally reconsider whether such a methodology was suitable.

77. The Special Rapporteur addressed the situation of small, low-lying island States in draft guideline 11, paragraph 2, and draft guideline 12, paragraph 3. He too had strong sympathy with low-lying South Pacific island States, such as Kiribati and Tuvalu, which were endangered by climate change and sea levels that were rising well above the global average. In principle, he fully agreed that the problem of rising sea levels was serious; however, it was closely related to issues such as the disappearance of statehood, maritime delimitation, especially the rights exercised by small island States in respect of their exclusive economic zones after a change in the baseline of the territorial sea, and the recognition of environmental refugees. Consequently, the situation gave rise to complex political and legal issues. Like previous speakers, he believed that it would be too risky to consider such issues in the context of the draft guidelines, for a number of reasons.

78. First, at its previous session, the Commission had completed the second reading of the draft articles on the protection of persons in the event of disasters,¹³³ which also covered the situation of seriously affected low-lying coastal countries, including small island developing countries. According to paragraph (4) of the commentary to draft article 3 (a), the draft articles applied equally to

sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or sea-level rise), as well as frequent small-scale events (floods or landslides).¹³⁴ Second, all those issues should be dealt with more seriously in other political forums, such as the United Nations Climate Change Conference, the General Assembly or the Security Council. The Commission's discussion on the issues might have some positive effects, but, on the other hand, it might precipitate negative obstacles to a future high-level political round table.

79. Turning to the draft guidelines proposed by the Special Rapporteur, he said that while he endorsed the fundamental approach to the issue of interrelationship, it was not clear whether the somewhat repetitive draft guideline 9 was necessary in view of the subsequent guidelines. If such a general explanation was needed, he would propose rephrasing the title and specific contents to illustrate, for example, whether the guiding principles on interrelationship concerned the interrelationship with other areas of international law in general. He proposed the deletion of the word "develop"; it would be sufficient to "interpret and apply the rules".

80. In his fourth report, the Special Rapporteur referred to a number of legal instruments related to trade and investment that had incorporated the concept of "mutual supportiveness" between trade and investment and the environment, on the basis of which the Special Rapporteur proposed draft guideline 10. His initial impression of the draft guideline was that it was similar in content to draft guideline 9, except for the fact that it referred specifically to international trade and investment law. In that context, he wondered what was meant by the statement "States should take appropriate measures" for the protection of the atmosphere, since it was not evident from the relevant portion of the report.

81. He was not quite sure of the purpose of draft guideline 11: to illustrate the relationship between the law of the sea and existing relevant rules for the protection of the atmosphere; or to create new norms in the field of the law of the sea for the purpose of enhancing the protection of the atmosphere. In that connection, he asked whether the intent of the expression "States should take appropriate measures in the field of the law of the sea" was to impose new obligations upon States, or whether, in the event of conflict, interpretation and application should favour the protection of the atmosphere. Furthermore, the problem of rising sea levels due to global warming should not be considered in the draft guideline.

82. With regard to draft guideline 12, while in paragraph 1 he understood the need to prescribe that States should "interpret and apply" international human rights norms, he considered that to require them "to develop" such norms was going too far, by imposing certain values to be protected. His questions therefore were whether the protection of the atmosphere was an overriding value that provided guidance for other normative frameworks such as human rights law and whether there was consensus on the issue. He did not deem it necessary to discuss the issue of compliance with international human rights norms separately in paragraph 2. Since the

¹³³ *Yearbook ... 2016*, vol. II (Part Two), pp. 25 *et seq.*, paras. 48–49.

¹³⁴ *Ibid.*, p. 29 (para. (4) of the commentary to draft article 3).

interrelationship between the protection of the atmosphere and human rights law had been illustrated, it would be enough to state the need for special consideration of vulnerable groups of people and the interests of future generations, as reflected in the draft articles on the protection of persons in the event of disasters. He considered that it would be better to delete paragraphs 3 and 4. The substance of paragraph 3 was already covered by paragraph 2. As to paragraph 4, in his view, the need to take into account the interests of future generations was dealt with in draft guidelines 5 and 6.¹³⁵ However, if it was deemed necessary to retain the substance of paragraph 4, it could be incorporated in the preamble.

83. Since some of the draft guidelines proposed by the Special Rapporteur overlapped and were in parts ambiguous, he proposed that all four draft guidelines be merged into one guideline, entitled “Guiding principles on interrelationship with other relevant international law”. The text would read:

“Without prejudice to the relevant customary international law concerning the interpretation of treaties, especially article 31 of the 1969 Vienna Convention on the Law of Treaties, States should interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, *inter alia*, international trade law, international law of the sea and international human rights law.”

84. The Special Rapporteur proposed that his next report address several issues, including the implementation of domestic law. As domestic obligations had already been discussed in draft guidelines 3 and 4,¹³⁶ he asked whether the intention was to deal with the procedural aspects of domestic implementation. It was also proposed that compliance and dispute settlement issues be discussed. He wondered whether it would be appropriate to address specific features of dispute settlement relating to the law on the protection of the atmosphere given the complexity of the issue. In conclusion, he thanked the Special Rapporteur for his efforts and expressed the hope that the draft guidelines adopted on first reading would be based on the discussions held during the current session.

85. Mr. NGUYEN said that he wished to thank the Special Rapporteur for his fourth report and for his initiative to organize the informal meeting with scientists. He welcomed the Special Rapporteur’s basic approach, namely to deal with the three main threats to the atmosphere in one legal instrument in order to avoid the fragmentation of rules in international environmental law. The Special Rapporteur had provided a comprehensive review of State practice, domestic and international legislation and international jurisprudence, and the topic met the requirements established by the Commission for its consideration. However, in the interests of clarity, he wished to make a few comments regarding the previous reports.

86. In his first report, the Special Rapporteur had introduced the notion, in draft guideline 3, that the protection of the atmosphere was a “common concern of

humankind”.¹³⁷ However, the draft guideline had been amended and the notion had subsequently been incorporated in the preamble as a “pressing concern”¹³⁸ of the international community as a whole. In his opinion, the term “pressing concern” was ambiguous: it could be understood in different ways depending on the attitude of each State and the reliability of scientific data. The neighbouring States of polluting States often showed greater concern than other States about transboundary air pollution. By contrast, other States questioned the existence of climate change due to unconfirmed scientific data, while others still invoked the need for economic development to assert the principle of common but differentiated responsibilities, and developed countries, having supported the protection of the atmosphere and the environment in the territory under their jurisdiction, continued to export pollutants to developing countries. In other words, the term “concern” was not a strict legal term that entailed rights and obligations for States. They could decide to take measures to protect the environment or not, depending on their own concerns and the seriousness of the consequences that pollution caused them.

87. In his second report, the Special Rapporteur had noted that the concept of the common concern of humankind had been established in State practice and in literature.¹³⁹ Yet some parties had questioned the reasons for climate change and threatened to withdraw from the Paris Agreement under the United Nations Framework Convention on Climate Change. The protection of the atmosphere was not simply a common concern. It should be a common objective towards a clean and safe environment for present and future generations, and proposals for joint action to achieve that end were required. For those reasons, he recommended that the term “common objective” be used instead of “pressing concern”. The protection of the atmosphere must be the ultimate objective for humankind through the adoption of measures that would serve as the basis for the cooperation of all States.

88. In that connection, he drew attention to the ASEAN (Association of Southeast Asian Nations) Agreement on Transboundary Haze Pollution of 2002, which provided a progressive approach that could be applied in the context of the protection of the atmosphere. The Agreement established a legal framework for ASEAN countries to take individual but concerted action to control haze pollution in the ASEAN region. Under the Agreement, ASEAN member States were required to take internal legislative, administrative or other measures to prevent and mitigate haze pollution.

89. The Special Rapporteur had devoted his fourth report entirely to the interrelationship between international law on the protection of the atmosphere and other fields of international law. As a result, it contained four draft guidelines on one single issue; however, the language used in draft guidelines 10, 11 and 12 was repetitive as these draft guidelines all mentioned the principle of

¹³⁵ *Ibid.*, pp. 176–177 (draft guidelines 5 and 6).

¹³⁶ *Ibid.*, pp. 173 and 175 (draft guidelines 3 and 4).

¹³⁷ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, pp. 273–274, para. 90.

¹³⁸ *Yearbook ... 2015*, vol. II (Part Two), p. 19 (draft third preambular paragraph).

¹³⁹ See *ibid.*, vol. II (Part One), document A/CN.4/681, p. 201, para. 30.

mutual supportiveness. In order to avoid repetition and to ensure balance between related issues, he proposed that the common provision in draft guidelines 10, 11 and 12 be combined with draft guideline 9, paragraph 1, to read:

“In line with the principle of interrelationship, States should develop, interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, notably international trade law and international investment law, law of the sea, and human rights law, with a view to resolving conflict between these rules and to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation.”

90. Regarding terminology, he noted that various terms were used in the report, such as “interrelationship” “mutual supportiveness” and “harmonization”, without any explanation as to the distinction between them. Moreover, the principles were referred to in different ways: “principles guiding interrelationship”, “guiding principles on interrelationship” and “guiding principles of interrelationship”. That might lead to problems of interpretation and give to understand that the “principle of interrelationship” was only one of many other principles governing the interrelationship between the law on the protection of the atmosphere and other relevant fields of international law. Furthermore, although the principle of interrelationship was purported to be the main focus of chapter I of the report, a detailed analysis of the principle was not provided, covering, for example, its establishment, recognition by the international community and use in treaties and “soft law”.

91. In chapter II of the report, the Special Rapporteur endeavoured to prove the wide recognition of the concept of mutual supportiveness between trade, investment and environmental issues in treaties, free trade agreements, multilateral environmental agreements, judicial decisions and State practice. The first part of draft guideline 10 was modelled on the *chapeau* of article XX of GATT. The second part contained the recommendation that, in order to avoid any conflict, States should ensure that interpretation and application of relevant rules of international law conform to the principle of mutual supportiveness. However, that portion of the report prompted a few remarks.

92. First, the Special Rapporteur cited only a few of the more than 20 multilateral environmental agreements to illustrate the recognition of mutual supportiveness as a general principle of international environmental law. There were not enough cases of environmental disputes being adjudicated to consider the applicability of the principle when addressing the relationship between the environment and trade from the international environmental law perspective. The Special Rapporteur based his analysis primarily on WTO dispute settlement practice concerning environmental protection measures that might be in violation of WTO fundamental principles. Similarly, the Special Rapporteur relied solely on judicial decisions concerning investment disputes to address the relationship between international environmental law and international investment law. Moreover, no mention was made of the fact that most of the environmental protection claims under the WTO dispute settlement mechanism failed to fulfil

the strict requirements under the *chapeau* of article XX of GATT, even though the WTO Dispute Settlement Body had addressed environmental issues in a more open and mutually supportive manner through its interpretation of article XX, paragraph I (g), of GATT, for example, in the *United States–Standards for Reformulated and Conventional Gasoline* case. It should be noted that draft guideline 10 did not include a very important phrase from the *chapeau* of article XX, “between countries where the same conditions prevail”. It should also be noted that few investment agreements used the formulation proposed in draft guideline 10. He therefore posited that the draft guideline might not be applicable to both trade and investment issues.

93. Second, although the Special Rapporteur proposed the principle of mutual supportiveness to avoid conflicts between international environmental law and international trade law, he remained silent as to how States should act in cases where a conflict had already taken place. In such cases, the mutual supportiveness principle might not be applicable; however, cooperation and good faith between States could play an important role. The Special Rapporteur had overlooked the most typical case of a conflict involving international environmental and trade obligations and issues relating to international jurisdiction, namely, the *Chile–Measures Affecting the Transit and Importation of Swordfish* case. The case, which had been considered in parallel before two tribunals and eventually resolved through a political agreement, cooperation and good faith, had evidently been of utmost importance in resolving the conflict. He therefore proposed that a reference to the importance of cooperation and good faith in resolving conflicts be included, either in draft guideline 10, or in draft guideline 8,¹⁴⁰ on the obligation to cooperate.

94. Third, although the Special Rapporteur mentioned the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA) and some other bilateral agreements, the contribution of developing countries, such as Viet Nam, towards mutual supportiveness and sustainable development was also worthy of note. For instance, the 2016 European Union–Viet Nam free trade agreement,¹⁴¹ in its preamble, referred to strengthening economic, trade and investment relations in accordance with the objective of sustainable development, and in its chapter XV, reaffirmed the principle of mutual supportiveness in the interpretation and application of the agreement.

95. In chapter III of the report, the Special Rapporteur attempted to demonstrate the wide recognition of mutual supportiveness between the United Nations Convention on the Law of the Sea and other international instruments regulating issues relating to atmospheric pollution and atmospheric degradation. Accordingly, draft guideline 11 provided that the interpretation and application of the rules of international law relating to the protection of the atmosphere should conform to the principle of mutual

¹⁴⁰ *Yearbook ... 2015*, vol. II (Part Two), pp. 24–25 (draft guideline 5). In 2016, draft guideline 5 was renumbered as draft guideline 8 (see *Yearbook ... 2016*, vol. II (Part Two), p. 172, footnote 1210).

¹⁴¹ Information on this free trade agreement is available from the European Union website: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_184.

supportiveness. He wished to make a number of comments on that portion of the report.

96. First, it dealt mainly with the international rules governing the protection of the marine environment, rather than the protection of the atmosphere. The most important question that needed to be addressed was whether the “atmosphere” could be considered as part of the marine environment. In paragraph 57 of the report, the Special Rapporteur referred to a commentary to article 194 of the United Nations Convention on the Law of the Sea to argue that the atmosphere could be regarded as a component of the marine environment, at least to the extent that there was a direct link between the atmosphere in the superjacent airspace and the natural qualities of the subjacent ocean space; however, he did not provide sufficient information on current views and approaches to support that argument. The lack of an in-depth analysis of the relationship between the law on the protection of the atmosphere and the law of the sea gave rise to confusion between the protection of the marine environment and that of the atmosphere. The Special Rapporteur focused mainly on land-based and vessel pollution sources with reference to article 212 of the United Nations Convention on the Law of the Sea. He could have mentioned article 195 of that Convention, on the duty not to transfer, directly or indirectly, damage or hazards from one area to another or to transform one type of pollution into another. In paragraph 52 of the report, the Special Rapporteur asserted that Part XII of the Convention covered atmospheric pollution from land-based sources; in fact, it covered all kinds of pollution to the marine environment from land-based sources to atmospheric pollution in coastal areas to the sea and to the oceans. Moreover, the report should have provided information on the interrelationship between the Convention and the regulatory instruments of IMO, not on the Organization itself.

97. Second, some of the cases cited in the report were not appropriate for illustrating the interrelationship between the United Nations Convention on the Law of the Sea and other international legal instruments. In certain cases, the International Tribunal for the Law of the Sea had not even mentioned the Convention or the atmosphere, yet the Special Rapporteur asserted that the Tribunal had addressed the mutual supportiveness between the Convention and other international legal instruments. The Special Rapporteur needed to substantiate his arguments to make them more convincing.

98. Third, while the Special Rapporteur’s analysis of the sea-level rise and its impacts on the determination of the normal baseline, forced migration and human rights was adequate, more examples of regulations, case law and doctrine should have been provided as the legal basis for draft guideline 12, paragraph 3. The sea-level rise was the direct consequence of global warming and climate change— atmospheric pollution was just one of many contributing factors. The impact of the sea-level rise on the change of baselines to measure territorial waters and other maritime zones was one of the urgent issues that confronted coastal States, especially small island States and low-lying States. The maritime baseline was linked with the maritime boundary of territorial seas, which served as a basis for identifying national airspace. In his view, the issue of the sea-level rise should be dealt with under general international

law and the law of the sea, not under the law on the protection of the atmosphere. It must be set apart from the 2013 understanding, according to which questions relating to outer space, including its delimitation, were not part of the topic, and the outcome of the Commission’s work should be draft guidelines that did not seek to impose on existing treaty regimes any legal rules or legal principles not already contained therein. Furthermore, according to draft guideline 2, paragraph 4, nothing in the draft guidelines should affect the status of airspace under international law nor questions related to outer space, including its delimitation. For those reasons, he proposed that draft guideline 11, paragraph 2, and draft guideline 12, paragraph 3, be amended to avoid any misunderstanding. He further proposed that the topic of the sea-level rise be included in the Commission’s long-term programme of work.

99. In chapter IV of the report, the Special Rapporteur had addressed the interrelationship between the law on the protection of the atmosphere and international human rights law in a clear and detailed way and had invoked many relevant regulations and judicial decisions to support his proposals. Nevertheless, draft guideline 12 failed to illustrate that interrelationship in detail. In particular, draft guideline 12, paragraph 1, merely repeated the importance of mutual supportiveness between the law on the protection of the atmosphere and international human rights law, perhaps to ensure a consistent approach in the interrelationship between the law on the protection of the atmosphere and other relevant fields of international law. It might be helpful if the draft guideline specified more concrete conditions for the applicability of international human rights law to the protection of the atmosphere, including: the causal link between environmental pollution or degradation and the impairment of protected human rights; a certain minimum level of adverse effect sufficient to apply international human rights law; and a sufficient nexus between the pollutant emission and the State.

100. In conclusion, he expressed appreciation of the Special Rapporteur’s efforts and the hope that the proposed amendments to the draft guidelines would be taken into account.

Organization of the work of the session (*continued*)

[Agenda item 1]

101. The CHAIRPERSON drew attention to the programme of work proposed for the remaining three weeks of the session. It should be noted that, on 16 May, the Drafting Committee would discuss the topic “Crimes against humanity” and not “Protection of the atmosphere”. It might be necessary to reconsider the scheduling of the meeting of the Working Group on the long-term programme of work closer to its proposed date. If he heard no objection, he would take it that the Commission wished to adopt the programme of work, as amended, on that understanding.

It was so decided.

The meeting rose at 1 p.m.