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Held at the Palais des Nations, Geneva, on Tuesday, 16 May 2017, at 10 a.m.

Contents

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	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. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/705)

Ms. Lehto said that she appreciated the Special Rapporteur's fourth report on the protection of the atmosphere (A/CN.4/705) and the thoughtful, determined manner in which he had approached the topic under challenging circumstances. She also welcomed his many outreach activities and the interactive discussion he had organized the previous week with scientific experts from the United Nations Environment Programme, the World Meteorological Organization and the Economic Commission for Europe, who had provided insights on the complex interaction between the oceans and the atmosphere.

While she agreed that the search for interrelationships between the legal rules pertaining to the protection of the atmosphere and other related rules of international law was a meaningful way for the Special Rapporteur to approach the topic, that very ambitious aim required an analysis that was much more thorough than what had been possible within the limits of the Special Rapporteur's report. The analysis appropriately drew upon draft conclusions 1 to 4 of the 2006 report of the Commission's Study Group on the fragmentation of international law (A/CN.4/L.682 and Add.1) as a methodological basis for approaching the issue of interrelationship, although it departed from those conclusions in certain respects, in particular when introducing the concept of mutual supportiveness.

The 1969 Vienna Convention on the Law of Treaties provided the framework for both the Study Group's analysis and the principle of harmonization, or systemic integration, referred to in the Special Rapporteur's report. As pointed out in the Study Group's report, that principle worked best when it dealt with a relationship between two treaties that had identical parties and related topics; it thus would not be very helpful in respect of the relationship between different treaty regimes, such as trade law, human rights law and environmental law. The 2006 study also mentioned mutual supportiveness as a technique for resolving normative conflicts, but only between treaties that were part of the same regime. Some authors had criticized the study as not perceiving the autonomy of mutual supportiveness as a means of dealing with fragmentation, taking the view that mutual supportiveness was qualitatively different from harmonization in that it was linked not to the presumption against normative conflict but to the principle of normative cohesion or interconnection between different regimes. Mutual supportiveness also entailed encouraging States to negotiate proactively with a view to avoiding conflict between different treaty provisions, as highlighted in paragraphs 15 and 16 of the Special Rapporteur's report.

Some Commission members had questioned whether reliance on that concept was warranted in the context of protection of the atmosphere. Thus far, the principle of mutual supportiveness had come into play primarily in international trade law; its status in general international law was uncertain. Some authors regarded it as an emerging principle of international law rooted in the overarching requirements of good faith and cooperation, while others saw it as a policy statement or a simple call for coordination. In any event, it could not be seen as creating obligations for States. Accordingly, some Commission members had said that the references to mutual supportiveness in the draft guidelines should be replaced with references to the Vienna Convention. She hoped that the Special Rapporteur would further develop the argument as to why the concept had added value and whether it could be usefully combined with the principle of harmonization.

She agreed with other Commission members that the Special Rapporteur's report did not always make clear the "intrinsic links" that international trade and investment law, the law of the sea and international human rights law had with international law on the protection of the atmosphere. One difficulty in that respect was the fact that the case law and treaties described in the report related mostly to environmental law in general; as a result, the analysis in chapters II, III and IV of the report, while interesting, raised few questions that directly concerned the protection of the atmosphere.

With regard to the proposed draft guidelines, she agreed with other Commission members that the number of guidelines should be reconsidered with a view to avoiding repetition. Draft guideline 9 introduced a new concept, the "principle of interrelationship",

which had been explored *inter alia* by the International Law Association in the context of sustainable development but which, like mutual supportiveness, seemed to constitute an approach rather than a principle. It did not appear to add anything to draft guideline 9, which already contained references to mutual supportiveness and harmonization. She supported the new wording of draft guideline 9 that had been proposed by Mr. Aurescu, since it provided useful safeguards.

Draft guidelines 10 and 11, which called on States to take appropriate measures in the fields of international trade law, international investment law and the law of the sea to protect the atmosphere, should be drafted carefully so as not to undermine existing obligations. She agreed with other Commission members that paragraph 2 of draft guideline 11 should be deleted, as it was not closely related to the topic under consideration. Draft guideline 12, on the manner in which States should develop, interpret and apply international human rights norms, exemplified the view of mutual supportiveness as a broad, proactive notion, but it was not clear whether such norms should be developed from that particular perspective. Paragraph 3 of the draft guideline referred to sea level rise, but that problem, though important, could not be addressed in the context of the draft guidelines on protection of the atmosphere. The reference, in paragraph 4, to future generations seemed unnecessary, as draft guideline 6 already referred to "present and future generations of humankind". Lastly, she recommended that the draft guidelines should be referred to the Drafting Committee, which should consider the option of merging some or all of them.

Mr. Reinisch said that he shared the Special Rapporteur's view that the identification of potential conflicts between international law on the protection of the atmosphere and other fields of international law, and the provision of legal tools for avoiding and/or resolving them, was a very important exercise. Although the Special Rapporteur's report contained numerous references to "conflicts", it did not precisely define or characterize their nature. From reading the report, he deduced that at least two kinds of conflict could arise. The first was a conflict between the objectives pursued by environmental law and those pursued by other regimes such as trade law. In such cases, mutual supportiveness was difficult to achieve because the objectives clearly contrasted and sometimes even contradicted each other. In such situations, the traditional techniques offered by the Vienna Convention and discussed in the Commission's Study Group on the fragmentation of international law provided the necessary toolbox for conflict resolution.

The second kind of conflict arose from the overlapping scope of different sets of obligations, even where they had common objectives; the report cited, as an example, the interrelationship between International Maritime Organization (IMO) instruments, the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change. In such situations, the mutual supportiveness approach, implemented through harmonious interpretation, would be easier to pursue.

Another term that was not clearly defined in the report was "interrelationship". In paragraph 12, it was referred to as a "concept" that reflected "the interdependence of environmental protection and social and economic development", which suggested that it was meant to describe the fact that environmental measures might interrelate and sometimes even conflict with development measures. It also appeared to have a normative aspect, however, as shown by the indication that it was "expected to strike a proper balance in sustainable development". That normative aspect was also apparent in draft guideline 9, which referred to a "principle of interrelationship" that States should follow in order to avoid conflicts between different legal rules. Lastly, "interrelationship" was most often used in the report to describe the interaction between different legal regimes such as the law of the atmosphere and international trade and investment law.

In paragraph 7 of the report, the Special Rapporteur identified several fields of international law — international trade and investment law, the law of the sea and international human rights law — as having "intrinsic links" with the law on the protection of the atmosphere, but gave no explanation of where such links came from. It was not clear why other fields such as intellectual property rights law or humanitarian law were not deemed to have a similar intrinsic link to the topic under consideration. In paragraph 18 of the report, concerning the interpretative principle of harmonization, the Special Rapporteur referred to the well-known case *United States — Standards for Reformulated and*

Conventional Gasoline, which had come before the World Trade Organization (WTO) Appellate Body. Given the report's subsequent focus on both trade and investment, it should be noted that that principle of interpretation had also been endorsed by a number of investment tribunals, which had emphasized that investment treaties could not be read in isolation from public international law.

Concerning draft guideline 9, he wondered whether the term "principle of interrelationship" should be replaced with "principle of mutual supportiveness" or "principle of harmonization". The term "interrelationship" seemed to be descriptive, whereas "mutual supportiveness" or "harmonization" could be regarded as normative principles for avoiding the conflicts that could result from the interrelationship among different norms. The draft guideline's purpose appeared to be to apply the "principle of interrelationship" to law-making, adjudication and enforcement ("develop, interpret and apply the rules of international law"), yet the end of the guideline could be misunderstood as relating only to interpretation and application, not development. It might therefore be appropriate to add "avoiding or" before "resolving conflict between these rules". Another question was whether the phrase "with a view to resolving conflict between these rules" was repetitive, since it reflected the wish to interpret and apply the rules in a "harmonious manner".

With regard to the interrelationship between the law on the protection of the atmosphere and international trade and investment law, which was dealt with in draft guideline 10, paragraph 31 of the report mentioned investment treaties that guaranteed "fair and equitable treatment against expropriation"; it would be more accurate to say "fair and equitable treatment as well as compensation for expropriation", since the fair and equitable treatment standard did not entail any guarantees against expropriation, and the expropriation standard did not prohibit expropriation, but only tied it to a compensation requirement.

Draft guideline 10 contained two suggestions to States that were quite specific but did not directly result from the discussion in the paragraphs of the report that preceded the proposal. The first suggestion might be misunderstood as relating not to treaty-making in the fields of international trade and investment law, but to actual State measures for the protection of the atmosphere, as it reflected the proviso in article XX of the General Agreement on Tariffs and Trade (GATT) that State measures should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment. That wording, however, imposed proportionality requirements on State measures that were to be assessed in light of the Agreement; it did not refer to treaty-making in the field of trade law. When States took "appropriate measures in the fields of international trade law and international investment law" by means of treaty-making, it did not seem appropriate to subject those measures to any specific test; for example, if they wished to adopt new treaty rules that afforded a higher level of protection, those rules should not be subject to the proportionality test referred to in article XX of the Agreement.

Another reason not to impose the language from the Agreement as an overarching standard was that States had much more freedom to adopt protective measures or allow for environmental considerations in the field of investment law than in the field of trade law. In WTO dispute settlement practice, the "proportionality" language in article XX had been interpreted in a manner that imposed a considerable burden on the party adopting the measures, but States that concluded treaties should have the discretion to determine the standard they wished to adopt. Further, the phrase included the stronger word "shall" instead of "should", which was used in the rest of the draft guideline. With respect to the second sentence of draft guideline 10, he wondered to what extent States could "ensure" that the relevant rules were interpreted and applied in accordance with the principle of mutual supportiveness, as that was usually the task of independent dispute settlement bodies.

He was concerned that draft guideline 11 (1) might weaken the existing obligations of States under the United Nations Convention on the Law of the Sea and other applicable treaties, both because of the hortatory language used and because its second sentence might be interpreted as a recommendation that the relevant rules of international law should be applied in a weakened form in order to avoid potential conflicts. In addition, like other

Commission members, he questioned whether an issue as specific as sea level rise and its impact on small island and low-lying States, which was addressed in draft guidelines 11 (2) and 12 (3), should be mentioned in draft guidelines on the more general topic of protection of the atmosphere.

There were some drafting problems with draft guideline 12. It was unclear from paragraph 2 whether States were required to comply with international human rights norms or merely to make their "best efforts" to comply with them. If the draft guideline was intended to remind States to take international human rights norms into account in developing, interpreting and applying rules and recommendations relevant to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, it should be reformulated to express that intention more clearly.

He endorsed Mr. Park's proposal to consider whether the four draft guidelines proposed by the Special Rapporteur could be merged into a single overarching structure.

Mr. Ruda Santolaria said that he wished to thank the Special Rapporteur for introducing his fourth report and for organizing an informal meeting with leading scientists.

Turning to the report itself, he said he agreed with other Commission members that, while "mutual supportiveness" was an undeniably important aim or aspiration, it did not constitute a principle of general international law, let alone the "guiding principle" for States and international courts and tribunals in the harmonious interpretation and application of the relevant rules, as it was described in paragraph 17. To illustrate that point, he noted that the trade agreement provisions cited in paragraph 26 of the report, as well as identical provisions in other trade agreements concluded by Latin American countries with the United States of America and the European Union, reflected the will to enhance, increase or strengthen mutual supportiveness between trade and the environment and between multilateral environmental agreements and trade agreements as a goal or objective that the parties should seek to achieve. Thus, mutual supportiveness was not a principle of international law, but an aim.

In paragraph 18 of the report, the Special Rapporteur rightly noted that article 31, paragraph 3 (c), of the 1969 Vienna Convention on the Law of Treaties tacitly guaranteed the interpretative principle of harmonization by providing that any "relevant rules of international law applicable in the relations between the parties" should be taken into account in the interpretation of treaties. As an example, in paragraph 28 the Special Rapporteur cited the report of the WTO Appellate Body on the *Gasoline* case, which referred to the "general rule of interpretation" set out in article 31 of the Vienna Convention as a rule of general or customary international law that the Appellate Body had been directed to apply by article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Unlike the General Agreement on Tariffs and Trade (GATT) of 1947, which had been interpreted in a very restrictive manner from a dispute settlement perspective, article 3 (2) of the Understanding on Rules and Procedures explicitly stated that the WTO dispute settlement system was to clarify the provisions of the relevant agreements "in accordance with customary rules of interpretation of public international law". The Appellate Body had thus concluded that the General Agreement was "not to be read in clinical isolation from public international law". However, as other Commission members had noted, the case law of WTO dispute settlement bodies did not always reflect an interpretation of parties' obligations under the relevant agreements that was harmonious with other applicable rules of international law.

Any abridgements that might have been made to the report were regrettable, as the inclusion of additional elements would have been useful for providing a comprehensive overview of the interrelationship of the rules relating to the protection of the atmosphere with international trade law and investment law, as well as with the law of the sea and international human rights law.

With regard to chapter III.A of the report, on the linkages between the sea and the atmosphere, he pointed out that several Latin American countries had launched a comprehensive multidisciplinary programme of study under the 1992 Protocol on the Programme for the Regional Study of the El Niño Phenomenon in the South-East Pacific. As for chapter III.B, on the legal relationship between the law of the sea and the law on the

protection of the atmosphere, he agreed with some other Commission members that, while rules relating to the protection of the atmosphere clearly existed, they did not constitute a specific branch of law, as did the law of the sea.

With regard to sea level rise and its impact, especially on small island developing States, he noted that the General Assembly had recognized the seriousness of that threat by adopting resolution 69/15 on the SIDS Accelerated Modalities of Action (SAMOA) Pathway. Nonetheless, a substantive analysis of the far-reaching consequences of sea level rise, as described in particular in paragraph 11 of resolution 69/15, was beyond the scope of the report on the protection of the atmosphere. Like other Commission members, he believed that sea level rise should not be addressed in the draft guidelines, but should be included in the Commission's long-term programme of work.

Lastly, he believed that the four draft guidelines proposed by the Special Rapporteur should be merged into two guidelines. The first could set out the importance of interpreting the rules relating to the protection of the atmosphere in a harmonious manner with other rules of international law, highlighting interpretation criteria that had acquired customary status, and the second could address the linkages between the sea and the atmosphere more specifically. As other Commission members had noted, it would be necessary to take account of the content of the draft guidelines that had already been provisionally adopted in order to avoid any overlap or repetition.

Mr. Jalloh said that he would like to thank the Special Rapporteur for his thoughtful fourth report, extensive outreach efforts and initiative to organize informal exchanges with scientists.

In a world in which facts, especially those based on scientific evidence, were increasingly being called into question, and in which some public officials took a cavalier attitude towards mounting environmental concerns, it was important to recognize the exceptional urgency of the challenges facing the environment. Moreover, it had been demonstrated that the lower layers of the atmosphere played a critical role in the regulation of those aspects of the weather system that had the most immediate impact on the lives of human beings around the world. The facts spoke for themselves: extreme weather events were increasingly frequent in an increasing number of countries, and global temperatures were rising. Worldwide, 2015 had been the warmest year on record. In that context, the need for international cooperation to combat climate change had never been more urgent, and international law, including the work of the Commission, had and should continue to have a useful role to play as part of those efforts.

During the election of the members of the Commission in the autumn of 2016, quite a few delegations to the General Assembly had expressed strong support for the Commission's recent work on topics related to the global environment. Many had stressed the great urgency of environmental issues, and some had mentioned the need to strike a balance between more traditional, State-centred topics of public international law and newer, human security-centred topics. On that last point, he agreed with the Special Rapporteur that such an approach would enable the Commission to identify new possibilities and opportunities for the twenty-first century. The Commission should build on its progress to date with a view to identifying and highlighting the existing international legal principles that should govern the protection of the atmosphere.

With regard to the report itself, he found it regrettable that administrative limitations had been imposed on the length of the report. He generally agreed with most of the concerns that other Commission members had raised, although there were a few specific aspects, in particular international trade law and international human rights law, on which his views differed.

The rise in sea level caused by global warming, which was identified in the report as one of the most profound impacts of atmospheric degradation on the sea, posed severe threats to coastal States, in particular those with heavily populated or low-lying coastal areas, and to small island States. Those threats raised a whole host of international legal issues, some of which had been identified by other Commission members.

He agreed entirely that greater attention should be paid to the specific concerns of small island developing States in further work on the topic of protection of the atmosphere and on other topics related to the environment. The 37 States Members of the United Nations that were classified as small island developing States relied on the Organization to find solutions that they were unable to develop on their own or in other multilateral forums. According to a concept note prepared by New Zealand in advance of a 2015 Security Council debate on the peace and security challenges facing small island developing States (S/2015/543), the particular vulnerability of such States to the effects of climate change and weather-related disasters was compounding existing security and development challenges. It was expected that, over time, competition for scarce resources would increase, thereby increasing the risk of armed conflict. Thus, failure to address climate change would inevitably result in a less secure future for those States.

While the Special Rapporteur was to be commended for highlighting the complex challenges facing small island developing States, those challenges called for a truly holistic solution that transcended the topic of protection of the atmosphere, and thus might be better addressed elsewhere, including through political negotiation. Nevertheless, the Commission could help to anticipate and address the fundamental international legal issues that they raised. Accordingly, he urged the Special Rapporteur to give serious consideration to Mr. Aurescu's proposal that the situation of small island developing States should be addressed in greater detail in a subsequent report, which would include revised guidelines, or, alternatively, that it should be excluded from the discussion on the protection of the atmosphere and dealt with comprehensively as a separate topic. If the Commission accepted the second option, it could then work to identify and address all the relevant international legal issues and their consequences for the affected States. In his view, both options seemed excellent.

Regarding the two main proposals — one made by Mr. Park and the other by Mr. Aurescu — for the merger or consolidation of the four draft guidelines set out in the fourth report, he recalled that the Special Rapporteur's initial position had been that each of the draft guidelines had a distinct content and nature and should therefore not be merged. In his own view, however, it was not altogether certain how distinct their content actually was, and it seemed to him that at least certain aspects of the draft guidelines could be merged. He welcomed Mr. Park's proposal to merge all of them into a single draft guideline because it addressed in a succinct way the main concerns that had been expressed by many Commission members about the "packaging" of the four proposed draft guidelines.

Mr. Aurescu's proposal, on the other hand, was to consolidate the four draft guidelines into two separate guidelines. The first would be based on a revised version of draft guideline 9 and would refer in general to the concepts of interrelationship and mutual supportiveness between norms on the protection of the atmosphere and other sub-branches of international law. It could also refer to systemic integration and the principle of harmonization, while underscoring the fundamental rules of interpretation found in article 31 of the Vienna Convention. The proposal also contained safeguards that, in his view, served to balance the various interests.

The second of the two reformulated guidelines would be based on a merger of proposed draft guidelines 10 to 12 and would refer in a non-exhaustive manner to the three sub-branches identified by the Special Rapporteur. Alternatively, that reformulated draft guideline, as proposed by Mr. Aurescu, could be split into two separate draft guidelines. Mr. Aurescu had further proposed that some of the wording of the existing draft guidelines 10 to 12 should be transposed to the preamble, including the reference to future generations.

He could support either of those proposals or, given his view that both had merit, a combination of the two. However, he had a slight preference for Mr. Aurescu's proposal. As to the future plan of work, the Special Rapporteur might wish to consider setting up an informal working group of Commission members or holding informal consultations with members regarding the aspects that he proposed to cover in his fifth report. That might help the Commission to complete the first reading of the draft guidelines at its seventieth session, as proposed by the Special Rapporteur. He supported that timeline and was in favour of referring the draft guidelines to the Drafting Committee.

Mr. Vázquez-Bermúdez said that, in his fourth report, the Special Rapporteur examined the interrelationship between the international law related to the protection of the atmosphere and other branches of international law. The Special Rapporteur also referred to some of the draft conclusions of the Commission's Study Group on the fragmentation of international law, according to which the rules and principles of international law should be interpreted against the background of other rules and principles; any normative conflicts should be resolved in line with the approach laid out in the Vienna Convention; and norms that concerned the same issue should be interpreted so as to give rise to a single set of compatible obligations, in keeping with the principle of harmonization.

In recent decades, there had been a major increase in the development of international conventions at the global, regional and bilateral levels that related directly or indirectly to the protection of the atmosphere. Such developments could give rise to relationships of interpretation and relationships of conflict between those conventions and the rules and principles pertaining to other branches of international law. However, the relevant provisions of the Vienna Convention did not cover all circumstances: article 30, for example, was limited to the application of successive treaties relating to the same subject matter. Thus, in cases where States could anticipate potential conflicts of interpretation or application, provision was made in international treaties for what was known as "mutual supportiveness" as a means of avoiding or resolving such conflicts.

As noted by the Special Rapporteur in his report, conflicts between international law relating to the protection of the atmosphere and other branches of international law should be resolved, as far as possible, through active coordination and the application of the concept of mutual supportiveness. International Law Association resolution 2/2014, "Declaration of legal principles relating to climate change", was consistent with that position. Various international legal instruments incorporated mutual supportiveness as a way of addressing the relationship between environmental, cultural and trade-related treaties from the perspective of synergy rather than conflict. Examples of such provisions included article 20 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and article 4 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

Despite the incorporation of the concept of mutual supportiveness in a number of treaties, it was still not clear whether mutual supportiveness had achieved the status of a principle, as the Special Rapporteur seemed to maintain, or whether it served merely to guide States in interpreting and applying the treaties in which it was mentioned. In his view, the concept could be incorporated into the draft guidelines along the lines of the latter description. On the other hand, its use in guiding States during the treaty negotiation stage with a view to avoiding conflict with other laws would represent a novel development, and the Commission should consider the advisability of proceeding in that direction. If the Commission adopted draft guidelines to that effect, it should define the content and scope of mutual supportiveness in the relevant commentaries.

Draft guideline 9 was a general guideline that related to mutual supportiveness and harmonization. However, the interrelationship that might exist between rules belonging to different legal regimes or branches of international law should be considered a fact and not a principle. The reference to harmonization in draft guideline 9 did not make clear whether it was considered to be complementary to or independent of mutual supportiveness, especially in light of the reference in the title to "guiding principles" in the plural. The Special Rapporteur referred to the "principle of harmonization" in his report but did not develop it or elaborate on its relationship to the principle of mutual supportiveness.

Although he endorsed several of the comments made by other Commission members concerning draft guidelines 10, 11 and 12, he was not in favour of merging them into one draft guideline, as that would not take account of their specificities. In any event, that matter should be dealt with in the Drafting Committee.

Pursuant to draft guideline 10, States were to take appropriate measures in the fields of international trade law and international investment law to protect the atmosphere, provided that those measures did not "constitute a means of arbitrary or unjustifiable

discrimination or a disguised restriction on international trade or foreign investment". That wording had been taken directly from article XX of the General Agreement on Tariffs and Trade. However, reproducing the wording of a treaty aimed at promoting free trade in a set of draft guidelines on the protection of the atmosphere could imply that the interpretation of that standard in WTO case law should be applied in relation to the latter topic. It would be advisable, therefore, to explore other language that was better adapted to the protection of the atmosphere, such as the suggestion to include a reference to sustainable development.

As had been pointed out, arbitral tribunals in the field of international investment tended to interpret environmental standards in such a way as to avoid conflict with investment rules and to give priority to States' obligations under the latter. The absence of clear guidance on the scope and application of the so-called principles of mutual supportiveness and harmonization could give rise to the arbitrary harmonization of environmental rules that conflicted with rules under other legal regimes, thereby reducing the effectiveness of international environmental law in general and the standards relating to the protection of the atmosphere in particular. The commentary to any future draft guideline on that subject should describe how those principles or tools should be applied in practice.

In the commentary to draft guideline 10, reference should be made to recent cases of investment arbitration relating to the protection of the atmosphere that pointed towards replacing the so-called "one-way street" that favoured foreign investors with a more balanced system in which both investors and host States had obligations and liability. The Special Rapporteur might also find it helpful to refer in the commentary to recent investment treaties that included an express obligation to respect domestic laws, including those relating to the environment. The Southern African Development Community Model Bilateral Investment Treaty Template, for example, required investors to carry out environmental and social impact assessments in accordance with international standards, maintain an environmental management system and observe environmental standards that were consistent with the international environmental obligations of the host State or the investor State, whichever obligations were higher. That was an example of how the institutional framework of international investment law was being adapted to promote environmental protection and reflected the growing complementarity between the two legal regimes, which had the potential to go beyond mere harmonization.

With regard to draft guideline 11 on the interrelationship of law on the protection of the atmosphere with the law of the sea, it was important to point out that the oceans and the atmosphere interacted closely with each other in various physical processes, which included the negative impact of atmospheric pollution and degradation on the sea, including the sea level rise caused by global warming. Although sea level rise and its effects on the recession of coastlines had important legal ramifications for the population, territory and maritime areas of States, especially small island developing States, it involved a highly important and complex set of problems that exceeded the scope of the draft guidelines. As other speakers had pointed out, it could well constitute a separate topic to be included in the Commission's future programme of work. It was nevertheless worth pointing out that the development of norms on the protection of the atmosphere and the promotion of State cooperation in that area had a direct bearing on the effects of atmospheric pollution and degradation, including global warming and its grave consequences.

Lastly, draft guideline 12 should be reformulated so as to avoid giving the impression that it diminished the importance of human rights norms, which, of course, was not the Special Rapporteur's intention.

Mr. Peter said that protection of the atmosphere was a topic which affected the everyday life of real people, because it was linked to the impact of climate change. As it was a highly technical subject, the members of the Commission had benefited tremendously from listening to the presentations of the eminent scientists who had been invited to address them on various areas of natural science that were of relevance to the topic. In the Sixth Committee, many delegations had underscored the value of that dialogue during the debate on the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

The Commission was apparently completely oblivious to the main views expressed in the Sixth Committee with regard to its work. A majority of delegations had enthusiastically welcomed the inclusion of the topic "Protection of the atmosphere" in the Commission's programme of work. Only 2 of the nearly 50 delegations that had made statements on chapter VIII of the Commission's report in 2016 had failed to express support for its work on the topic. The only delegation that had recommended its discontinuance had been that of the United States. Yet the current debate gave the impression that none of the Commission members wished to associate themselves with the topic, which, according to some of them, was not going anywhere.

In the Commission's current debate, several references had been made to the 2013 "understanding", which had in fact been an ultimatum forcing the Special Rapporteur to accept severe restrictions on what matters he could deal with if he wished to pursue the subject. Those unethical constraints, which prevented the Special Rapporteur from freely exploring the subject matter and precluded an open debate, were not the way to approach a topic where valid scientific arguments were of key significance. Moreover, during the Sixth Committee debate in 2016, the Algerian delegation had complained of the Special Rapporteur's failure to address the issue of international cooperation based on the common but differentiated responsibilities of States, not realizing that the "understanding" had placed that issue out of bounds, while the delegation of South Africa had actually objected to those restrictions. At least two delegations had explicitly expressed their approval of the Special Rapporteur's plan of work and of the subject matter he intended to cover in his fourth report. It was therefore high time for Commission members who objected to its contents to take note of the opinions expressed by Member State representatives in the Sixth Committee, who represented the wishes of the wider international community.

He fully supported the Special Rapporteur's choice of areas that were interrelated and intrinsically linked to the protection of the atmosphere. In the context of international trade and investment law, it might be useful to examine the model investment agreements of the International Centre for Settlement of Investment Disputes (ICSID) that incorporated environmental protection clauses, in order to see what action could be taken to ward off threats to the environment of developing countries from large investors whose sole aim was to make a profit. Another text worth mentioning in the context of the law of the sea was an instrument designed to prevent toxic waste from being dumped into the waters of developing countries, namely the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. The Special Rapporteur should also address the impact on the environment, and therefore on the atmosphere, of accidents on offshore oil rigs, and should deal at greater length with the growing appreciation of the fact that human and peoples' rights included the right to a clean environment, as shown by the inclusion of that right in the constitutions of three African States after it had been embodied in article 24 of the 1981 African Charter on Human and Peoples' Rights. In light of those developments, it was unsurprising that most developing States viewed the Commission's annual report to the General Assembly as out of date and irrelevant.

The issue of the global mean sea level rise caused by climate change was of vital importance to small island and low-lying States, whose very existence was in jeopardy. It was therefore untrue that there was no difference between their situation and that of other coastal States. In that connection he drew attention to the statements made by the delegations of Tonga, Tuvalu and the Federated States of Micronesia during the Sixth Committee's debate on the Special Rapporteur's third report (A/CN.4/692). For that reason, he supported the contents of draft guidelines 11 (2) and 12 (3). The Commission should not ignore the plight of small island and low-lying States at their time of need, when their very survival was threatened by environmental degradation.

In view of time constraints, he would provide the Special Rapporteur with written comments on each of the four draft guidelines contained in the fourth report. The suggestion that they should all be combined into a single guideline was nonsensical and was indicative of a failure to appreciate their specific value and connectivity with the topic. The interrelationship between the atmosphere and the subject covered by each draft guideline was different. An attempt to lump together international trade and investment law,

the law of the sea and international human rights law in a single guideline would produce an oddity that would imply that there was something fundamentally wrong with the Commission's understanding of basic public international law principles.

The list of areas which, in the opinion of the Special Rapporteur, were interrelated with protection of the atmosphere was neither cast in stone nor exhaustive. The Commission should be willing to learn from scientists and, possibly, to add to the list. The draft guidelines produced by the Special Rapporteur were backed by both law and science. They should therefore be referred to the Drafting Committee with the aim of strengthening them. They should not be watered down, because the wishes expressed by representatives of two States in the Sixth Committee did not represent the views of the world community. For that reason, he encouraged the Special Rapporteur to pursue his chosen path without being deterred by negative comments.

The meeting rose at 1.05 p.m.