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Held at Headquarters, New York, on Tuesday, 22 May 2018, at 10 a.m.

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18-08190 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/707 and A/CN.4/718)

The Chair invited the Special Rapporteur to sum up the debate on his fifth report on the provisional application of treaties (A/CN.4/718).

Mr. Gómez-Robledo (Special Rapporteur), thanking the members of the Commission for their valuable feedback on his fifth report, said that he wished to make several general observations before responding to specific questions. His work had been guided by three principles. The first was that the legal regime of provisional application of treaties was mainly based on article 25 of the Vienna Convention on the Law of Treaties and that the legal regime of provisional application was rooted in the Convention, as indicated in paragraph (2) of the general commentary to the draft guidelines; in draft guideline 1 and paragraph (3) of the commentary thereto; and in guideline 2 and paragraph (2) of the commentary thereto.

The second principle was that, whatever form the final outcome of the Commission's work took, the flexibility provided by the provisional application of treaties must be maintained, as indicated in paragraph (3) of the general commentary, where the Commission stated that one of the main aims of the draft guidelines was to "keep the flexible nature of the provisional application of treaties and to avoid any temptation to be overly prescriptive".

The third principle was that the defining characteristic of provisional application was its optional or voluntary nature, a point which was reflected throughout the draft guidelines, in particular in paragraphs (1) and (3) of the general commentary; in both draft guideline 2 and paragraph (1) of the commentary thereto, where the Commission stated that the purpose of the draft guidelines was "to provide guidance"; and even more directly in draft guideline 3, where it explained in paragraph (2) of the commentary thereto the use of the word "may", something that was not done in article 25 of the Vienna Convention.

While he felt that all three principles had been captured in the draft guidelines, in the light of the comments made by Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Petrič, Mr. Rajput and Mr. Ruda Santolaria, he also felt that the general commentary could be revised to ensure that the principles, in particular the optional or voluntary nature of provisional application, were conveyed more emphatically from the outset. He believed that a new, separate draft guideline on that aspect was not necessary, however, as it was already reflected in draft guideline 3. In addition, the commentary to draft guideline 11 could be revised to ensure, as proposed by Mr. Argüello Gómez, that an appropriate balance was struck between provisional application and the internal law of States.

When drafting the guidelines, the Commission had been careful not to give the impression that it was seeking to develop a provisional application regime that mirrored that of the entry into force of treaties. Indeed, that consideration had been at the core of the Commission's work, as indicated in paragraph (5) of the commentary to draft guideline 6, with the statement that provisional application was "not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force".

Accordingly, it had not seemed relevant to conduct an exhaustive study of the entire regime set out in the Vienna Convention as it related to provisional application, nor to look for linkages to other provisions of the Convention, beyond what was reasonable and what practice had revealed. The Member States had not requested that approach, and he had proceeded in a deliberately selective manner. Moreover, it was his view that an exhaustive study would be of little value to legal practitioners who might wish to use any guide to practice that the Commission produced to address issues related to treaty law that might arise on a daily basis. Indeed, that aspect was also captured in paragraph (3) of the general commentary: "It is of course impossible to address all the questions that may arise in practice and cover the myriad of situations that may be faced by States and international organizations."

The provisional application regime, by definition, was primarily intended to produce effects before the objective entry into force of a treaty. In many ways, it facilitated the entry into force of treaties, although there were examples of provisional application continuing for a State or States for whom a treaty had not entered into force, as indicated in paragraph (5) of the commentary to guideline 3. The idea that the basic aim of provisional application was to facilitate the entry into force of a treaty could, if the Drafting Committee deemed it appropriate, be included in the general commentary, and perhaps also in the commentary to draft guideline 8, or in a new, separate draft guideline.

As outlined in paragraphs 27 and 28 of his third report (A/CN.4/687), emphasis had been placed on the relationship between provisional application and article 18

of the Vienna Convention, but the practice identified thus far indicated that provisional application generated obligations that went beyond article 18. For that reason, in not only that third but also in his fourth report (A/CN.4/699), he had analysed the relationship of provisional application to other provisions of the Vienna Convention, including those mentioned by Mr. Huang, with the exception of article 46. Nevertheless, the fact that practice indicated a wide range of legal effects linked to other provisions of the Vienna Convention did not mean that there was not an important relationship between articles 18 and 25.

A State provisionally applying a treaty must refrain from both national and international acts that would defeat the object and purpose of that treaty. If two or more States agreed to apply a treaty provisionally with limitations deriving from the internal law of States or rules of internationals organizations, pursuant to draft guideline 11, which addressed one of the central aspects of the provisional application regime, such limitations must be in keeping with the obligations deriving from articles 18 and 27 of the Vienna Convention, as reflected in draft guideline 9. In the light of the mini-debate that had taken place during the Commission's 3405th meeting, it might be advisable to include an explicit reference to the relevance of article 18 in the general commentary, and to emphasize that the obligation not to defeat the object and purpose of a treaty extended to the entire provisional application regime, since the aim was to safeguard the *pacta sunt servanda* principle. That would avoid the need for a separate draft guideline, as suggested by some members of the Commission.

Turning to specific comments, he noted that Mr. Park and Mr. Ouazzani Chahdi had asked why he had not addressed the question of the provisional application of treaties that enshrined rights of individuals, as set out in paragraph 182 of his fourth report, with a view to clarifying what happened to such rights if the provisional application of the treaty was terminated or if the treaty never entered into force. He had reviewed various multilateral human rights treaties, including those of the International Labour Organization, and had not identified any cases of such treaties being applied provisionally, nor of States referring to the provisional application of such treaties. Accordingly, he had decided not to examine the issue further.

With regard to draft guideline 5 *bis* on the formulation of reservations, he said that, as noted by himself and several members of the Commission, there were very few examples of States or international organizations formulating reservations to a treaty that was being applied provisionally, which could give the impression that draft guideline 5 *bis* was pointless or of little value. However, during the debates in the Sixth Committee at the seventy-first and seventy-second sessions of the General Assembly, 12 delegations had raised the issue. Some had concurred with his view that, in principle, nothing would prevent a State from formulating reservations as from the time of its agreement to apply a treaty provisionally. Others had expressed doubts, in particular regarding matters of procedure. Others still had requested the Commission to address the issue in greater depth. Accordingly, he had included, *ad cautelam*, a draft guideline on the issue in his fifth report, although he was not convinced that it was indispensable.

With regard to the search for practice in respect of treaties and treaty actions registered with the United Nations Secretariat, there were a number of considerations to bear in mind. The Secretariat was responsible for registering treaties, including treaty related actions, such as the formulation of reservations, pursuant to articles 1 and 5 of the 1946 Regulations on Registration and Publication of Treaties and International Agreements, adopted by the General Assembly in its resolution 97 (I), prior to the adoption of the Vienna Convention. The Regulations stipulated that the Secretariat should register reservations to treaties that were in force; accordingly, reservations formulated at a later date with a view to applying a treaty provisionally were automatically excluded, as they would not have been formulated when the treaty entered into force.

As outlined in paragraph 3 of the memorandum by the Secretariat on the provisional application of treaties (A/CN.4/707), the number of bilateral treaties applied provisionally during the time period of the study was, in reality, higher than that available in the United Nations Treaty Collection. In theory, therefore, there could be cases where reservations had been formulated to a treaty while it was being applied provisionally. Accordingly, the Commission might wish to consider making a recommendation to the General Assembly that it should review the Regulations, to ensure that the registration of treaties pursuant to Article 102 of the Charter of the United Nations was fully consistent with the Vienna Convention and the practice of States.

He also wished to clarify what was meant — or, rather, not meant — by reservations in the context of provisional application. First, he had avoided referring to reservations with regard to an agreement to provisionally apply a treaty as such, and had decided instead to refer to reservations to certain treaty provisions that would be provisionally applied Secondly, while it might seem more straightforward for a State, instead of formulating a reservation, to simply ensure that any provision that it found problematic in an

agreement that it had agreed to apply provisionally was excluded from the agreement, if it was taken that, despite the foregoing, the article 25 regime excluded *ab initio* the possibility of formulating reservations, then the State might be forced to forego the benefits of provisional application, because it would have to wait for the treaty to enter into force before being able to formulate or confirm a reservation. That too would not be a reasonable outcome.

In any case, it was clear that draft guideline 5 *bis* needed to be discussed in more detail by the Drafting Committee. He intended to propose a number of adjustments to the draft guideline so that the Commission found it worthy of retention, by ensuring that it was not formulated from the perspective of a "right" of States, as noted by Mr. Grossman Guiloff and Mr. Reinisch, or in the form of a "without prejudice" clause, as pointed out by Mr. Grossman Guiloff, Mr. Hassouna, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Ouazzani Chahdi, Mr. Petrič, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Vázquez-Bermúdez and Sir Michael Wood. The Committee might also be able to address the pertinent questions raised by Ms. Escobar Hernández, Mr. Šturma and Sir Michael Wood regarding the other possible implications and viability of the draft guideline by providing more clarifications in the commentary thereto, where necessary. He was referring to such procedural issues as the confirmation of reservations.

Whatever the outcome of the Drafting Committee's deliberations, he felt that, before the second reading, it might be highly useful, given the difficulty of identifying relevant practice, to issue a special request to States that when they sent their comments on the draft guideline, they should indicate whether they had ever formulated reservations to a treaty being provisionally applied and what their opinion was on the issue.

Turning to draft guideline 8 *bis* on the termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach, he said that 11 delegations had raised the issue in the Sixth Committee at the seventy-second session of the General Assembly and had called for greater clarity on the issue of termination in general and termination or suspension as a consequence of the breach of a treaty more specifically. It was clear from the comments made by Member States and members of the Commission that article 25, paragraph 2, of the Vienna Convention did not contain all the answers to the question of the termination of the provisional application of a treaty, despite the ease and speed it offered.

On the one hand, as Mr. Reinisch had pointed out, there could be instances in which a State did not wish to assume the political cost of expressing its intention not to become a party to a treaty as a way of terminating its provisional application, only to subsequently become a party to it, thereby raising doubts about its good faith. On the other hand, as he himself had noted, there might be cases where the termination or suspension of provisional application would apply to only one State, while the provisional application would continue in respect of the other States involved.

In response to the question from some members of the Commission as to why the issue of termination or suspension had been considered solely in relation to article 60 of the Vienna Convention and whether the issue could be expanded to include the other forms of termination and suspension set out in part V of the Convention, such as article 46, as had been noted by Mr. Huang, he said that, first, in the Sixth Committee, the only means of termination or suspension of the provisional application of a treaty raised by various delegations had been termination or suspension as a consequence of its breach. Secondly, in his view, termination or suspension of as a consequence of a breach was more plausible and less exceptional than termination or suspension as a result of the breakdown of diplomatic relations or the emergence of a *jus cogens* norm.

The Drafting Committee might therefore wish to consider those issues, along with the clarification that draft guideline 8 *bis* referred only to the termination or suspension of provisional application, or the suggested wording put forth by Mr. Aurescu. The Committee could also examine whether there was any merit in having a separate draft guideline on termination or suspension as a consequence of a breach, or whether it would suffice to discuss the issue in the commentary to draft guideline 8.

Turning to the proposed model clauses, he said that they were not intended to have the same status as the draft guidelines. They should be seen as a non-exhaustive list of examples intended to guide States, and should be accompanied by an explanatory note. However, Australia, Greece, Italy, Mexico, Portugal, Romania, Turkey, the United Kingdom and the United States, together with the European Union and the Nordic countries, had supported the formulation of model clauses, which might be useful to States.

In his view, model clauses could not be replaced with a compendium of existing clauses, as suggested by Mr. Murphy, or with examples of clear clauses, as noted by Mr. Jalloh. In the search for an existing provision that could be considered "exemplary", having reviewed

many such clauses over the years in his capacity as Special Rapporteur, he felt that it was difficult to find an existing formulation that was sufficiently clear, that met the needs of States, and that promoted the consistent use of terms and therefore avoided confusion, as stated in paragraph (4) of the general commentary.

That view was confirmed by the wide variety of clauses reviewed by the Secretariat in its latest memorandum (A/CN.4/707) and the fact that the United Nations Treaty Collection website, where the Secretariat registered treaties, offered 12 different search criteria with respect to actions related to provisional application, as noted in paragraph 119 of his fourth report (A/CN.4/699). In other words, as noted by the members of the Commission, the practice of provisional application varied widely. It was precisely that lack of uniformity and clarity that had given rise to confusion about provisional application and prompted delegations to call for the formulation of model clauses to serve as a guide for negotiating States. As Mr. Cissé had noted, model clauses could help to make the practice more uniform.

He had taken note of Mr. Rajput's comments about the importance of leaving enough flexibility to ensure that the political interests of States could be represented during the negotiation of a treaty. The model clauses were not intended to limit such interests, but to offer flexible guidance to negotiating States that could be adjusted depending on the needs of a particular negotiation. Nor was the intention to promote the inclusion of clauses on provisional application in treaties that were under negotiation, as Mr. Park had implied, but instead simply to provide guidance to negotiating States that wished to do so.

While he did not think that a compendium of actual examples of clauses would meet the needs of States, for the reasons he had set out, there was added value in compiling State practice to date, including national laws on provisional application. He suggested that such information could be included in a future volume of the United Nations Legislative Series.

In the light of the above, he proposed that the Commission should refer draft guidelines 5 *bis* and 8 *bis* and the proposed model clauses to the Drafting Committee, which, in accordance with its practice, would take into account all the opinions expressed and suggestions made during the debate. He also proposed that the draft guidelines adopted at the sixty-ninth session should be referred back to the Committee for the preparation, with the necessary adjustments if time permitted, of a consolidated first-reading text of the draft guidelines, to be considered in plenary. The consolidated text could be entitled "Guide to the provisional application of treaties".

Lastly, he noted that the final outcome of the Commission's work should, as pointed out by Mr. Murase, take the form of guidelines and not conclusions. Indeed, in the report on the work of its sixty-third session (A/66/10/Add.1), the Commission itself had indicated that the word "guidelines" referred to "a *vade mecum*, a 'toolbox' in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised". That was very different from what conclusions sought to do.

The Chair said he took it that the Commission wished to refer draft guidelines 5 *bis* and 8 *bis* and the proposed model clauses to the Drafting Committee and to refer back to the Drafting Committee draft guidelines 1 to 11 adopted at the sixty-ninth session, for the sole purpose of preparing, time permitting, a consolidated first-reading text of the draft guidelines on provisional application of treaties.

It was so decided.

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

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the provisional application of treaties was composed of Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Grossman Guiloff, Mr. Huang, Ms. Lehto, Mr. Murphy, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov, together with Ms. Galvão Teles, *ex officio*.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/711)

The Chair invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/711)

Ms. Oral, thanking the Special Rapporteur for his report and for his informative oral introduction, said that the report was somewhat imbalanced overall, with the Special Rapporteur dwelling excessively and going into considerable detail in certain parts, such as when discussing the Singaporean Transboundary Haze Pollution Act 2014 or the select group of cases of the International Court of Justice on the use of experts, with footnotes No. 40 and No. 139 being more than one page in length. The Special Rapporteur was also selective in his approach to certain subjects and references, the issue of references being something that he himself had brought

up. For example, on the question of compliance, there were many more examples available in the literature than presented in his report. In particular, the Special Rapporteur failed to cite the Manual on Compliance with and Enforcement of Multilateral Environmental Agreements prepared by the United Nations Environment Programme, which contained both guidelines and an extensive comparative analysis of different compliance mechanisms in a range of environmental instruments, including those related to protection of the atmosphere.

With regard to the draft guidelines proposed by the Special Rapporteur, she said that draft guideline 10 (Implementation) should be read in conjunction with draft guideline 3, as provisionally adopted by the Commission, which provided that States had the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures to that end, in accordance with applicable rules of international law. The nature of States' due diligence obligations in terms of protection of the environment had been explained in a number of decisions of international courts and tribunals, including the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the obligations and responsibilities of States sponsoring persons and entities with respect to activities in the Area, and the advisory opinion of the International Tribunal for the Law of the Sea on flag State responsibility for illegal, unregulated and unreported fishing and the principle of due diligence.

While the Special Rapporteur had made reference to draft guideline 3 in his oral introduction of the report, no references to the principle of due diligence or to the above-mentioned cases had been included in the discussion of draft guideline 10 in the report itself, even though those cases provided the framework for States' obligations in implementing draft guideline 3.

In paragraph 14 of the report, the Special Rapporteur identified three types of obligations without explaining the legal or doctrinal foundation on which they rested. First, he identified a category of obligations for which States were required to take appropriate measures within their existing national law (obligation of measures), which he described as a traditional type of international obligation and the measures to be taken to meet it were left to the broad discretion of States and, accordingly, States were not required to amend their domestic law. In her own view, that was an overly broad statement with which she did not agree; such measures could include specific implementing requirements, such as licensing and the setting of specific standards, which were not discretionary.

Secondly, he identified a category of obligations for which States were required to amend their existing national law or enact new legislation if they were not equipped with the methods of implementation specified in the relevant agreement (obligation of methods), again without any reference to a source. The only example he cited was that of a treaty requiring the imposition of a tax on carbon dioxide emissions, which she understood to be only hypothetical.

Lastly, he identified a category of obligations for which States were required to undertake constant monitoring and supervision in order to maintain certain standards specified in an agreement (obligation of maintenance). In that connection, he cited the example of the obligation to reduce carbon dioxide emissions to a specified level (for instance, a 6 per cent reduction compared with 1990 emission levels), which appeared to be a reference to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, except that he went on to say that States were under an obligation to maintain those emission levels by all means, which should be ensured by national legislation. However, he did not provide any basis for that observation or conclusion. The Kyoto Protocol made no reference to maintenance, but rather required States to reduce their overall quantified greenhouse gas emissions by a pre-determined amount by the end of the specified commitment period. Indeed, under the Paris Agreement, States parties were required to progressively reduce their emissions in order to achieve their nationally determined contributions, which went beyond an obligation of maintenance.

She questioned the need to create such categories when current international environmental law provided a framework for national compliance with due diligence obligations, which entailed the adoption of appropriate rules and measures, the exercise of a certain level of vigilance in their enforcement, and the exercise of administrative control over public and private operators. Although she appreciated the fact that in paragraph 15 of his report the Special Rapporteur included due diligence obligations in the category of obligation of measures, she felt that due diligence was much broader. As currently framed, paragraph 1 of draft guideline 10 therefore needed to be revised to reflect international law, in particular as it pertained to due diligence obligations, which were an integral part of draft guideline 3.

With regard to paragraph 4 of draft guideline 10, the Special Rapporteur's focus on a limited set of

examples of extraterritoriality that had any kind of connection with protection of the atmosphere had resulted in an oversimplified portrayal of what was a rather complex issue. As noted by the Special Rapporteur, the question of extraterritoriality was found in various areas of international law, including human rights law, criminal law and anti-trust law. In that connection, she noted the recent issuance by the Inter-American Court of Human Rights of an advisory opinion supporting the extraterritorial application of a regional convention to protect the marine environment in the Caribbean region in cases involving transboundary environmental harm, in the interest of protecting the human rights enshrined in the American Convention on Human Rights.

One issue that the Special Rapporteur did not cover in his report and that was of particular relevance to international environmental law with implications for extraterritoriality was that of the protection of the global commons, which included the atmosphere, the oceans and outer space and entailed obligations *erga omnes*. The protection of the global commons involved questions of jurisdiction that should not be portrayed in as simplified a manner as reflected in paragraph 4. For that reason, and owing to the complexity of the issue of extraterritoriality, paragraph 4 should be deleted.

Turning to draft guideline 11 (Compliance), she said that the distinction that the Special Rapporteur drew in paragraph 33 of his report between breach and non-compliance, whereby a breach of international law by a State entailed its responsibility and non-compliance was aimed at the achievement of an amicable solution and could be the result of lack of capacity by the State or other non-wilful reason, was inconsistent with the understanding of compliance reflected in the relevant literature and in international law. The sources cited by the Special Rapporteur in footnote 95 of his report merely outlined different theories of compliance and did not state legal facts *per se*.

Furthermore, the Special Rapporteur's characterization of compliance, in paragraph 32 of his report, as referring to mechanisms or procedures at the level of international law did not reflect the substantive aspects of compliance with obligations under international agreements. Indeed, in the guidelines contained in its Manual on Compliance with and Enforcement of Multilateral Environmental Agreements, the United Nations Environment Programme defined compliance as the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the agreement, which implied observance of the principle of *pacta sunt servanda* codified in article 26 of the Vienna Convention. Similarly, Rüdiger Wolfrum had defined compliance as, *inter alia*, the effective implementation of a treaty, which included the adoption of relevant measures at the international and national levels, on the basis of the principle of *pacta sunt servanda*.

According to those definitions, an act of non-compliance with a treaty could amount to a breach of the treaty and give rise to State responsibility, an implication that complicated the distinction drawn by the Special Rapporteur between the concepts of breach and non-compliance. Indeed, the article cited by the Special Rapporteur in footnote 92 of his report did not support his findings. In the article, the author Martti Koskenniemi explicitly refrained from drawing such a distinction, stating that: "It is unclear, however, whether implementation control through something called a 'non-compliance' procedure is different from the common procedures available for breach of a treaty." That article had been written in 1992, well before the adoption by the Commission in 2001 of its articles on responsibility of States for internationally wrongful acts. Furthermore, the 2000 article by Malgosia Fitzmaurice and Catherine Redgwell cited by the Special Rapporteur in footnote 96 of his report was inconsistent with a later article by the same authors published in 2009, in which they suggested that, instead of being at cross purposes, non-compliance procedures functioned alongside traditional dispute settlement mechanisms used in cases of material breach of treaty obligations entailing State responsibility.

As she believed that the intended purpose of proposed draft guideline 11 was to differentiate between the substantive aspects of non-compliance and the procedural mechanisms implemented to verify that States were complying with their international obligations, that difference needed to be clarified in the report. In fact, there seemed to be some confusion between the two.

Moreover, the Special Rapporteur had focused on four compliance mechanisms of environment-related instruments that included the Kyoto Protocol. However, in paragraph 39 of his report, the Special Rapporteur stated that the Kyoto Protocol had been replaced by the Paris Agreement when, in fact, the Protocol had been amended in 2012 by the Doha Amendment, which established a second commitment period running from 2013 to 2020 but had not yet entered into force. That paragraph should be revised accordingly. In addition, on the basis of the experience of the Kyoto Protocol, the Special Rapporteur broadly stated that the incorporation of adversarial elements in non-compliance mechanisms was highly undesirable and might make parties to an international agreement less likely to commit to more ambitious actions or make them decide not to join the

agreement at all. He consequently indicated that non-compliance mechanisms introduced for multilateral environmental agreements after the Kyoto Protocol had been largely of a facilitative/promotional nature, but provided only one supporting reference from 2011, which preceded the end of the Protocol's first commitment period. It was moreover uncertain whether his conclusions reflected the view of all parties to the Protocol, in particular non-Annex parties. Owing to its broad scope, paragraph 1 of draft guideline 11 would likely elicit concern from States and could perhaps be omitted altogether, as it was not integral to the draft guideline's ostensible purpose of establishing a compliance mechanism. Paragraphs 2 and 3, while acceptable in principle, should be revised, possibly in the Drafting Committee.

Paragraph 1 of draft guideline 12 (Dispute settlement) was based on the Charter of the United Nations, which was also referred to in Principle 26 of the Rio Declaration on Environment and Development. However, the paragraph's broad scope, which seemed to cover all disputes relating to the protection of the atmosphere, could result in encroachment on other dispute settlement regimes. For example, the United Nations Convention on the Law of the Sea included provisions relating to all sources of pollution in general and atmospheric pollution in particular, and the dispute settlement regime set out in part XV of the Convention, which included compulsory dispute settlement procedures, could apply to disputes involving pollution of the marine environment from or through the atmosphere.

She fully understood the point made in paragraph 2 of the draft guideline regarding the importance of science and the use of experts in disputes involving technical matters related to the protection of the atmosphere. While the International Court of Justice had been criticized for not appointing its own experts, in paragraphs 101 to 103 of his report, the Special Rapporteur cited several examples of tribunals that had made effective use of experts. However, she did not quite understand paragraph 3 of the draft guideline and the Special Rapporteur's proposal to extend the principle of *jura novit curia* to the facts of a case. The Special Rapporteur discussed that point at length in paragraphs 86 to 97 of his report, but in an abstract manner. The *Pulp Mills* case and the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* provided by the Special Rapporteur did not adequately demonstrate the constraints imposed on the International Court of Justice by the limitations on its ability to evaluate facts. Furthermore, it was unclear to her how the claim that *jura novit curia* applied not only to law but to facts was supported by the Special Rapporteur's statement at the end of paragraph 97 that: "the Court is encouraged to seek experts' assistance and/or ask the parties to produce further evidence or further explanation".

In conclusion, she thanked the Special Rapporteur for his efforts over the years to develop a set of meaningful guidelines for the protection of the atmosphere within the limitations imposed by the terms of reference of the topic. She recommended that draft guidelines 10, 11 and 12 should be referred to the Drafting Committee, although she was also of the opinion that they each required review and revision.

Mr. Peter said he had some general comments to make before addressing the substance of the Special Rapporteur's report. He wished to congratulate the Special Rapporteur for his lecture entitled "Protection of the atmosphere: the work in progress of the ILC", delivered on 4 May 2018 as part of the Dag Hammaskjold Library Speaker Series. At that lecture, which had been by and large well received, the Special Rapporteur had shown great kindness to those who had been trying to block his topic through some highly technical and very irresponsible methods. While some Commission members had complained about New York as a venue for the first part of the current session, he himself had been happy with the venue; he liked the meeting room, which though somewhat squeezed was acceptable. He liked the side events, which had been educational; and he liked the opportunity of meeting with the Sixth Committee, which had given him a better appreciation of the members of that body. It would not be a bad idea for the Commission to come to New York more often.

He commended the Special Rapporteur on his report and his oral introduction. A few hard-core doubters notwithstanding, recent extreme climatic phenomena, such as flooding and global warming, underscored the importance of the topic of protection of the atmosphere. In that connection, it had been gratifying to witness the growing number of States that were not only supporting the topic but also connecting it to the environment in a wider context in the Sixth Committee. During the Committee's debates held at the seventy-second session of the General Assembly, several delegations had welcomed the Commission's work on the topic and some had gone even further, acknowledging the link between the atmosphere and the interests of future generations, with the representative of Indonesia proposing that the principle of common heritage of humankind should be included in the preamble to the draft guidelines on the protection of the atmosphere. Nonetheless, some States continued to have reservations about the topic.

In draft guideline 10, States were urged to take measures at national level to protect the atmosphere. States' behaviour diverged in that controversial area, as it depended entirely on good faith on the part of each State. While Governments had been hesitant to enact legislation to protect the environment, and the atmosphere in particular, implementation- and enforcement-related rulings handed down by courts of law around the world, as reflected in footnotes No. 40 of the report, pointed to a positive judicial trend. However, as the Special Rapporteur warned, it would be a mistake to generalize that aspect of implementation and enforcement.

He agreed with the Special Rapporteur that fulfilment of international undertakings in the area of protection of the atmosphere depended on each State's approach to such undertakings. With monist States, once an international treaty was signed and ratified by a State, it became part of that State's domestic law and was therefore implementable immediately. With dualist States, led by the United Kingdom and its former colonies, the international instrument must be domesticated through a local law. Otherwise, the instrument would remain of persuasive value only. The Special Rapporteur did address those complications and their impact in international agreements relating to the atmosphere in paragraphs 13 and 14 of his report. All the same, States were required to fulfil their international obligations in good faith, taking into account their national legal systems. The Special Rapporteur's approach to addressing the failure by States to fulfil their international obligations was one of international cooperation and assistance, where necessary, in the spirit of his entire project, rather than one of shame and blame. He himself felt that that approach might be well received in the Commission.

The section of the report on extraterritorial application of national law was, in his opinion, a land mine. The Special Rapporteur had, with his usual industry, enumerated circumstances in which extraterritorial application of national law might be permitted as legitimate and cited four principles that might give that cause of action legal justification, namely, the objective territoriality principle, the passive personality principle, the protective principle and the universality principle, in footnote No. 48 of his report. After citing the *S.S. "Lotus"* case of the Permanent Court of International Justice as a precedent confirming the objective territoriality principle, the Special Rapporteur had gone on to discuss other cases, including the General Agreement on Tariffs and Trade (GATT) Panel decisions on the *Tuna-Dolphin* cases, the World Trade Organization *Gasoline* case relating to the extraterritorial application by the United States of its Clean Air Act, the European Court of Justice *Air Transport Association* case, which was distinguishable, in his own opinion, from the argument of extraterritorial application of national law, and the Singaporean Transboundary Haze Pollution Act 2014. After discussing that Singaporean case at length, the Special Rapporteur had ultimately not taken a clear position on the subject but justified the resort to extraterritorial application of domestic legislation in other countries. He had cited his own work for his contention that extraterritorial application in international law might be said to be neither entirely legal nor entirely illegal, but instead opposable to the State to which the domestic law was applied extraterritorially. To defend the notion of opposability as valid, he had drawn upon the Singaporean legislation to an unjustifiable extent, almost to the point of romanticizing it. Ms. Oral too had pointed out that the Special Rapporteur had dwelt too much on the Singaporean legislation.

In his view, that section was the weakest part of the report, as the argument made therein supported and sanctioned direct interference with the territorial integrity of other States. Granting licence through international law to allow unilateral actions by States was dangerous, as it would be tantamount to sanctioning abuse by powerful States, which in the past had unilaterally decided to go to war without global consent, by granting them another avenue to intervene in the affairs of weaker States. He respectfully requested that the Special Rapporteur should reconsider his position on the issue and, like Ms. Oral, urged him to delete paragraph 4 of draft guideline 10. It was contradictory insofar as it characterized the extraterritorial application of domestic law by a State as permissible when there was a well-founded grounding in international law, while asserting that the extraterritorial enforcement of domestic law by a State should not be exercised in any circumstance. Something could not be permissible and not enforceable at the same time. Moreover, it remained to be seen who would determine that the grounding was well-founded and how exactly to exercise care in carrying out the extraterritorial application of domestic law.

Turning to draft guideline 11 on compliance, he concurred with the Special Rapporteur's distinction between breach of an international undertaking — for which a State might be held responsible — and non-compliance, which might be resolved through amicable discussion. The first alternative — the cooperative, non-confrontational and conciliatory method — was prescribed in the Montreal Protocol on Substances that Deplete the Ozone Layer and explained at length in paragraph 36 of the report. The second alternative —

enforcement with an emphasis on penalizing non-compliance — had been adopted under the Kyoto Protocol. In 2015, the global community had abandoned that approach in the Paris Agreement, opting instead for the facilitative, non-punitive and non-confrontational approach. According to the Special Rapporteur, most States preferred the latter approach. It appeared that that was the Special Rapporteur's line of thinking. However, it would be important for him to clarify which method he preferred, because there seemed to be a divergence between his oral introduction and the report itself. In his oral introduction, the Special Rapporteur had stated that draft guideline 11 did not in any way express preference of one approach over the other, but merely contrasted between the two. However, the draft guideline appeared to consist of a cocktail of the two mechanisms, as a closer examination of paragraphs 2 and 3, on the hand, and paragraph 4, on the other hand, would reveal.

Moreover, given that some States failed to comply because they lacked the capacity to do so and needed facilitation or assistance, or because of any other national or strategic interests, it made no sense to massage them into compliance. He therefore strongly urged the Special Rapporteur to amend paragraph 3 to read: "Facilitative measures include providing assistance to non-complying [deserving] States in a transparent, non-adversarial and non-punitive manner to ensure that those States comply with their international obligations by taking into account their capabilities and special conditions." The proposed formulation would mean that facilitative measures were not open to each and every State, only to deserving ones, and that States had to make a case for assistance or facilitation. He would be most grateful if the Special Rapporteur would consider that proposal. More importantly, the Special Rapporteur should examine the draft guideline in its entirety and restructure it for the sake of clarity.

Turning to draft guideline 12 on dispute settlement, he agreed for the most part with the Special Rapporteur that the settlement of disputes relating to the atmosphere should be handled through alternative dispute resolution mechanisms, listed in paragraph 1 of the draft guideline, which were inherently peaceful. That paragraph was based on Article 33 of the Charter of the United Nations. The question posed by the Special Rapporteur was whether the last part of Article 33, namely "other peaceful means of their own choice", should be added to the list in that paragraph. He himself saw no problem with such addition, given that the framework was that of a set of guidelines.

With regard to the handling of scientific experts, he thought that rules and procedures should clearly stipulate that the tribunal, arbitrator or other facilitator should invite experts or scientists, choosing them from a pool identified by the parties. The parties themselves should, however, never be directly involved in inviting the experts. Given that experts and scientists were deposing on science, not personal views, they should be cross-examined on their scientific depositions. The weight of the evidence presented derived from their capacity to withstand cross-examination. Persons invited by the parties were not scientists as such, but rather witnesses of the parties; the weight of their evidence might be coloured depending on who invited them.

He was uncomfortable with paragraph 3 of draft guideline 12 and found its inclusion in the report unnecessary. It was based on the explanation of the principle of *jura novit curia* (the court knows the law) and the rule of *non ultra petita* (not beyond the request) given in paragraphs 89 to 97. As to whether the tribunal should be allowed to judge on both law and facts or be limited only to what was being sought by the parties, he concurred with the convincing argument made by Gerald Fitzmaurice in *The Law and Procedure of the International Court of Justice* and elaborated in paragraph 90 of the report. Entertaining the *non ultra petita* rule was likely to result in the whole judicial process being declared *ultra vires*. Once the parties had placed their trust in a judicial settlement mechanism, it should be allowed to operate independently. In short, he was not sure whether paragraph 3 was really needed in the report.

Lastly, as the Special Rapporteur neared the end of his work, he seemed to be leaving a great deal to chance. Instead of the airtight arguments he had expected from the Special Rapporteur in areas in which he had the opportunity to invite scientists to Geneva several times to help clarify some issues for lawyers, the Special Rapporteur had appeared very insecure and hesitant, seeking the Commission's guidance or intervention even when he had solid materials that pointed in a particular direction. He himself supported referring draft guidelines 10, 11 and 12 to the Drafting Committee, in the hope that some of the issues he had raised would be resolved in the manner suggested.

Mr. Park thanked the Special Rapporteur for his contributions in preparing his fifth report. Maintaining clean air quality and a sustainable ecosystem in the face of transboundary atmospheric pollution and global atmospheric degradation were tasks to which Northeast Asian countries attached the utmost priority. South Koreans believed that air pollution posed a greater threat than social or economic instability, imperilling the health of present and future generations.

He agreed with the Special Rapporteur that extra care should be taken to formulate pertinent and appropriate draft guidelines that States would be willing to accept and comply with, given the high public profile of the topic and the dearth of relevant State practice to rely on and the sometimes extremely hypothetical nature of the topic.

Before addressing the draft guidelines, he had some general comments to make. First, it seemed to him that, while the starting point of the work had been mainly the analysis of previous work by the Commission on such topics as the Convention on the Law of Non-Navigational Uses of International Watercourses, the articles on the law of transboundary aquifers and the draft articles on the protection of persons in the event of disasters, as the work had progressed, it was aligning more and more with mechanisms to address climate change, which was the Special Rapporteur's area of particular concern. That trend made the draft guidelines proposed by the Special Rapporteur more complicated and difficult to accept.

Secondly, in his general comments on the fourth report (A/CN.4/705) at the sixty-ninth session, he had expressed doubts about the feasibility of the three draft guidelines proposed by the Special Rapporteur for inclusion in his fifth report. He had thought at the time that, as the question of the implementation of domestic law had already been discussed in draft guidelines 3 and 4, including it in the current draft guideline would be unnecessary and a duplication of effort. He had also said that it would be inappropriate to address compliance and dispute settlement, given the nature and complexity of the topic of the protection of the atmosphere.

Turning to paragraph 1 of draft guideline 10 (Implementation), he said that the Special Rapporteur had stressed its relevance in explaining the three different categories of international obligations, in paragraph 14 of his report. However, as the classification of the three types was rather artificial and could be interpreted differently by different readers, he was not convinced that the Special Rapporteur was correct to conclude, in paragraph 15 of his report, that the obligation to protect the atmosphere (draft guideline 3) and the obligation to cooperate (draft guideline 8) belonged to the first category of obligations, while the obligation to ensure that an environmental impact assessment was carried out belonged to the second category.

In his view, questions concerning national implementation were already mentioned in draft guidelines 3 and 4 and did not need to be addressed again in draft guideline 10. For example, in paragraph (2) of the commentary to draft guideline 4, the Commission stated that: "What is required is that the State put in place the necessary legislative, regulatory and other measures for an environmental impact assessment to be conducted with respect to proposed activities." Moreover, that paragraph dealt with the fulfilment of the obligations set out in the draft guidelines, inevitably raising questions about the nature and scope of those obligations. It was also set out in the understanding that the Commission had reached in 2013 that; "the project will not seek to 'fill' the gaps in the treaty regimes", and that "[t]he outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein." That point was further articulated in draft guideline 2. It was therefore necessary to ascertain that the obligations affirmed in paragraph 1 of draft guideline 10 did not impose new obligations beyond those contained in existing treaty regimes. Hence, instead of the wording proposed in paragraph 31 of the Special Rapporteur's report, namely "obligations affirmed by the present draft guidelines relating to the protection of the atmosphere", a more general phrasing specifying "obligations under the relevant conventions and customary international law" would be appropriate, with the emphasis that such existing obligations should be implemented in good faith. The Special Rapporteur himself had acknowledged as much, stating in paragraph 12 of the report that "all that can be addressed in the present draft guidelines is that States are required to implement the relevant international law in good faith". Moreover, he believed that the final sentence of paragraph 1 specifying the forms of domestic implementation was not necessary.

Turning to paragraph 2, he said he doubted whether responsibility arising from failure to fulfil obligations needed to be articulated in the draft guideline. He reiterated the view that, despite the Special Rapporteur's contention in his oral introduction that the issue of responsibility could be dealt with because it had not been precluded in the 2013 understanding, it was unclear whether protection of the atmosphere concerned liability or responsibility in international law. Even putting aside that reasoning, paragraph 2 was controversial for two reasons. First, he doubted that the issue of responsibility or liability for protection of the atmosphere was ripe for discussion, given the insufficiency of State practice in that area. The unwillingness of States to further develop the area had been exemplified by the 1979 Convention on Long-range Transboundary Air Pollution, which contained a footnote expressly providing that the Convention did not contain a rule on State liability as to damage. Secondly,

responsibility for breach of an international obligation could be dealt with in the secondary rules on State responsibility stipulated in the articles on responsibility of States for internationally wrongful acts. Additional discussion in that regard would raise the question of whether the draft guideline was *lex specialis* and whether the approach was adequate. Furthermore, the suggested standard requiring "clear and convincing evidence" for proving damage or risk could also be considered overly stringent.

Paragraph 3 imposed on States the obligation to implement in good faith the recommendations contained in the draft guidelines. However, a recommendation was, by definition, not binding. In his view, that stipulation would be beyond the scope of the 2013 understanding and the scope defined in draft guideline 2.

With regard to paragraph 4, he did not believe that there existed a general agreement on the extraterritorial application of domestic environmental law. Although the case examined relating to the Singapore Transboundary Haze Pollution Act would be meaningful, deducing and then generalizing legal principles from that single case was somewhat premature. Retaining the paragraph would send the wrong message to States, namely, that the Commission recognized the legal effect of the controversial issue of extraterritorial jurisdiction, a concern also raised by Mr. Peter. If the aim of extraterritorial application of domestic environmental law was to fill the gaps in the relevant treaties, as noted in paragraph 30 of the report, that aim was certainly inconsistent with the 2013 understanding and with the scope of the draft guidelines as articulated in draft guideline 2. Like Ms. Oral, he too felt that it would therefore be wisest to delete the paragraph. Moreover, if retained, the paragraph might revive the Commission's discussion from its sixty-eighth session on obligations *erga omnes*. In sum, while his first preference would be to omit draft guideline 10 in its entirety, as a second option, a new paragraph 2 of draft guideline 3 could be drafted, with more general wording, to read: "Draft guideline 3(2): States are required to implement obligations that they have under the relevant conventions and customary international law in good faith."

Turning to draft guideline 11, he wondered whether a clear distinction could be made between breach and non-compliance, and whether non-compliance was due to a lack of capacity while breach was due to a lack of willingness, as explained by the Special Rapporteur in paragraph 33 of his report. Martti Koskenniemi, however, took a different view, stating in his work entitled "Breach of treaty or non-compliance?", that: "It is unclear whether implementation control through something called a 'non-compliance procedure' is actually different from the common procedures available for breach of treaty." It was also doubtful that the so-called facilitative/promotional approach and the coercive/enforcement approach were theoretically and practically settled distinctions and terms. If such distinctions were indeed feasible, he would endorse the general terms articulated in paragraph 1. However, the contents of paragraph 2, which dealt with the forms of non-compliance mechanisms, should perhaps be attached to the last sentence of paragraph 1 or else referenced in the commentaries, instead of appearing as a stand-alone paragraph.

While the explanations in paragraphs 3 and 4 provided useful theoretical grounding, he doubted whether they needed to be included as a draft guideline; it might be best to include them in the commentaries. Defining specific enforcement approaches might impose undue limitation. Accordingly, he proposed that draft guideline 11 should be revised to read: "States are required to effectively comply with the international law relating to the protection of the atmosphere in accordance with the rules and procedures of the relevant multilateral environmental agreements."

With respect to draft guideline 12 on dispute settlement, he maintained that a dispute settlement clause would not be appropriate in that context, given that a possible mechanism of dispute settlement was an issue for a future diplomatic conference. Moreover, considering the Commission's tradition, a dispute settlement provision had mostly been adopted in cases where the final outcome was a set of draft articles. Indeed, draft guideline 12 could be compared to article 19 of the draft articles on prevention of transboundary harm from hazardous activities. Draft article 19, however, provided for a basic rule of dispute settlement arising from the interpretation or application of the regime of prevention set out in the draft articles and emphasized that such a rule was residual in nature. Indeed, the content itself, namely the judicial settlement of disputes relating to the protection of the atmosphere, had a *lex ferenda* character. Moreover, the purpose of that draft article was to suggest that an impartial fact-finding commission should be established. He doubted that a similar provision would be necessary and possible when the outcome took the form of guidelines, and even for the regime of the protection of the atmosphere itself.

Nonetheless, if draft guideline 12 was to be revised, as proposed by the Special Rapporteur, he would have a number of suggestions. With regard to paragraph 1, a general statement stipulating that disputes should be settled through peaceful measures would be sufficient. However, it would not be necessary, in his view, to enumerate the judicial and non-judicial

measures mentioned in Article 33(1) of the Charter of the United Nations.

While he endorsed paragraph 2, which emphasized the fact-intensive and science-dependent character of disputes over the protection of the atmosphere, the procedural aspects, such as specifying how experts might be appointed, were unnecessary, given that the final outcome was a set of draft guidelines. The sentence should therefore be revised to emphasize the necessity of giving due consideration to the rules and procedures ensuring proper assessment of scientific evidence.

Turning to paragraph 3, he said he had doubts as to whether the standard of proof considered by the court should be discussed in the draft guideline. While the principles of *non ultra petita*, *jura novit curia* and standard of proof discussed in paragraphs 86 to 100 of the report might be useful for demonstrating increasing scholarly interest and the necessity of relevant court cases on the subject, he, like Ms. Oral and Mr. Peter, doubted whether it was appropriate to include such discussion in the draft guideline itself. He therefore proposed that paragraph 3 should be deleted and paragraphs 1 and 2 should be combined, such that the revised draft guideline 12 would read: "Disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the rules and procedures ensuring proper assessment of scientific evidence".

Lastly, the title of the draft guideline should also be amended to reflect the proposed revision and to emphasize the importance of fact-finding and the science-dependent character of disputes arising from the protection of the atmosphere. "Due consideration of fact-finding" could be a suitable title.

To conclude, he reiterated his profound appreciation for the Special Rapporteur's efforts to lead the discussion on the protection of the atmosphere. He expected the Commission to conclude its first reading on the topic in 2018 and its second reading in 2020, based on the Special Rapporteur's sixth report.

Mr. Nguyen said that the three draft guidelines proposed by the Special Rapporteur, together with the draft guidelines so far provisionally adopted by the Commission, provided a foundation for a comprehensive convention on the protection of the atmosphere, which was the Special Rapporteur's ultimate goal. In his report (A/CN.4/711), the Special Rapporteur had skilfully combined scientific evidence, legal knowledge and examples of State practice to demonstrate new trends in international law relating to the protection of the atmosphere. Moreover, the dialogues with scientists organized by the Special Rapporteur at the Commission's sixty-seventh, sixty-eighth and sixty-ninth sessions had helped new Commission members to understand the link between science and law, as well as the need for guidance on new trends related to the protection of the atmosphere. Implementation, compliance and dispute settlement were very specific technical issues, and in fact, the Montreal Protocol, the Kyoto Protocol and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, among others, already had individual compliance and implementation regimes, each of which was tailored to the specific needs of the instrument concerned.

In contrast with previous reports, in which references to international practice had been rather thin, in section II of the current report, the Special Rapporteur demonstrated considerable evidence of State practice of implementation of rules and principles related to the protection of the atmosphere in Asia, Europe, the Americas and Africa. Section IV contained examples of cases in which scientific evidence and fact-finding had played a role in the judicial settlement of disputes. Those examples were useful for understanding the attitude of courts and tribunals regarding the use of experts and scientific evidence, something that many scholars had not addressed. They also raised new questions regarding the settlement of scientific-legal disputes and the use of scientific experts in the case of the non-participation of a party in judicial proceedings. Overall, the Special Rapporteur's comprehensive examination of State practice, domestic and international law, and international case law on the topic was useful for identifying customary international law and emerging rules of international law relating to the protection of the atmosphere.

Like other colleagues, he found that the rules and principles of the protection of the atmosphere were an integral part of the law on the protection of the environment. The concepts of implementation, compliance and dispute settlement relating to protection of the atmosphere must be interpreted in accordance with the rules and principles of the protection of the environment, in particular the principle of common but differentiated responsibilities. That principle did not restrict the collective responsibility of the international community for atmospheric degradation and climate change where the damaged caused and the scientific evidence of degradation could not be attributed to individual States. In line with the Paris Agreement, in which States parties acknowledged that climate change

was a common concern of humankind, the Special Rapporteur should recognize, in his reports on the protection of the atmosphere, that the protection of the atmosphere from atmospheric pollution and atmospheric degradation was a pressing concern of the international community as a whole. That common concern entailed a common obligation and a common responsibility on the part of the international community to protect against atmospheric degradation, for the benefit of present and future generations, a principle that formed the basis for the implementation of draft guidelines 5 and 6. However, in paragraph 17 of the report, the Special Rapporteur only made reference to the collective responsibility of developed countries for global atmospheric degradation. It should be noted in that regard that the concept of the collective responsibility of the international community did not absolve States of responsibility for internationally wrongful acts or omissions causing proven risk or damage to the atmosphere.

To his knowledge, the Special Rapporteur did not make a clear enough distinction between treaties in general and treaties related to the protection of the atmosphere to prove the existence of a new "trend" in international law relating to the protection of the atmosphere, as stated in paragraph 12 of his report. In that connection, it should be clarified whether the three categories of obligations identified in paragraph 14 of the report applied to international law relating to the protection of the atmosphere or to international law in general. Moreover, the Special Rapporteur needed to further develop his analysis of the obligation of maintenance, including by clarifying whether fulfilling such an obligation required transformation or incorporation of relevant treaty provisions into national law. In addition, while in paragraph 15 of his report he categorized draft guidelines 3 and 8 as obligations of measures and draft guideline 4 as an obligation of methods, he did not identify any specific obligations of maintenance. It was unclear how an obligation could be definitively classified as belonging to one of the three categories or how an obligation of maintenance would be fulfilled in cases where developed States purchased emissions quotas from developing States.

In his discussion of the extraterritorial application of domestic environmental law relating to the protection of the atmosphere, the Special Rapporteur provided examples of the practice of three international organizations: the World Trade Organization, the European Union and the Association of Southeast Asian Nations (ASEAN). The analysis of the weaknesses of the Agreement on Transboundary Haze Pollution of ASEAN provided in footnote No. 59 served as a useful justification for the extraterritorial application of domestic law in order to combat transboundary atmospheric pollution. In that regard, he recalled that, in its report on the work of its fifty-eighth session (A/61/10), the Commission had stated that the exercise of extraterritorial jurisdiction had become an increasingly common phenomenon, largely owing to an increase in transboundary issues.

It was worth noting, however, that the Singaporean Transboundary Haze Pollution Act 2014 provided for the exercise by Singapore of extraterritorial jurisdiction over an author of a breach who was present on Singaporean territory, on the basis of the objective territoriality principle, the protective principle and the effects doctrine. Singapore also considered that the Act was not intended to replace the laws and enforcement actions of other countries, but to complement the efforts of other countries to hold companies to account. Moreover, extraterritoriality must be considered, interpreted and applied in line with the principles of international cooperation, as set out in draft guideline 8, and of harmonization and systemic integration, as set out in draft guideline 9. Domestic law should be applied extraterritorially without undermining the principle of sovereign equality of States. Lastly, the extraterritorial application of domestic law must be consistent with the principle of common but differentiated responsibilities in cases where the States in question had different air quality indices and capacities for preventing air pollution and atmospheric degradation.

Promoting cooperation to improve the ASEAN Agreement was a more acceptable approach to preventing and combating haze pollution than allowing for unilateral exercise of extraterritorial jurisdiction. Indeed, since the measures taken by the Government of Singapore under the Haze Pollution Act in 2015 against the Indonesia-based suppliers of Asia Pulp and Paper Company Ltd to put out fires in their concessions that had caused severe haze in Singapore, drawing objections from the Government of Indonesia, no further action had been taken against other companies. When the atmosphere was viewed as a shared natural resource, transboundary cooperation on the basis of respect for the sovereign rights of States was essential. The causes and effects of damage to the atmosphere were not always easy to identify and a distinction between non-compliance with and breach of international law needed to be made. Singapore should assist non-complying States in complying with their international obligations related to the protection of the atmosphere, rather than seeking to incriminate them for non-compliance. He shared the Special Rapporteur's concern that, under international law, the extraterritorial application of national

environmental law could be said to be neither entirely legal nor entirely illegal. The Commission should therefore exercise caution in making recommendations on that issue. A reference to the Carbon Pricing Bill passed by the Parliament of Singapore in 2018 could also be added to the report.

The non-compliance procedures established under the Montreal Protocol, the Kyoto Protocol and the Paris Agreement demonstrated that a flexible, facilitative approach was most effective in encouraging compliance with multilateral environmental agreements relating to the protection of the atmosphere. Indeed, the principle of common responsibility for the protection of the atmosphere required such an approach. In that connection, under the ASEAN Agreement, a centre had been established to facilitate coordination among ASEAN members in managing the impact of land and forest fires, in line with the Association's customary style of resolving disputes diplomatically through negotiations and without sanctions.

The number of disputes related to the protection of the environment had increased rapidly in recent years. The settlement of such disputes largely depended on the good will and cooperation of States, the application of appropriate legal rules, and the ways in which scientific evidence was evaluated and experts were selected, appointed, cross-examined and recognized. The Special Rapporteur focused primarily on the judicial settlement of disputes but pointed out that there were close interactions between the judicial and non-judicial modes and that the gap between negotiation and judicial settlement was often relatively narrow. Claims relating to the protection of the environment and the atmosphere were rarely brought before courts, and the International Court of Justice and other standing institutions were viewed as a last resort for the settlement of international environmental disputes. Indeed, no cases had yet been brought before the Chamber for Environmental Matters established by the Court in 1993, and, of the five examples of environmental law cases brought before the Court that were cited by the Special Rapporteur, three were directly or indirectly related to air pollution. Moreover, in the case concerning *Aerial Herbicide Spraying (Ecuador v. Colombia)*, both parties had ultimately decided to settle their dispute by non-judicial means. Similarly, the dispute over compensation for the use of dioxin by the United States during the Viet Nam war was being settled through negotiations rather than lawsuits, and the United States was assisting in cleaning up contaminated areas in Da Nang, in recognition of its responsibility for the damage caused. Some parties also preferred to refer their disputes to fact-finding commissions rather than judicial bodies. Hence, draft guideline 12 would be improved by a stronger focus on non-judicial modes of dispute settlement, in particular on the role of experts and scientific evidence in the non-judicial settlement of disputes.

As prevention was a key priority of international law, mechanisms of dispute avoidance should be broadly implemented, in line with the recommendations of the Advisory Group on Dispute Avoidance and Settlement Concerning Environmental Issues convened by the United Nations Environment Programme in 2006. However, different situations would require different approaches, depending on, *inter alia*, levels of transparency, public access to information, level of technicality of and standards for scientific evidence, legal norms, cultural considerations, human resources, the stakeholders concerned and the expertise required. In addition, appropriate guidelines for the use of scientific experts in the event of the non-participation of a party in proceedings, as in the case concerning *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* arbitrated by the Permanent Court of Arbitration, should be drafted, and detailed rules governing the related procedures should be developed.

With regard to draft guideline 10, he said that under paragraph 1, States were required to implement in their national law the obligations affirmed in the draft guidelines relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The six general obligations set out in draft guidelines 3 to 9 were reflected in multilateral environmental agreements in general and were not meant specifically for agreements on the protection of the atmosphere. While the Special Rapporteur stated that those obligations were illustrative and the minimum necessary to protect the atmosphere, they in fact fell under the scope of the protection of the environment as a whole. Although those provisions helped to bypass the limitations imposed by the 2013 understanding, the relationship between the draft guidelines and principles of environmental protection, such as the precautionary principle, the preventive principle, the polluter-pays principle and the principle of common but differentiated responsibilities, needed to be demonstrated, as the comprehensive protection of the atmosphere could not be achieved without the implementation of those principles. Accordingly, the first sentence of paragraph 1 could be revised to read: "States are required to implement in their domestic law the principles of the law on the protection of the environment and the obligations affirmed by the present draft guidelines relating to the protection of the atmosphere from

atmospheric pollution and atmospheric degradation." The second sentence of the paragraph should be deleted.

With respect to paragraph 2, further clarification was needed regarding the responsibility of States for transboundary air pollution, given that State responsibility for the protection of the atmosphere was not clearly defined in international law. Indeed, the Paris Agreement provided no legal basis for State liability and compensation for loss and damage resulting from climate change, instead reflecting a softer approach whereby parties were encouraged to focus on areas of cooperation and facilitation to enhance understanding, action and support. In addition, the Convention on Long-range Transboundary Air Pollution stipulated that it did not contain a rule on State liability as to damage, and the ASEAN Agreement on Transboundary Haze Pollution contained no specific provisions on State responsibility and compensation for damage caused by such pollution.

In draft guideline 12, the Special Rapporteur should consider emphasizing the need for States to take measures to avoid the escalation of disputes, in line with the recommendation contained in the United Nations Convention on the Law of the Sea that States involved in a dispute should enter into provisional arrangements, pending an agreement, before resorting to the dispute settlement procedures provided for in the Convention. Furthermore, the draft guideline must reflect the tendency of States to resolve disputes through negotiation before resorting to other procedures. As the use of experts was common to judicial and non-judicial dispute settlement procedures, the phrase "if such disputes are to be settled by arbitration or judicial procedures" in paragraph 2 should be deleted. In the case of settlement through negotiation, mediation, conciliation or referral to a fact-finding commission, experts could be appointed jointly by the parties for assistance in the assessment of facts and scientific evidence. In the case of judicial settlement, they could be appointed separately by each party and cross-examined by the other party, or appointed by the court or tribunal to which the dispute had been referred. The Special Rapporteur should also clarify the meaning of the recommendation that due consideration should be given to the rules and procedures concerning, *inter alia*, the use of experts to ensure proper assessment of scientific evidence. He concluded by thanking the Special Rapporteur for his hard work on the topic over the years and for his fifth report in particular. He recommended that all the draft guidelines should be referred to the Drafting Committee for further review and improvement.

The meeting rose at 12.50 p.m.